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JANET ADRIENNE SPATE v MARIA DOOGAN & ANOR
[1999] ACTSC 76 (14 July 1999)

CATCHWORDS

CRIMINAL LAW – PROCEDURE – examination of witness prior to hearing – notice to other party of intended examination

Magistrates Court Act 1930 (ACT), s 67(1)

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No. SC 47 of 1999

Coram: Whitlam J
Supreme Court of the ACT
Date: 14 July 1999

IN THE SUPREME COURT OF THE)
) No. SC 47 of 1999
AUSTRALIAN CAPITAL TERRITORY)

BETWEEN: **JANET ADRIENNE SPATE**

Applicant

AND: **MARIA DOOGAN**

First Respondent

DAVID BRUCE MCRAE

Second Respondent

O R D E R

Judge Making Order: Whitlam J

Where Made: Canberra

Date of Order: 8 July 1999

THE COURT ORDERS THAT:

1. The order made by the first respondent on 21 June 1999 that the evidence of the second respondent be taken on 24 June 1999 is set aside.

AND DECLARES THAT:

2. The depositions made by the second respondent on 24 June 1999 are invalid and of no effect.

AND ORDERS THAT:

3. The second respondent pay the applicant's costs of these proceedings.

1. These are my reasons for the orders made on 8 July 1999 disposing of this application.

2. The applicant ("the defendant") is a person against whom eight informations have been laid in the Magistrates Court by the second respondent ("the informant"). The defendant has been charged with seven offences under the *Drugs of Dependence Act 1989* and one offence under the *Firearms Act 1996.* The informations are fixed for hearing on 9 and 10 August 1999.

3. On 21 June 1999 the first respondent ("the magistrate") made an order, on the application of the informant, that the informant's evidence relating to those informations be taken on 24 June 1999. The magistrate relied upon s 67(1) of the *Magistrates Court Act 1930* ("the Act"), which provides:

> *"67(1) Where, by evidence on oath, a magistrate is satisfied that any person is able to give material evidence or to produce relevant or material documents relating to any information or claim pending before a court, and that that person is likely to be absent from the Territory when the case comes on for hearing, the magistrate may, on the application of any party, order that the evidence of that person be taken or the documents be produced before him or her, at any time before the hearing, in the same manner as the evidence would be taken or the documents be produced at the hearing and after reasonable notice of the intended examination or production is given to the other party."*

4. The informant had given notice that such an application would be made at 9.30 am on 21 June 1999 by leaving a document to that effect at the office of the defendant's solicitor, Jennifer Saunders, on 18 June 1999. This was a Friday, and Ms Saunders had found the document at about 2.00pm that day.

5. On Monday, 21 June 1999, Ms Saunders was ill. Her secretary telephoned the office of the Director of Public Prosecutions ("the DPP") and asked to have the informant's application heard on 24 June.

6. A transcript of the hearing on 21 June was not in evidence before me, but a transcript of the subsequent hearing on 24 June was. That transcript confirms that on 21 June the magistrate did, in fact, accede to the informant's application under s 67(1) and did so in the absence of the defendant or the defendant's solicitor. However, no notice appears to have been given to the defendant prior to 24 June that an order under s 67(1) had been made.

7. The sworn evidence upon which the magistrate made her order was not adduced before me. I was informed that one of the charges under the *Drugs of Dependence Act* related to the alleged supply of pethidine. This is an indictable offence, but I was told that, on account of the alleged quantity, it may be dealt with summarily. The defendant is a veterinary surgeon. The dates of 9 and 10 August for the preliminary examination were fixed on 23 April 1999, having regard to the availability of senior counsel for the defendant.

8. The evidence before me did not disclose whether a notice had ever been given under s 90 of the Act. The possibility of tendering written statements of evidence was raised at a case status inquiry on 8 June, which was then adjourned until 15 June in order to give the defendant an opportunity to consider that question. On 15 June Tim Sharman, a solicitor employed by Ms Saunders, indicated that the defendant "did not consent to a paper committal". The informant was represented by a Ms Hunter from the DPP's office, who indicated that the informant "would not be available" on the dates fixed for the preliminary examination and who asked whether the defendant required the informant "to give his evidence orally". Ms Saunders subsequently telephoned Ms Hunter. In that telephone conversation Ms Hunter informed Ms Saunders that the informant (who is a member of the Australian Federal Police) "was being posted to Western Australia on 8 August 1999". Ms Saunders told Ms Hunter that the defendant did not consent to a statement by the informant being tendered in evidence. This was the background to the application before the magistrate on 21 June.

9. If the magistrate gave any reasons for making her order on 21 June, they were not in evidence before me. (Nor was the defendant entitled to make a request for such reasons under s 13(1) of the *Administrative Decisions (Judicial Review) Act 1989* because Schedule 2 to that Act applied to the magistrate's decision.) However, counsel for the defendant rely on the transcript of 24 June in order to demonstrate error in the magistrate's approach to the making of her decision on 21 June.

10. Mr Sharman appeared before the magistrate on 24 June. It appears from the transcript that he was plainly unaware that an order under s 67(1) of the Act had actually been made on the previous Monday, and that he was initially under the misapprehension that the informant's application had yet to be dealt with. Nothing in the transcript

indicates that any notice was given to the defendant or her solicitor that the order for examination was actually made on the previous Monday. Indeed, a fair reading of the transcript suggests that the magistrate considered that the informant's notice on Friday of an order to be sought on the following Monday that he be examined three days later on 24 June was "reasonable notice of the intended examination" for the purposes of s 67(1). That is, the magistrate appears to have thought that notice could be given before the order was made under s 67(1).

11. Counsel for the defendant are also critical of other statements by the magistrate in the initial exchanges recorded in the transcript. Her Worship said that she did not know either "how significant" the informant's evidence was, or "the significance" of his evidence. The magistrate said:

> *". . . it's not a matter that can be finalised in this Court in any event. It's set down for two days and given that it is a committal proceeding I don't intend to put the community to the expense of having a police officer flown all the way back from Perth to give evidence because it's not convenient for the defence to have his evidence given prior to him leaving on the weekend."*

12. Mr Sharman made it clear to her Worship that he did not have the carriage of the defendant's case within Ms Saunders' firm. He asked that the taking of the informant's evidence be deferred until any of several dates in July that were convenient to senior counsel for the defendant. The magistrate rejected that application saying that it would be "nonsense to fix another date in the future in July when the matter is set down for hearing in August." Her Worship allowed an adjournment to midday in order that the defendant could be brought to court.

13. The defendant was present when the matter resumed later that day. Mr Sharman objected to the taking of the informant's evidence on the ground that the defendant had not been provided with reasonable notice of the intended examination. The informant's depositions were then taken and documents produced by him were marked for identification. Mr Sharman was not in a position to cross-examine the informant, and he said so. The informant's evidence is important and obviously central to the prosecution case to be presented at the preliminary examination.

14. On 28 June the defendant commenced these proceedings by filing an application for review under the *Administrative Decisions (Judicial Review) Act 1989*. Following a

directions hearing on 1 July, the DPP sent a letter dated 6 July to Ms Saunders, in which he said:

> *"With respect to the informant's evidence, I appreciate how you say he is a significant witness to the defence. I note also that most of the charges your client faces are purely summary and therefore there would be no further opportunity in any forum for Constable McRae to be cross-examined about those matters. Should this matter proceed to hearing the prosecution will make Constable McRae available for cross examination [sic]. As you are aware he is in Perth and we may need to seek a further date if he cannot attend on 8-9 August 1999.*

15. Depositions under s 67(1) of the Act are to be taken "in the same manner as the evidence would be taken . . . at the hearing". That means in the present case that the defendant is entitled, by her counsel, to cross-examine the informant as one of the witnesses for the prosecution: ss 53(2) and 90AB of the Act. That consideration necessarily affects the exercise of the magistrate's direction under s 67(1) in fixing the time of any intended examination and the notice to be given to the defendant. It may be expected that in the usual case notice will be given forthwith after the making of the order. The question of "reasonable notice" will then become, in effect, one of the reasonableness of the time fixed for the intended examination.

16. In the present case at least one of the charges is extremely serious from any point of view. All of the charges may have a grave impact on the defendant's ability to practise her profession. The dates for the preliminary examination were, no doubt, fixed with those considerations in mind so that senior counsel for the defendant, properly and adequately instructed, would be able to appear. The right to cross-examine the informant may be rendered meaningless if cross-examination were required to be undertaken on only three days' notice. In the present case, of course, no notice at all was given. That failure alone means, in my opinion, that the exercise of the magistrate's discretion miscarried here. I do not understand counsel for the informant to submit otherwise. (The error is obvious when it is appreciated that an application under s 67(1) of the Act can, and no doubt usually will, be made *ex parte*. There is no requirement for notice of such application to be given to the other party.)

17. Counsel for the informant resisted the grant of the relief sought by the defendant on the basis that, if necessary, his client would attend for cross-examination at the preliminary examination on the dates fixed or "a further date". I appreciate that that

offer was made in good faith and that, in the event the informant was for any reason not available for cross-examination, the Magistrates Court would have a discretion not to permit the informant's depositions to be read by counsel for the DPP on the preliminary examination. However, the exercise of the magistrate's discretion having plainly miscarried, the defendant has made out, in my opinion, an overwhelming case for the exercise of this Court's powers on judicial review so as to leave no scope for the future use of the tainted depositions.

I certify that this page and the four (4) preceding pages are a true copy of the Reasons for Judgment herein of the Honourable Justice Whitlam

Associate: Melissa Bullen

Date: 14 July 1999

Counsel for the applicant:	A J Bellanto QC with G C Corr
Instructing Solicitors:	Saunders & Company
Counsel for the first respondent:	R T Bayliss
Instructing Solicitor:	ACT Government Solicitor
Counsel for the second respondent:	S M Whybrow
Instructing Solicitor:	Director of Public Prosecutions
Date of hearing:	8 July 1999