
TRANSCRIPT OF PROCEEDINGS

SUPREME COURT OF VICTORIA

CRIMINAL JURISDICTION

MELBOURNE

WEDNESDAY 3 SEPTEMBER 2008

(13th day of hearing)

BEFORE THE HONOURABLE JUSTICE CURTAIN AND A JURY OF TWELVE

THE DIRECTOR OF PUBLIC PROSECUTIONS v. HORTY MOKBEL
TOREQ BAYEH

1 (In the absence of the jury.)

2 MR SHIRREFS: Your Honour, I mentioned yesterday that there was
3 a subpoena returnable this morning. That's the reason we
4 assembled, was to give the counsellors here who appear on
5 behalf of the Chief Commissioner. He phoned me this
6 morning to indicate that he thought he might need some
7 more time but I thought rather than ring around we should
8 assemble here to mention it to Your Honour formally.

9 HER HONOUR: Yes, very well.

10 MR SHIRREFS: The subpoena seeks an information report
11 pertaining to the activities of ^{Mr Cooper} between
12 1 November 2004 and 30 April 2006. Previously we
13 obtained in other proceedings some information reports
14 that had large portions of them deleted, obliterated, so
15 you couldn't see the information contained within. We're
16 seeking to obtain that information. I understand there
17 will be claims of public interest immunity on the basis
18 of informer privilege and/or police methodology or
19 ongoing investigations. These are reports that at least
20 to the extent that we can discern what's in them, may
21 well reveal other sources of chemicals been obtained by
22 ^{Mr Cooper} and other sources, other - I should say
23 destinations of persons purchasing methylamphetamine from
24 him, and Your Honour could understand the relevance of
25 that in this case, given the evidence that's fallen from
26 him thus far.

27 Mr Gipp indicated, as I said earlier, that he needs
28 more time to complete the confidential affidavit for Your
29 Honour to read. I don't know how much time you need but
30 I've introduced the matter so I'll hand you across to
31 Mr Gipp.

1 HER HONOUR: Yes, Mr Gipp.

2 MR GIPP: Yes, thank you, Your Honour. I do need some extra
3 time, Your Honour, I would hope no longer than an hour.
4 The confidential affidavit that's being prepared has been
5 prepared since late yesterday afternoon is virtually
6 complete. It can indicate this, that there are 16
7 information reports that are in issue under this
8 subpoena, and counsel for the defendant have identified
9 those parts, or those parts of the blackened out or
10 redacted material that they seek access to.

11 I have instructions to release the information
12 contained in one information report. My current
13 instructions - and I'm still sorting that out with the
14 informant and his superiors - is that we would maintain a
15 privilege claim over the redacted material sought on the
16 other 15 information reports. My learned friend is
17 right, the privilege claim that will be sought to be
18 maintained will be informer privilege and also prejudice,
19 ongoing police investigations. I don't have instructions
20 about police methodologies at this stage, so there are
21 two privilege claims in respect of that.

22 The affidavit that's been prepared, Your Honour,
23 sets out the factual basis upon which those privilege
24 claims are made, and I am in the processes of finalising
25 that with the informant. So I'd ask the court's
26 indulgence for the additional time. We only received -
27 it's been received late on Monday evening. It only came
28 to my attention through the Chief Commissioner's legal
29 advisers yesterday afternoon. And it's not only the
30 informant that needs to be consulted in this regard, Your
31 Honour, there are a number of other police agencies and

1 other officers to be spoken to.

2 HER HONOUR: Yes, very well. I have another matter to deal
3 with, so I'll adjourn this application until 2.15 this
4 afternoon.

5 MR GIPP: Thank you, Your Honour.

6 MR SHIRREFS: Your Honour, could I just mention before we leave
7 the court with respect to this two matters. The first is
8 we had tried to negotiate with the informant directly to
9 obviate the need for a subpoena last week. That's why
10 ultimately we couldn't get passed this block and it's
11 been issued a bit late in the piece. But in terms of the
12 affidavit, in addition to the affidavit being provided to
13 Your Honour, what should be provided to Your Honour are
14 the original information reports which are in their
15 complete form, and also the form in which they are
16 proposed to be provided to us, so Your Honour can see and
17 compare what's actually in its original format, what has
18 been blacked-out, to make that assessment.

19 HER HONOUR: Is that what's normally done in applications such
20 as these?

21 MR SHIRREFS: Absolutely, Your Honour.

22 HER HONOUR: Are you able to do that, Mr Gipp?

23 MR GIPP: Yes, I am, Your Honour.

24 MR SHIRREFS: The law requires it, Your Honour, to actually
25 inspect - - -

26 HER HONOUR: The only ones I've done is where there were some
27 provisions of the ASIO Act or something, and even I
28 wasn't allowed to look at it, so it was a bit difficult,
29 but that's obviously - we're not in that situation, so
30 there's nothing - - -

31 MR SHIRREFS: We're not in a terrorist case (indistinct).

1 HER HONOUR: There's nothing wrong with me looking at the
2 redacted material.

3 MR SHIRREFS: Exactly.

4 HER HONOUR: Very well.

5 MR SHIRREFS: Your Honour should see the unredacted and the
6 redacted.

7 HER HONOUR: Very good, thank you.

8 MR SHIRREFS: I hate that word but it seems to - - -

9 HER HONOUR: Yes, it's in currency.

10 MR SHIRREFS: It's in currency.

11 HER HONOUR: Very well. Now, your application - we're dealing
12 with that subpoena - will be dealt with at 2.15,
13 Mr Gipp. You may go, I have other matters to raise with
14 counsel.

15 MR GIPP: Yes.

16 MR SHIRREFS: Can he be excused, Your Honour?

17 HER HONOUR: No, no, I have other matters, thank you.

18 MR SHIRREFS: I'm sorry.

19 MR GIPP: Thank you.

20 HER HONOUR: Firstly, we're not in a position to resume the
21 trial tomorrow, we will have to resume it at 10.30 on
22 Friday morning. The other matter is that I propose to
23 give my ruling in respect of Ms Cure's application at
24 this stage, thank you.

25 (RULING FOLLOWS)

1 MS CURE: If Your Honour pleases.

2 MR SHIRREFS: If it please Your Honour.

3 HER HONOUR: Thank you. Yes, very well. We will resume
4 hearing the matter of Mokbel at 2.15. You needn't be
5 here, I don't think, Ms Cure.

6 MS CURE: No, I was going to suggest that. I think I've been
7 punished enough for yesterday.

8 HER HONOUR: Yes.

9 MS CURE: So perhaps if my client and I could be excused.

10 HER HONOUR: Yes.

11 MS CURE: No doubt we'll be asking for anything that's released
12 to Mr Mokbel.

13 HER HONOUR: Yes, there's no doubt you'll be able to see that
14 too.

15 MS CURE: Thank you.

16 HER HONOUR: Yes. Mr Bayeh, we won't need you here this
17 afternoon, and we will not be resuming tomorrow. We will
18 be resuming at 10.30 on Friday. Even if I have to resume
19 tomorrow morning to give a ruling in respect of these
20 subpoenaed documents, I won't require you, Ms Cure, and I
21 won't require Mr Bayeh.

22 MS CURE: Yes.

23 HER HONOUR: Yes, very well, thank you.

24 MR TINNEY: Your Honour, just before we adjourn, can I mention
25 a matter of personal commitment that I have and would
26 hope to try to meet on Friday afternoon. I've been
27 invited to a ceremony that's at Government House at 4.30
28 on Friday afternoon.

29 HER HONOUR: Yes, most certainly.

30 MR TINNEY: And I just wondered, Your Honour, whether it might
31 be possible for the court to adjourn perhaps - - -

1 HER HONOUR: Quarter to four?

2 MR TINNEY: Yes, or even ten to, Your Honour, something of that
3 order.

4 HER HONOUR: Yes, well, we can take a shortened luncheon
5 adjournment and adjourn at quarter to four.

6 MR TINNEY: I'd certainly appreciate that. I haven't had a
7 chance to discuss it with my learned friends, but I
8 thought I'd mention it now while Mr Bayeh was still here.

9 HER HONOUR: No doubt, in the hope that everybody gets invited
10 to Government House - - -

11 MR TINNEY: One day.

12 HER HONOUR: - - - one day, I don't think they'll object to
13 that course.

14 MR TINNEY: It doesn't concern me, I might say, Your Honour.

15 HER HONOUR: Yes, very well, thank you. I will leave the Bench
16 while the next matter is brought on, thank you.

17 LUNCHEON ADJOURNMENT

1

(Curtain J)

2 UPON RESUMING AT 2.24 P.M.:

3 HER HONOUR: You may be seated Mr Mokbel. Mr Shirrefs.

4 MR SHIRREFS: Your Honour, I did mention this morning that we
5 had the return of the subpoena today and the issues that
6 arise from it. We're at the stage where there are I
7 understand some 16 information reports that have
8 identified between the parties that have been in the main
9 redacted, to use the expression that's commonly used
10 these days, in ways that when one looks at them, we're
11 denied the information such as source of chemicals being
12 provided to ^{Mr Cooper} and destination of drugs
13 manufactured or in the possession of ^{Mr Cooper} that
14 he is passing onto others. Your Honour will be aware
15 clearly from the evidence that ^{Mr Cooper} has given thus far
16 in these proceedings that he's nominated two principal
17 sources throughout the period of the count with respect
18 to precursor chemicals, being Milad Mokbel and our client
19 Horty Mokbel, though he did say that towards the very
20 end.

21 HER HONOUR: He does say others, but he doesn't nominate them.

22 MR SHIRREFS: He did say towards the end there were some
23 others, this is towards the end of 2005 into 2006. He
24 also said that in terms of the on-sale of amphetamines
25 produced by him, certainly from about the beginning of
26 2005 or shortly into 2005 is predominantly to our client.
27 So, one could therefore understand our interest in
28 information received by the police that concerns ^{Mr Cooper}
29 ^{Mr Cooper} | that suggests both other sources of precursor
30 chemicals for an extended period and other destinations
31 for the sale of produced methamphetamine.

1 There's a confidential affidavit that I understand
2 Mr Gipp will be handing to Your Honour shortly, together
3 with the original information reports and the redacted
4 form of them that have been shown to us, and I've been
5 informed by Mr Gipp that there are three that upon his
6 instruction some information can be provided. I don't
7 know which three they are.

8 HER HONOUR: Has that been provided to you, no?

9 MR SHIRREFS: It's in the process of being done as Your Honour
10 was coming onto the Bench. They're not in a form where
11 they can be copied in the way which we'd see the printed
12 form, but we've been told verbally that the names of some
13 persons or the information that's blacked.

14 Your Honour, in terms of the principles that are
15 applicable, the first to consider is, is the material
16 that's sought relevant? In our submission it is relevant
17 and I don't think there'll be any argument to the
18 contrary that it would not be relevant. The next
19 question is, or be it relevant, in other words, or be it
20 that there is a legitimate forensic purpose? The
21 question that needs to be considered, is there a public
22 interest that otherwise arises with respect to this
23 information. There are well-known heads of public
24 interest, public interest immunity, principally that of
25 informer privilege where in common law the principle is
26 that - - -

27 HER HONOUR: Could you just keep your voice up please.

28 MR SHIRREFS: Sorry. Where the principle is that at common law
29 the identity of informer should not be revealed unless
30 there are very strong competing interests to the
31 contrary, and that goes beyond merely the interests of

1 the case in question in terms of the public interest,
2 because informer privilege is to ensure that people who
3 in the future would seek to provide information to the
4 police do so in the belief that their identity will be
5 protected. And the cases speak of that, and my learned
6 friend brought a case along and I'd already done a copy
7 of it as a shorthand for Your Honour, it's a ruling of
8 Justice Kaye in Cox, Sadler, Ferguson X 2 Ruling No.3,
9 which I could hand to Your Honour which usefully
10 summarises the principles. A number of the cases
11 referred to such as Allister and Sanke v. Whitlam X, Z
12 and some others that are referred to by His Honour I also
13 have if Your Honour would desire to read through them,
14 but a number of them are High Court authorities and
15 they're fairly lengthy reads.

16 Really, in terms of the issue of informer privilege
17 comes down to the balancing exercise in our submission,
18 bearing in mind of the strong presumption of the favour
19 of non-disclosure. We don't seek disclosure of the
20 informer's identity, we don't need to know that and we
21 shouldn't know that, what we seek is the information
22 which was provided by a person or persons unknown to the
23 police and the date upon which the information is said to
24 be relevant to the investigation, in other words, when it
25 was received or when it is that ^{Mr Cooper} is
26 supposedly engaging in the conduct that is referred to in
27 that information.

28 HER HONOUR: So, you want the information?

29 MR SHIRREFS: That's all.

30 HER HONOUR: The date it was received by the police?

31 MR SHIRREFS: The approximate date of it as to when it's said

1 that he has engaged in amphetamine production or that he
2 is ██████████ a particular person ██████████
3 or that he's obtained chemicals from a person unknown or
4 that he sold amphetamine to persons, I say unknown
5 because it's blacked out, the names are given.

6 HER HONOUR: So, the manufacture, the selling and the sourcing?

7 MR SHIRREFS: All of those, yes, and indeed, the location where
8 he's supposedly doing the cook. Our position, Your
9 Honour, is that we don't accept what ^{Mr Cooper} has
10 said as to the nature and extent of his activities, we
11 don't know, but they certainly didn't involve us to the
12 extent that he says that they did and over the period
13 that he says that they did. If he was cooking during
14 2005, it wasn't associated with us. So his credit and
15 the like is very much in issue in this case, particularly
16 if there's information that indeed he was doing it, and
17 doing it for other people, who he's now seeking to
18 protect for a variety of reasons, or to his advantage
19 because they're already in gaol. Those are the sorts of
20 issues that arise.

21 To the extent that it may be suggested that the
22 revealing of this information might interfere with
23 ongoing police investigations, whilst it is true that
24 clearly there is a public interest to ensure the police
25 are able to conduct their investigations without there
26 being a risk of interference, here we are now at a trial
27 in the latter part of 2008 and the information that we
28 seek goes back at least two and a half years, if not
29 longer.

30 I know that a lot of people have already been
31 arrested and charged as a result of information provided

1 ^{Mr Cooper} by | that's not a matter of great secrecy,
2 in terms of the balance, the balance that Your Honour is
3 required to exercise, there is in our submission less
4 favour in relation to non-disclosure in those
5 circumstances and greater militation towards disclosure
6 because of the passage of time and the time the police
7 have had to investigate. It's also relevant in this case
8 to what investigations the police have conducted in
9 relation to information that have concerning ^{Mr Cooper}

10 ^{Mr Cooper} | or has it simply been an exercise of taking
11 ^{Mr Cooper} | word on face value and then running with it to
12 prosecute those he's nominated? All those issues
13 legitimately arise in a forensic way.

14 What is the exercise clearly that Your Honour will
15 be required to perform is to consider the terms of the
16 confidential affidavit, for which we have obviously no
17 access to, to look at the original information reports
18 which is sought to be protected and not produced pursuant
19 to the subpoena and then to consider what has been
20 provided to us in the deleted format that we have, and
21 beyond that, there's nothing much more that I can
22 usefully add to the task at hand, Your Honour, other than
23 to provide you with a copy of - I think I've already done
24 that - the ruling of Justice Kaye.

25 HER HONOUR: Thank you.

26 MR SHIRREFS: And if Your Honour's interested, (indistinct)
27 through Sanke v. Whitlam, Allister v. R and X and Z which
28 is actually referred to, it's only a two page authority X
29 and Z, it's the Full Court of the Federal Court of
30 Australia, and the passage that is referred to by Justice
31 Kaye and extracted from X and Z is contained within the

1 two pages of the judgment of the Full Court and it
2 touches on the issue of informer privilege. I'm happy to
3 pass them up to Your Honour.

4 HER HONOUR: Thank you. Mr Gipp.

5 MR GIPP: Thank you, Your Honour. Your Honour, I concur with
6 everything that's been said by my learned friend in
7 respect of the principles that need to be applied and the
8 procedures that need to be applied in respect of this
9 claim for public interest immunity. The decision in the
10 Cox, Sadler matter which has already been handed up to
11 Your Honour succinctly summarises all of those principles
12 and procedures.

13 HER HONOUR: Thank you.

14 MR GIPP: And I would submit, Your Honour, that that is the
15 procedure that should be adopted in this case. There are
16 13 information reports which are in issue, 12 of those
17 reports are the subject of police informer privilege
18 claim.

19 HER HONOUR: Just a moment. Twelve are subject to?

20 MR GIPP: Police informer privilege. One is subject to a
21 privilege claim of prejudice police investigations. In
22 respect of two of those twelve where the police informer
23 privilege claim is made, simultaneously there is a claim
24 that the document would also - the disclosure of that
25 information would prejudice police investigations. So,
26 there's an overlap there of two of the information
27 reports where both privileged claims are made.

28 Your Honour, I hand up to you a fairly lengthy
29 affidavit, I'm sorry, it summarises the issues in
30 relation to the privilege claim. Can I just explain how
31 this has been compiled, Your Honour. In the information

1 reports which have been redacted, there's a lot of
2 information that's been redacted and in discussions
3 between the informant and counsel for the defence only
4 certain parts of the redacted information is being sought
5 by the defence, and that was circled in a pink
6 highlighter and provided to me yesterday. So, I've
7 confined the issues about privilege to that which were
8 circled in the pink highlighter.

9 How I've addressed that in the confidential
10 affidavit is to repeat in the confidential affidavit that
11 part of the information report which is in issue between
12 the parties. That is how it's set out first. Underneath
13 that I then identified what the objection is to its
14 production as police informer privilege and/or prejudice
15 police investigations, and then Mr Johns who has sworn
16 the affidavit then explains why it is that that privilege
17 claim should be maintained, and it's done in respect of
18 all 13 information reports.

19 Can I hand up to Your Honour, firstly, the
20 confidential affidavit and the 13 exhibits, which as my
21 learned friend indicated is the original information
22 report unedited, and the second one is the redacted
23 version which has been provided to the defence already.

24 HER HONOUR: Thank you. You may be seated Mr Gipp, thank you.

25 MR GIPP: Yes, thank you.

26 HER HONOUR: If you'd just look at paragraph 13 of the
27 confidential affidavit, and I'll hand it back to you,
28 Mr Gipp, it looks like you might have missed out a "not."

29 MR GIPP: Yes, the very last paragraph.

30 HER HONOUR: Yes, it should be "not"?

31 MR GIPP: Yes, it should be "not", yes.

1 HER HONOUR: Yes, thank you. All right, and these are the
2 various information reports, are they?

3 MR GIPP: Yes, they are, Your Honour.

4 HER HONOUR: The un-redacted material appears first and the
5 redacted material is after that?

6 MR GIPP: Yes, it is, Your Honour.

7 HER HONOUR: Very well, I'll have to give that further
8 consideration quite obviously, are there any other
9 matters that you wish to raise with me?

10 MR GIPP: No.

11 MR SHIRREFS: Can I just mention something, Your Honour, there
12 are in fact three names that we know from other
13 statements that we have of ^{Mr Cooper} | that don't form
14 part of the brief of persons who supplied material to him
15 and to whom he has sold and I should mention them to you:

16

17 HER HONOUR: [REDACTED] ?

18 MR SHIRREFS: [REDACTED]. [REDACTED]

19 [REDACTED] ^{Mr Bickley}

20 HER HONOUR: ^{Mr Bickley}

21 MR SHIRREFS: ^{Mr Bickley}

22 HER HONOUR: Very good. Mr Gipp, Mr Shirrefs's indication that
23 they are not concerned with the name of any informer, but
24 only what the information was and the date of when it's
25 said that Mr ^{Mr Cooper} | was engaged in manufacture, selling,
26 sourcing or the location of any of the cooking
27 laboratories, does that further specificity assist you
28 and through you Mr Johns in determining whether any
29 further matters can be released?

30 MR GIPP: That information, that indication was given to us
31 earlier, Your Honour, it doesn't assist us at all,

1 because of the nature of the information would disclose
2 police informer issues.

3 HER HONOUR: Very good.

4 MR GIPP: Except for the very last document which is a
5 prejudice police investigations claim only, that's the
6 only document that doesn't have an informer privilege
7 claim attached to it.

8 HER HONOUR: Very well, thank you, and I'll give my ruling at
9 10.30 tomorrow morning. Thank you.

10 MR GIPP: Yes, thank you, Your Honour.

11 HER HONOUR: Thank you, I'll leave the Bench whilst the next
12 matter is brought on. Thank you.

13 MR SHIRREFS: Your Honour, a requirement for our client to be
14 here for tomorrow's ruling?

15 HER HONOUR: No, he doesn't have to be here. Very well, thank
16 you.

17 ADJOURNED UNTIL THURSDAY 4 SEPTEMBER 2008