[2005] WASC 214

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA IN CRIMINAL
CITATION	**:**	THE STATE OF WESTERN AUSTRALIA -v- CHRISTIE [2005] WASC 214
CORAM	**:**	MCKECHNIE J
HEARD	**:**	25 AUGUST 2005
DELIVERED	**:**	27 SEPTEMBER 2005
FILE NO/S	**:**	INS 229 of 2002
BETWEEN	**:**	THE STATE OF WESTERN AUSTRALIA Prosecutor AND RORY KIRK CHRISTIE Accused

Catchwords:

Criminal law and procedure - Witness summons for production of material - Whether legitimate forensic purpose has been established - Public interest immunity - Matters in balance

Legislation:

Criminal Procedure Act 2004 (WA)

Result:

One summons dismissed
Inspection allowed on other summons limited to legal practitioners

Category: A

Representation:

Counsel:

Prosecutor	:	Ms T D Sweeney
Accused	:	Ms B J Lonsdale
Witness	:	Mr P D Lochore

Solicitors:

Prosecutor	:	State Director of Public Prosecutions
Accused	:	Ian R Farquhar & Co
Witness	:	State Solicitor's Office

Case(s) referred to in judgment(s):

Air Canada & Ors v Secretary of State for Trade [1983] 2 AC 394
Alister v The Queen (1984) 154 CLR 404
Attorney-General (NSW) v Stuart (1994) 34 NSWLR 667
Burmah Oil Co Ltd v Bank of England [1980] AC 1090
Button v The Queen (2002) 25 WAR 382
Carter v Hayes SM (1994) 61 SASR 451
Christie v The Queen [2005] WASCA 55
Connell v The Queen (No 6) (1994) 12 WAR 133
D v National Society for Prevention of Cruelty to Children [1978] AC 171
Dietrich v The Queen (1992) 177 CLR 292
Easterday v The Queen [2003] WASCA 69; (2003) 143 A Crim R 154
Jago v District Court of New South Wales (1989) 168 CLR 23
Maddison v Goldrick (1976) 1 NSWLR 651
R v Brown (Winston) (1994) 1 WLR 1599
R v Francis [2004] NSWCCA 85; 145 A Crim R 233
R v Stinchcombe (1991) 3 SCR 326
Ran v The Queen (1996) 16 WAR 447
Young v Quinn (1985) 59 ALR 225

Case(s) also cited:

Nil

1 **MCKECHNIE J**: There is an indictment pending in the Supreme Court charging the accused with murder following a successful appeal: ***Christie v The Queen*** [2005] WASCA 55.

2 The accused has issued two witness summonses directed to the Commissioner of Police on 25 July 2004 and 11 August 2004 seeking:

- evidence of covert surveillance conducted on the Accused by undercover officers or agents of the police in the form of notes or statements and telephone intercept and other taped material.

- a report of a Senior Constable Kerr on the profile of the likely killer of Susan Christie.

3 The accused also seeks orders permitting inspection.

4 The Commissioner opposes the production of some of the material until a legitimate forensic purpose is identified and also raises a claim of public interest immunity. The State objects to the production of the material on the ground of relevance.

Principles at Common Law

5 The principles regarding disclosure in criminal cases in common law jurisdictions have evolved over the last 40 years until they can be reasonably regarded as settled. The application of the principles to particular circumstances requires the exercise of judgment and discretion.

6 In Western Australia the provisions of the *Criminal Procedure Act 2004* have also clarified what was once an area of debate and difficulty.

The Prosecution's Duty of Disclosure

7 Nearly 30 years ago in ***Maddison v Goldrick*** (1976) 1 NSWLR 651 Samuels JA (Street CJ and Moffitt P agreeing) said at 668:

> "But, over recent years, the endeavours of law reformers, in most cases supported by the judges, have been directed to disposing of the last vestiges of trial by ambush, and to enabling each side to start the contest with the greatest possible knowledge of what is going to be alleged against him. It is true that these endeavours proceed upon a basis of mutuality which does not so far exist in criminal procedure, because of the

> proscription upon any procedural rule which might require a defendant to provide evidence against himself."

8 What was then foreshadowed has now largely come to pass. The clear intention of the *Criminal Procedure Act 2004*, *inter alia*, is to require full disclosure by the prosecution: s 35, s 44, s 45, s 95. The disclosure is of confessional material and evidential material as defined: s 42. The obligation to disclose is a continuing obligation.

9 The right to a fair trial is the central pillar of our criminal justice system: ***Jago v District Court of New South Wales*** (1989) 168 CLR 23. The right has manifested in rules of law and of practice designed to regulate the course of the trial: ***Dietrich v The Queen*** (1992) 177 CLR 292 at 299. In ***R v Brown*** (Winston) (1994) 1 WLR 1599 Steyn LJ (Owen and Ian Kennedy JJ agreeing) said at 1606:

> "… in our adversarial system, in which the police and prosecution control the investigatory process, an accused's right to fair disclosure is an inseparable part of his right to a fair trial".

10 In ***Carter v Hayes SM*** (1994) 61 SASR 451 King CJ (with whom Bollen and Mullighan JJ agreed) said at 456:

> "The summons to produce evidentiary material is the means by which a party procures the material to be brought to the Court. Access by the defence to the material is quite another issue. …
>
> Disclosure by those conducting a prosecution of material in the possession or power of the prosecution which would tend to assist the defence case, is an important ingredient of a fair trial, (*Clarkson v Director of Public Prosecutions* [1990] VR 745 at 755), and is an aspect of the prosecution's duty to ensure that the 'Crown case is presented with fairness to the accused': *Richardson v The Queen* (1974) 131 CLR 116 at 119; *R v Apostilides* (1984) 154 CLR 563. Moreover the Court has power to order the production to the defence of material in the prosecution's possession or power if the interests of justice so require: *R v Clarke* (1930) 22 Cr App R 58; *Mahadeo v The King* [1936] 2 All ER 813; *R v Hall* (1958) 43 Cr App R 29; *R v Xinaris* [1955] Crim LR 437, *R v Charlton* [1972] VR 758. …

When documents or other evidentiary material are produced to the court in response to a summons, it is necessary for the court to decide whether the defence is to be given access. The words of Hunt J in *R v Saleam* (at 18) provide guidance as to how the decision should be made:

> 'Before granting access when such an objection has been taken, the judge should usually inspect the documents (or those which the Crown may suggest are sufficiently representative) for himself, as it is unfortunately not unknown for the objection taken to be misconceived: see also the remarks of Brennan J in *Alister's* case (at 455-456). If no public interest immunity or other privilege is claimed (and upheld), and if a legitimate forensic purpose for their production has been demonstrated, the judge should not withhold access to the documents simply on the basis that in his view that purpose would not be satisfied in that particular case because he can see nothing in the documents which will in fact assist the accused in his defence. Provided that a legitimate forensic purpose has been demonstrated, it should be for the accused (or, in appropriate cases, for his legal advisers only) to satisfy himself on that score after his own inspection of the documents.'

Inspection of statements of witnesses for the prosecution should be allowed virtually as a matter of course: *Maddison v Goldrick.* Moreover the defence is prima facie entitled to inspect any document which may give it the opportunity to pursue a proper and fruitful course in cross-examination: *Maddison v Goldrick*, per Samuels JA (at 667-668); *R v Saleam* (at 19)."

The duty of disclosure is similar in Canada.

11 In ***R v Stinchcombe*** (1991) 3 SCR 326 the Supreme Court of Canada held as reported in the headnote:

> "The Crown has a legal duty to disclose all relevant information to the defence. The fruits of the investigation which are in its possession are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done. The obligation to disclose is subject to a

> discretion with respect to withholding of information and to the timing and manner of disclosure. Crown counsel has a duty to respect the rules of privilege and to protect the identity of informers. A discretion must also be exercised with respect to the relevance of information. The Crown's discretion is reviewable by the trial Judge, who should be guided by the general principle that information should not be withheld if there is a reasonable possibility that this will impair the right of the accused to make full answer and defence."

12 The judgment of the Court was delivered by Sopinka J.

13 The principle was affirmed in ***R v Taillerfer; R v Duguay*** [2003] SCC 70.

14 The principles are further discussed by Steytler J in ***Easterday v The Queen*** [2003] WASCA 69; (2003) 143 ACrim R 154 at 188 - 190 and also in ***Button v The Queen*** (2002) 25 WAR 382.

"On the Cards"

15 In ***Burmah Oil Co Ltd v Bank of England*** [1980] AC 1090 Lord Edmund-Davies said at p 1126:

> "What are the probabilities of such documentary support being in existence? Is it merely pure conjecture? If so, applying the plaintiff's own test, production should be refused. But in my judgment there is more to it than that. It is, at the very least, 'on the cards' in the light of the Bank's known support and advocacy of profit-sharing, they expressed their unequivocal dislike when the government expressed determination to impose its final terms on *Burmah*. It was, I think, an over simplification for the Attorney General to submit that the only issue is whether the January agreement was in fact inequitable, and not whether the Bank regarded it as inequitable. For if, faced by government obduracy despite its strong representations, the Bank insisted on the proposed contractual terms, an arguable foundation for the appellant's allegations of unconscionability against the Bank itself could be laid. Then is all this merely 'on the cards', simply a 'fishing expedition'? If that is all there is to it, discovery should be refused. …".

16 In ***Air Canada & Ors v Secretary of State for Trade*** [1983] 2 AC 394 Lord Wilberforce, after referring to the judgment of

Lord Edmund-Davies in ***Burmah Oil*** and also Lord Keith of Kinkel, who had expressed the test a little differently, said at 439:

> "Both expressions must mean something beyond speculation, some concrete ground for belief which takes the case beyond the mere 'fishing' expedition. One cannot attain greater precision in stating what must be a matter of estimation."

17 The expression "on the cards" found its way into Australian jurisprudence in a case dealing with prosecution disclosure, that of ***Alister v The Queen*** (1984) 154 CLR 404 per Gibbs CJ at 414:

> "Just as in the balancing process the scales must swing in favour of discovery if the documents are necessary to support the defence of an accused person whose liberty is at stake in a criminal trial (see *Sankey v Whitlam* (1978) 142 CLR at 42, 62) so, in considering whether to inspect documents for the purpose of deciding whether they should be disclosed, the court must attach special weight to the fact that the documents may support the defence of an accused person in criminal proceedings. Although a mere 'fishing' expedition can never be allowed, it may be enough that it appears to be 'on the cards' that the documents will materially assist the defence."

18 A majority in ***Alister***, Gibbs CJ, Murphy and Brennan JJ, suggested that a more liberal approach was appropriate when the proceedings were criminal in nature. Wilson and Dawson JJ specifically dissented on this point.

19 In ***Ran v The Queen*** (1996) 16 WAR 447 Franklyn and Wallwork JJ applied the "on the cards" test. Franklyn J, after a further review of authorities beyond ***Alister***, said at 454:

> "What is clear, however, from all of the authorities, and I refer particularly to *Alister*, is that a 'fishing expedition' is not a legitimate forensic purpose. That being so, it follows, in my view, that the application for access must demonstrate to the satisfaction of the judge the likelihood that the documents which do, or might, exist will contain material which will materially assist the defence by enabling it (in the present case) to conduct a proper, fruitful course in cross-examination and/or, in the appropriate case, by the adduction of evidence."

20 Scott J formulated the test somewhat differently at 456:

> "The test is sometimes expressed as being that there must be evidence to suggest that it is 'on the cards' that the documents can, or are likely to, materially assist the defence: see *Alister v The Queen*. In my opinion, the better test is that there should be evidence that the documents concerned are likely to be relevant for some legitimate forensic purpose before access to the documents is permitted."

21 In ***Connell v The Queen (No 6)*** (1994) 12 WAR 133 the Court set out the applicable law at page 203:

> "It is not in dispute that the applicable law is to be found in *National Employers' Mutual General Association Ltd v Waind* [1978] 1 NSWLR 372 at 381, 383-385 and in *Alister v The Queen* (1984) 154 CLR 404 at 412-415, 431,456-457. In *National Employers',* Moffit P [*sic*] said (at 385) in the exercise of the power to permit inspection of a document, the judge must determine whether it appears relevant in the sense that it relates to the subject matter of the proceedings. He continued, that once the judge is of the opinion that the document contains information of apparent relevance to the issues, inspection will normally be allowed 'notwithstanding that the document is not admissible as it stands, and notwithstanding that the party seeking inspection has not given any undertaking to tender it, or use it in cross-examination'. *Alister's* case makes clear that the test of relevance must include consideration of the possibility that the document may support the defence of an accused person in criminal proceedings (at 414) per Gibbs J. It 'may be enough that it appears to be "on the cards" that the documents will materially assist the defence'. It is not right to refuse disclosure simply because there were no grounds for thinking that the document could assist the accused (at 414-415)."

22 As I read the authorities to which I have made reference, and the *Criminal Procedure Act*, there is to be discerned a general intention that in order to ensure a fair trial, the State has an obligation to ensure that the fruits of an investigation are in general terms made available to the defence. There seems to remain, however, two qualifications to that broad-ranging and general duty. The first qualification is that, at least in matters which are not specifically enumerated within the *Criminal Procedure Act* as evidentiary material or confessional material, there is an onus on the defence to show some legitimate forensic purpose in the disclosure of the material; that is, a reasonable possibility that production

will materially assist the defence. The second qualification is that even if there is shown to be a legitimate forensic purpose, the material may nevertheless be prevented from disclosure on the grounds of a public interest immunity. Such an immunity, of course, requires a balance to be made as to the differing community interests, on the one hand, in ensuring a fair trial and, on the other hand, in preventing disclosure of certain police techniques and methods, of a covert nature, which, if they became generally known, would impact upon the ability of the Police Service to control crime.

23 In exercising judgment in a particular case, it should be recognised that the Court has within its power the ability to limit disclosure to certain persons, including legal practitioners. This power may on occasions inform the judgment to be made on the competing claims of the public interest immunity. Legal practitioners are officers of the Court and owe a duty to respect not only the confidences of their clients but also any confidences the Court may impose.

24 I now turn to the terms of the witness summonses.

The Profiler's Report

25 The legitimate forensic purpose advanced by the defence is as follows:

- The case against the accused was entirely circumstantial. There were many other suspects for the death of Susan Christie.
- The police running sheet reveals that, during the course of the investigation into the disappearance of Susan Christie, the police prepared a profile on the probable killer.
- It is submitted that the defence has a legitimate forensic purpose in having access to the profile on the basis that it is likely to assist him to identify the person responsible for Mrs. Christie's death or disappearance and thus help to exonerate him.

26 In answer, the State submits that the purpose of a criminal trial is to determine whether the prosecution can prove the charges against the accused beyond reasonable doubt. Should the jury not be so satisfied, it will be no part of their task to deliver a finding as to what they suspect happened, or who else - if indeed they suspect anyone else - might have

been involved. The report is not admissible and cannot be used in cross-examination. If, for argument's sake, the report concludes that the killer has a personality consistent with the Accused, the State cannot tender the report or cross-examine the accused on its contents. The report has no relevance.

27 The State's submission cannot be accepted in its entirety. Although the only question for the jury is whether the State has proved the accused's guilt, an accused is entitled to make a case raising, at the least, a reasonable doubt that some other person may have committed the offence. As described in the submissions by the Commissioner of Police at 18:

> "It is submitted that as the profiling report comprises speculation, opinion and conjecture by a police constable of the possible profile of the offender responsible for Mrs Christie's death or disappearance, the report is not likely to provide any new line of inquiry and will not assist the defence team to identify the person responsible for Mrs Christie's death or disappearance. Accordingly, it is submitted that the request is a mere fishing expedition."

28 The report seems to have been prepared by a constable. No relevant qualifications for the report writer are advanced. There is nothing put forward by the defence that gives rise to a reasonable possibility that the report might materially assist it. I do not consider a legitimate forensic purpose has been disclosed. The report is no more than one person's opinion and could not lead to any legitimate area of inquiry. By its description, it is a profile, not an identification of a person. If profiles could actually identify a person, they may be useful. There is nothing to suggest that this profile does more than express an opinion of one person about the characteristics of a possible killer. I dismiss this summons.

Statements and Other Material Concerning Surveillance Upon the Accused

29 The Commissioner of Police has identified the following documents in his possession or control answering the descriptions in the witness summons:

> "a. 103 audiotapes recorded from a device used at the accused's residence pursuant to a warrant obtained under the *Surveillance Devices Act 1998* between 8 February 2002 and 13 March 2002 ('the **audiotapes**');

b. running sheets from the surveillance of the accused by operatives from the Western Australia Police ('**WAPOL**') Covert Operations Unit on 14 December 2001 and various dates between 24 December 2001 and 7 August 2002 ('the **running sheets**');

c. audio recordings of conversations between Rory Christie and another person at 2 locations other than the residence obtained as part of surveillance of Rory Christie by members of the WAPOL during 2002 ('the **audio recordings**');

…

e. video footage and 2 photographs of the accused taken on 14 December 2001 …".

30 The State's case at the first trial (and the contention it will advance on the retrial) was that the accused's conduct demonstrated that he was "surveillance-aware" and that he was showing signs of anxiety or nervousness.

31 In its submissions the State opposes the production of this material as irrelevant. It says that after the Ford Festiva was forensically examined on 12 December and returned on 13 December the accused behaved in a surveillance-aware fashion on 14 December. It was at this time, and shortly after, that he made preparations for what the State puts forward as evidence of flight. The State argues that the accused's behaviour between February and August 2002 is not relevant to his behaviour on 14 December 2001.

32 The accused submits:

- The Defence seeks to rebut the State's assertion and show that the Accused's conduct prior to his arrest displayed no such evidence of anxiety or nervousness by which a consciousness of guilt could be inferred.

- Unless all evidence of covert surveillance conducted upon the Accused is disclosed to the Defence, there is a danger that the complete picture of his behaviour prior to his arrest will not emerge. This has the potential to result in a miscarriage of justice should the jury accept the

State's assertions his conduct in the absence of other evidence to suggest that his conduct was unremarkable.

- Such covert surveillance material would tend to confirm or deny the State's assertions that his behaviour prior to his arrest was indicative of a consciousness of guilt.

33 In my opinion, the accused has established a legitimate forensic purpose. Whether the material ultimately becomes, or is able to become, evidence is not the issue. The material may give rise to a legitimate line of inquiry.

34 The Commissioner also takes issue with the contention of the accused and submits that the audiotapes would not be evidence that tends to throw doubt over the accused's guilt. That may or may not be. That, however, is not the test.

35 The Commissioner objects to producing copies of all 103 audiotapes on the basis that to do so would be oppressively expensive. He submits that effectively this would require WAPOL to pay for each of the 103 tapes to be copied. I do not think this is so. The tapes can be produced to the Court and arrangements made by the accused to listen to them. If the accused wishes to pay for copies for his convenience, then that is a matter to be negotiated with the Commissioner of Police. A witness summons can only require the production of documents to the Court. Under the *Criminal Procedure Act* the Court has power to make orders dealing with the costs that a witness may incur in responding to a summons. I do not see the power as extending to a power to make orders requiring a witness to produce copies of materials.

Running Sheets

36 In conformity with my ruling on the audiotapes, I consider that running sheets which detail surveillance on the accused between February and August 2002 do have a legitimate forensic purpose.

Covert Audio Recordings at Other Locations

37 For the same reasons I consider that the accused has established a legitimate forensic purpose in respect of these materials.

Tapes and Transcripts of Conversations Between the Accused and Kelli Budrikis

38 Ms Budrikis is a significant witness in the prosecution case. The conversations are between she and the accused. I consider there is a legitimate forensic purpose in disclosing those conversations on the same basis and subject to the same conditions as I have referred to.

Crime Stoppers' Report

39 Nothing is advanced that would satisfy me as to the legitimate forensic purpose in disclosing this material. Even if there was some legitimate forensic purpose, I consider that the strong public interest in the confidentiality of all information provided by callers to the Crime Stoppers program would require the public interest immunity to extend over that material.

Public Interest Immunity

40 In the event that a legitimate forensic purpose is established, the Commissioner claims public interest immunity in respect of the material.

41 I have touched upon the competing public interests. It is necessary to say a little more about them. The public interest in maintaining the effectiveness of the Police Force and other agencies has been recognised as one of importance: ***D v National Society for Prevention of Cruelty to Children*** [1978] AC 171; ***Young v Quinn*** (1985) 59 ALR 225 at 237.

42 Moreover, it is essential that method used by police in the pursuit of offenders and which, if disclosed, may impede or frustrate police in that pursuit or which may reveal matters that prejudice future police activities: ***Attorney-General (NSW) v Stuart*** (1994) 34 NSWLR 667. Balanced against this very important public interest is the public interest in ensuring, as far as possible, that the accused's right to a fair trial is not eroded. As I have previously remarked, the cases can only set out the principles which apply. The balance of the competing interests in a particular case is necessarily left to the trial Judge.

43 The Commissioner's claim is that the audio-recordings would tend to reveal sensitive police investigative methodology and that if the claim is not upheld the methodology will become more widely known among the community thereby undermining its effectiveness. Similar claims are made in respect of the unit running sheets.

44 The Commissioner points out that if knowledge of police covert operations becomes widely known criminal elements will increasingly employ counter-surveillance techniques.

45 I accept these as legitimate concerns. They are conveyed in an affidavit of Scott Hamilton Higgins, sworn 18 August 2005, on behalf of the Commissioner of Police in support of claims of public interest immunity.

46 At the hearing of 25 August 2005 counsel for the Commissioner of Police tendered a supplementary confidential affidavit of Mr Higgins, sworn 24 August 2005, in further support of claims of public interest immunity. He asked that the contents of that affidavit not be disclosed to others. I received the affidavit but indicated I would not read it until parties had had the opportunity of making submissions upon it.

47 The defence accepts that it is permissible for a judge to receive confidential material for the purposes of considering whether a claim to public interest immunity is established where that would appear to be necessary to protect the public interest. I note that a similar procedure was referred to without disapproval in ***R v Francis*** [2004] NSWCCA 85; 145 A Crim R 233.

48 I have, therefore, read the supplementary affidavit and have taken account of its contents. I must necessarily be elliptical to avoid disclosing the material.

49 I have given careful consideration to the legitimate points made on behalf of the Commissioner and amplified in the affidavits. In this particular case, the surveillance was conducted upon the accused. He was, of course, privy to all of the conversations which were recorded.

50 In the present case the need for disclosure as part of the fair trial process outweighs, albeit by a slim margin, the matters advanced on behalf of the Commissioner. However, in order to accommodate those concerns as much as possible, the material may only be inspected by the accused's legal advisers and not disclosed to any other person without further order.

Summary of Conclusions and Orders

(a) Profiler's report 12 April 2002: the summons seeking its production is dismissed.

(b) Evidence of covert surveillance conducted on the accused in the form of notes, telephone intercepts and other material: inspection allowed by the accused's legal advisers only. Not to be disclosed to others without order.

(c) Tapes and transcripts of conversations between the accused and Kelli Budrikis: inspection of the material is permitted by the accused's legal advisers only. Not to be disclosed to any other person without further order.

(d) Notes or records of conversations with Crime Stoppers by Lena Durbridge or Lena Evans: that part of the summons relating to Crime Stoppers is dismissed.