

STRICKLAND (A PSEUDONYM) v COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS & ORS (M168/2017)

GALLOWAY (A PSEUDONYM) v COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS & ORS (M174/2017)

HODGES (A PSEUDONYM) v COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS & ORS (M175/2017)

TUCKER (A PSEUDONYM) v COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS & ORS (M176/2017)

Court appealed from: Supreme Court of Victoria Court of Appeal
[2017] VSCA 120

Date of judgment: 25 May 2017

Date special leave granted: 17 November 2017

On 25 June 2008 the Australian Crime Commission ('ACC') made a determination under section 7C of the *Australian Crime Commission Act 2002* (Cth) ('the Act'). On 7 April 2010, a summons was issued by the ACC's examiner to compel the appellants to attend an ACC examination under the determination. At the time, each of the appellants was under investigation by the Australian Federal Police ('AFP') on suspicion of having committed offences against Commonwealth law. The ACC was not investigating those matters itself but had agreed, at the AFP's request, to use its coercive powers to examine the appellants on the matters the subject of the AFP investigation.

The ACC examiner permitted AFP investigators to be present during the examinations. The non-publication orders which the examiner made permitted the examination transcripts to be disseminated to the AFP and the Commonwealth Director of Public Prosecutions ('CDPP'). The appellants were subsequently charged with Commonwealth offences. They applied for a permanent stay of the criminal proceedings, contending that both the conduct of the examinations and the dissemination of the examination material had been unlawful. As a result, they argued, they would be unable to receive a fair trial.

Hollingworth J granted a permanent stay of the proceedings. Her Honour ruled that, as each of the appellants was at the time '*a person who may be charged*' within the meaning of s 25A(9) of the Act, the examiner had been bound to prohibit publication of the examination material to the AFP and CDPP, in order to avoid the risk of prejudice to a fair trial. His failure to do so was unlawful and, further, was '*reckless ... to an unacceptable degree*'. Her Honour concluded that, as a result of the unlawful dissemination of the material, the appellants would be unable to receive a fair trial as they would be unfairly constrained in the conduct of their defences. She concluded that a stay was warranted not only as a result of the forensic disadvantage considerations, but also in order to protect confidence in the administration of justice.

The CDPP's appeal to the Court of Appeal (Maxwell P, Redlich and Beach JJA) was successful, despite the Court upholding the trial judge's findings that both the decisions to conduct the examinations and the decisions to permit disclosure to the

AFP and the CDPP were unlawful. However, the critical question was not whether the decisions were unlawful but whether, as a result of those decisions, there would be a miscarriage of justice if the prosecutions were not stayed.

The appellants submitted that the proposed trial would be incurably unfair because: (a) the prosecution had been able to use the examination material to assemble the cases against them; and (b) the answers which each appellant had been compelled to give at his examination constrained his ability to conduct his defence at trial. They contended that it was not necessary for them to identify any practical disadvantage. It was sufficient that they had each been compelled to provide a response to the prosecution case and that the unlawful dissemination of their answers to investigators and prosecutors had resulted in 'pervasive illegality'. In the alternative, the appellants relied on the judge's finding that it was effectively impossible for them to identify particular respects in which the prosecution had been advantaged, given the widespread dissemination of the examination material. The Court of Appeal rejected each of these arguments.

With respect to the contention that the prosecution had been able to use the examination material to assemble the cases against the appellants, the Court noted that the AFP already had a well-developed case before the examinations commenced, and that the appellants had conceded that the evidence before the judge did not disclose '*with precision any specific examples of derivative use of examination material in terms of documents or evidence to be led*'. The Court considered that the trial judge erred in concluding that, although the circumstances of the case prevented the appellants from identifying any specific forensic benefit derived by investigators, she was nevertheless justified in inferring from all of the evidence that such benefit had been derived. The Court of Appeal noted that it was well open to the appellants to seek to prove the actual advantage (if any) derived by investigators from access to that material, but they simply did not attempt the task. As a result, there was no sufficient material before her Honour to support the inference that any unfair advantage had been obtained.

The Court found that the evidence did not permit the inference that it was highly probable that, as a result of the examinations, the AFP had undertaken inquiries or targeted witnesses, resulting in the prosecution gaining a material forensic advantage. Assuming that the investigators did make some use of the information obtained, there was no evidence as to the extent or importance of that use to the prosecution case and hence no foundation for a conclusion that its use was productive of such unfairness as to warrant a stay of the trial. Even if the investigators had derived some assistance from the examinations in 'guiding' and 'refining' subsequent documentary searches, the case against the appellants had not materially changed as a result of the examinations. The appellants failed to identify any evidence relied on by the prosecution which would not have been obtained but for the examinations. The Court identified steps that should be taken to ensure that the appellants receive a fair trial: the replacement of the prosecution team; the enjoining of the investigators from disclosing the contents of the ACC examinations to the prosecutors, or at all; and the trial judge's ability to prohibit the Crown from leading evidence, and to prohibit certain matters being referred to by investigators in their cross-examination, if to do so would be productive of unfairness to the appellants.

The ground of appeal is:

- The Court of Appeal erred by finding that the unlawful compulsion of answers from the appellants for the purpose of achieving a forensic advantage to the prosecution was not sufficient in the circumstances of this case for the grant of a permanent stay.