83/80

SUPREME COURT OF VICTORIA

GOLDS v COMERFORD

McInerney J

29 July 1980 — [1981] VicRp 35; [1981] VR 325; (1980) 35 ALR 395

CRIMINAL LAW – USE AN APPLIANCE TO RECEIVE MESSAGES – INTERPRETATION OF "RECEIVE", "MESSAGE", "INTERCEPTION" AND "INTERCEPT" CONSIDERED – WHETHER USE OF AN INTERCEPT DEVICE CONSTITUTES RECEIPT OF A MESSAGE – CHARGES FOUND PROVED – WHETHER MAGISTRATE IN ERROR – OBSERVATIONS AS TO THE EXERCISE OF DISCRETION UNDER SECTION 19B OF THE *CRIMES ACT* 1914-1973 (CTH); *WIRELESS TELEGRAPH ACT* 1905-1973 (CTH) S6.

C. a cadet journalist with *The Age* newspaper, used an appliance owned by *The Age* to receive messages at the Russell Street Police Headquarters. The communications scanned by C. were made by police officers and they were intended only for police personnel and were not intended to be heard by others. At the hearing, on a no case submission, it was said that the charges should be dismissed on the ground that the word "messages" ought to have a limited meaning. In rejecting this submission and finding the charge proved, the Magistrate said that C's conduct fell squarely within the terms of the *Wireless Telegraphy Act* and convicted C. and fined him $20 with costs. Upon appeal—

HELD: Order nisi absolute. Conviction set aside.
1. The question was whether C's use of the scanner was the use of an appliance for the purpose of receiving messages, he not having been an intended recipient of any of those messages but on the contrary a person who was not intended to receive any of those messages. The use of an intercept device does not constitute the receipt of a message. There is a distinction between receiving a message and, to use the questioned phrase, intercepting a message. There is a very real distinction between a message received by the intended recipients and one intercepted by an unintended addressee.

2. In the present case C. received a communication; he did not receive a message. The informant's view involves using the words "receiving a message" in a sense other than their actual meaning, and extending those words to cover something other than the receiving of a message. It involves hearing and interpreting a communication not intended for, and therefore not a message to the person operating the device in question in this case. Accordingly the order nisi would be made absolute and the conviction set aside.

***Obiter*. 3. In relation to the question of penalty the Magistrate did not regard the offence as being of a trivial character and he was aware of the character, antecedents and age of C. The Magistrate was made aware of the circumstances which counsel relied on as being extenuating. The evidence did, however, show that C's act was not an inadvertent or unintentional breach of the legislation. If there was a breach, C. believed that what he was doing was contrary to law, and in those circumstances the general tenor of the authorities has been against the proposition that a court should regard that as being an offence of a trivial nature. The penalty imposed was $20. It could not be said that the penalty imposed was, in the circumstances of the case of an offence which the Magistrate believed was intentional, so excessive as to be unreasonable.**

McINERNEY J: On 11 June 1979, an information was laid by the respondent Walter Thomas Golds, against the applicant Damien John Comerford, charging him with two offences, each alleged to have been committed on 8 and 9 March 1979 at Melbourne.

The first charge in the information was that the defendant did:
"without authorisation under the *Wireless Telegraphy Act* 1905 maintain an appliance for the purpose of receiving messages by means of wireless telegraphy, namely a Scooper 10-channel Scanner No MR3000A Serial 002891, contrary to s6 of the said Act."

The second charge was that he did without authorisation under the *Wireless Telegraphy Act*:
"use an appliance for the purpose of receiving messages by means of wireless telegraphy, namely a Scooper 10-channel Scanner No MR3000A Serial 002891, contrary to s6 of the said Act."

The matter came on for hearing at the Magistrates' Court at Melbourne on 17 July 1979 before His Worship Mr Hoare SM. The first information was withdrawn, but on the second information the defendant was convicted and fined $20 with $59.90 costs. Application for an order nisi was granted on 15 August 1979.

The facts are not in dispute. *[A summary of the facts and the questions and answers in the record of interview is as follows]* On 9th March 1979 the defendant was in the Press Room set aside for *The Age* newspaper at Russell Street Police headquarters. When the informant entered the room there was a Scooper scanner 10 channel radio monitor sitting in an open drawer of a desk. The scanner was connected to power, was switched on and the scanning lights were in operation rotating through the ten channels. The informant heard a broadcast over the scanner and recognized it as being from D24 Melbourne. The defendant told the informant that he was a cadet journalist, that the scanner belonged to *The Age*, that it covered some police channels and one ambulance channel and he used it for getting news, that when he commenced work that day the scanner was where it had been found and that it had been switched on. The defendant stated he had turned it off once during the day when he received a telephone call and had turned the scanner on when the telephone call was finished. All he knew was that the light scanned around ten channel lights and stopped when someone transmits. The defendant admitted he was not licensed or authorized to monitor radio transmissions with the scanner. In cross-examination the informant said that the police radio set was used to transmit communications from one member of the force to another and that there were about ten channels in operation round the Melbourne area. He said that communications were made by one member of the force to another, that they were intended only for police personnel, that they were not intended to be heard by others.

Mr EW Gillard QC who appeared for the defendant put before the learned Stipendiary Magistrate submissions which have been repeated before me and submitted that both informations should be dismissed as there was no case to answer. Mr Fuller, the solicitor appearing for the informant, submitted that it was a case of receiving messages and relied on the judgment of Sir John Latham, at p271 of the report of *Brislan's Case* [1935] HCA 78; (1935) 54 CLR 262; [1936] ALR 45. The Stipendiary Magistrate rejected Mr Gillard's submission saying that one could infer from the evidence that the police do send communications from one to another member of the force. He said that the purpose of the applicant's conduct was to hear messages broadcast by D24 or from one member of the Police Force to another member of the Force. He said that it had been contended by counsel that the word "messages" ought to have a limited meaning but that he did not accept that submission and said that the applicant's conduct fell squarely within the section of the Act. He indicated that he would find the charge proved. Mr Gillard reminded the Magistrate the applicant had not given evidence but added that, in any event, it was not proposed to call any evidence. He then proceeded to make a submission on penalty. The first charge in the information was withdrawn by the informant and on the question of penalty Mr Gillard addressed the Magistrate on the provisions of s19B of the Commonwealth *Crimes Act*. The Magistrate indicated that he was not prepared to adjourn the matter. Mr Gillard, continuing his plea, pointed to the applicant's comparative youth and to the fact he appeared to be acting under the instructions of his employers, whereupon the Magistrate interrupted Mr Gillard and indicated that he would impose a small penalty which would indicate his attitude to the offence. Mr Gillard said it was not so much the question of the money but the fact that the applicant would have to carry the conviction. The Magistrate, however, after hearing some further submissions by Mr Gillard, ordered that the applicant be convicted and fined him $20, in default two days, and ordered him to pay costs in the sum of $59.90 and granted the stay of one month.

Section 2(1) of the *Wireless Telegraphy Act* 1905-1973 defines wireless telegraphy as including:

> "all systems of transmitting and receiving telegraphic or telephonic messages by means of electricity without a continuous metallic connexion between the transmitter and the receiver."

Section 6(1) provides:

> "Except as authorized by or under this Act, no person shall—
> (a) establish, erect, maintain, or use any station or appliance for the purpose of transmitting or receiving messages by means of wireless telegraphy."

The applicant consented to being dealt with summarily and consequently, the maximum penalty was imprisonment for any period not exceeding six months or a penalty not exceeding $100. ...

The order nisi was granted on four grounds, two of which relate to conviction and two to penalty. The two which relate to conviction are grounds 1 and 2 which read as follows:

> "1. The Stipendiary Magistrate was wrong in holding that the applicant had used an appliance for the purpose of receiving messages by means of wireless telegraphy contrary to s6 of the *Wireless Telegraphy Act* 1905 (Commonwealth).
>
> 2. The Stipendiary Magistrate was wrong in holding that the monitoring of police messages by the applicant by means of the said appliance constituted a receiving of messages within the meaning of s6 of the *Wireless Telegraphy Act* 1905."

In answer to a question put by me, Mr Gillard indicated that the substantial ground relied on was ground 2. He did not suggest to me that ground 1 concealed any point other than the points which he argued in relation to ground 2. It will have been observed that the Act carries no definition of the word "receive" or of the word "message", so that one is left to enquire in the first place what is the ordinary meaning of those words. *[His honour then listed from various dictionaries the meanings of the words "receive", "message", "interception" and "intercept", commenting that one may receive a message by hearing the spoken word, a form which is not tangible and which leaves no permanent record. His Honour continued] ...*

The interpretation of Section 6, as well as the constitutional validity of the Act were considered by the Full High Court in *R v Brislan Ex parte Williams* [1935] HCA 78; (1935) 54 CLR 262; [1936] ALR 45. That decision has in turn been considered in the case of *Jones v The Commonwealth of Australia* [1965] HCA 6; (1965) 112 CLR 206; [1965] ALR 706; (1965) 38 ALJR 376; (1965) 11 LGRA 354, but I do not find anything in that case which assists me in the present context. More recently the section has been considered by White J of the Supreme Court of South Australia, *O'Leary v Matthews* (1979) 29 ALR 97. *[His Honour then adverted to the consideration given to the term "messages" by the various judges in Brislan's case, Latham CJ, Rich, Starke and Evatt JJ and to some comments by McTiernan J and pointed out that all those observations emphasized three things, the transmission of a communication from an originator to a recipient or intended recipient over a distance. His Honour continued]* ... They do not touch the question that I have here to consider the point now raised was not considered, and in one sense did not fall to be considered because the defendant in that case was one of the class of persons for whom the transmission of the speech, music, or other sounds broadcast, was intended to be received.

I come to the dissenting judgment of Dixon J, who at p299-291 of the report said that the word "messages":

> "appears to me to mean a communication sent to one definite person by another ..." In the Act the word 'message' is, I think, appropriate only to individual communication. In saying it means a communication to one definite person by another, I do not mean to exclude messages which are simultaneously despatched to many. Each of these is in fact a separate message although identical in expression with the others..."

It is clear that Dixon J would have regarded the transmission of messages on the police channel from D24 to individual members of the police or from some individual member or members of the police, to some other member or members of the police, as "messages" within the meaning of the word as he understood it. There is no doubt that what was heard by the applicant in this case was a message within the meaning of the definition, a message from one policeman to another, or by D24 to members of the Police Force. The question is whether the applicant's use of the scanner was the use of an appliance for the purpose of receiving messages, he not having been an intended recipient of any of those messages but on the contrary a person who was not intended to receive any of those messages.

O'Leary v Matthews (*supra*) resembles the present case in that the defendant in that case was using appliances for the purpose of hearing messages which were not intended for him, messages which were intended for hearing by members of the Police Force on the one hand and members of the Ambulance Service on the other. The conviction which extended to the receivers is in one

sense a decision on the very point I have to decide. But a perusal of the report does not indicate that any argument was directed to White J on the lines directed to me. It is obvious and it was indeed common ground in the course of argument before me that radio signals, radio messages, if one uses that term, are capable of being detected and understood by persons other than those for whom they were intended. The word "intercept" is often used to describe this process.

Mr Gillard objected to the use of the word "interception" or "intercept" in this context, pointing out that the notion of interception implies the prevention of the intercepted object from reaching its intended destination. ... As at present advised, and on the state of the evidence, ... I am unable to see how the use of an intercept device constitutes the receipt of a message. The actual decision in *O'Leary v Matthews* may be regarded as against Mr Gillard's contention, but the point was, as I have said, not argued in that case any more than it was in fact argued in *Brislan's Case*. In my view there is a distinction between receiving a message and, to use the questioned phrase, intercepting a message. ... To my mind there is a very real distinction between a message received by the intended recipients and one intercepted by an unintended addressee. ...

In this particular case in my view the defendant received a communication, he did not receive a message, and the easy transposition which is achieved from the word "communication" to the word "message" in some of the judgments in *Brislan's Case* and I have in mind in particular the judgments of Latham CJ and Starke J – cannot be achieved in this case. Convenient as may be the view contended for on behalf of the informant in this case, it does, in my view, involve using the words "receiving a message" in a sense other than their actual meaning, and extending those words to cover something other than the receiving of a message. It involves hearing and interpreting a communication not intended for, and therefore not a message to the person operating the device in question in this case. ...

It follows, in my view, that Ground. 2 of the order nisi is made out, and since I understand that the same point underlay Ground 1, that ground must likewise be regarded as made out. The consequence of that is that the order nisi would be made absolute and the conviction set aside.

It is, in that sense, strictly speaking, unnecessary to say anything as to the two remaining grounds which deal with the question of penalty, those grounds being:

> "3. The Stipendiary Magistrate was wrong in not exercising the discretion given him pursuant to s19B of the *Crimes Act* (1914) of the Commonwealth.
>
> 4. The penalty imposed by the Stipendiary Magistrate was so excessive in the circumstances as to be unreasonable."

But since this matter may well go on elsewhere, it may be appropriate to say something as to the points raised by those grounds of review. Mr Gillard had invited the Magistrate to act under s19B of the Commonwealth *Crimes Act* (1914-1973). ... It follows that the course referred to in paragraph (d) of that section does not involve a conviction. It was that course which Mr Gillard invited the Magistrate to take. Mr Gillard contended that the Magistrate had failed to exercise his discretion. Mr Gillard had addressed him as to the character, antecedents, age, although I do not think anything was said as to the health or mental condition of the applicant. Mr Gillard had submitted the offence was of a trivial nature and submitted the offence was committed under extenuating circumstances. If the Magistrate was satisfied as to those matters, or any of them, and being satisfied of those matters had then formed the view that it was inexpedient to inflict any punishment at all, or that it was inexpedient to inflict any punishment other than a nominal punishment, or that it was expedient to release the person on probation, he was entitled to take one or other of the courses set out in s19B, subject, however, to this: Mr Cantwell has drawn my attention to the fact that the *Crimes Act* contains no provision for a probation order other than that which is contained in s20C which is confined to "a child or young person".

Mr Cantwell tells me that at the time of the enactment of s19B in 1960 it was envisaged that there would be a probation scheme for the Commonwealth but nothing has ever been done about that. As at present advised, I do not think that a Magistrate or Judge of this Court could grant a probation order or could make a probation order under this legislation in the absence of "back-up legislation" such as is contained in the Victorian *Crimes Act*. I have not heard extensive argument on the point and the opinion I express is not to be taken as a concluded opinion.

It seems to me, as at present advised, that the Magistrate could take the course of dismissing the charge only if having been satisfied as to one or other or more of the three matters set out in paragraph (b) he had come to the conclusion that it was inexpedient to inflict any punishment. I am not persuaded he could take the course of dismissing the charge if he formed the view not that it was inexpedient to inflict any punishment but, on the contrary, formed the view that it was inexpedient to inflict any punishment other than a nominal punishment. As I see it the punishment cannot be inflicted unless there is a conviction.

The Magistrate did not, in terms, expressly make the findings on any of the matters set out in paragraph (b) of sub-s (1) of s19B. When the Magistrate intimated that he was not prepared to adjourn the case, he said so at a stage when he had heard evidence as to the circumstances of the offence; had heard submissions from the Bar table as to the character and antecedents and age of the accused; and as to the circumstances in which the applicant had come to commit the offence. He was, in my view, in a position to form an opinion on each of the matters referred to in paragraphs (i), (ii) and (iii) of paragraph (b) and I think this Court should take the remark of the learned Stipendiary Magistrate that he was not prepared to adjourn the matter as indicating he had considered whether or not to exercise the discretion which the section gave him, of taking the course urged on him by Mr Gillard. ...

The Magistrate did not accept that submission and it was his prerogative to say whether or not he would accept that submission. This Court is in the position in which it often finds itself in that full reasons have not been given by an inferior court, but as has been said in this Court in many cases – e.g said by Barry J in *Atkinson v Atkinson* [1969] VicRp 34; [1969] VR 278 at p280; [1969] ALR 269; (1968) 13 FLR 322, and as I observed in *Dole's Case* [1975] VicRp 75; (1975) VR 754 at p767; it is not to be assumed that a Magistrate sitting in a jurisdiction where problems such as this occur very frequently at all events, has not applied his mind to the matter, to all the relevant matters, simply because he has not stated them. It is no doubt more satisfactory if a Magistrate gives reasons and the absence of reasons is in itself a circumstance which gives rise to dissatisfaction on the part of the person whose submissions have been rejected.

It would be preferable if reasons were stated in a case such as this, stated more fully than they were. I think however that it can be collected sufficiently from this material that the Magistrate did not regard the offence as being of a trivial character, that the Magistrate was aware of the character, antecedents and age of the applicant. The learned Magistrate was made aware of the circumstances which Mr Gillard relied on as being extenuating. The evidence did, however, show that the applicant's act was not an inadvertent or unintentional breach of the legislation. If there was a breach, the defendant believed that what he was doing was contrary to law, and in those circumstances the general tenor of the authorities has been against the proposition that a court should regard that as being an offence of a trivial nature. I refer in this context to what was said by Forster J in *Bailey v Laczko* (1978) 20 ALR 658 at p661.

I am not satisfied that the Magistrate did not exercise the discretion given to him by s19B of the *Crimes Act*. Therefore Ground 3 of the order nisi is not made out. I am of the view that he did exercise his discretion and it has not been demonstrated that in exercising that discretion he proceeded on any wrong principle. As to Ground 4, that the penalty imposed by the Magistrate was so excessive in the circumstances as to be unreasonable, the maximum pecuniary penalty was $100. The penalty imposed was $20. I am not satisfied that it can be said that the penalty imposed was, in the circumstances of the case of an offence which the Magistrate believed was intentional, so excessive as to be unreasonable, and I would not be satisfied as to Ground 4.
