# SUPREME COURT OF QUEENSLAND

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| CITATION: | *The Commissioner of the Police Service v Cornack & Anor* [2003] QSC 026 |
| PARTIES: | **THE COMMISSIONER OF THE POLICE SERVICE**<br>(Applicant)<br>v<br>**SHERYL L CORNACK, MAGISTRATE**<br>(First Respondent)<br>and<br>**MATTHEW JOSEPH DUNK**<br>(Second Respondent) |
| FILE NO: | S6507/02 |
| DIVISION: | Trial Division |
| PROCEEDING: | Application |
| DELIVERED ON: | 17 February 2003 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 11 November 2002 |
| JUDGE: | Wilson J |
| ORDER: | **Application dismissed.** |
| CATCHWORDS: | ADMINISTRATIVE LAW – JUDICAL REVIEW LEGISLATION – Orders in the nature of Prerogative Writs – Certiorari – Grounds for Certiorari to Quash – Jurisdictional Error – Whether Prerogative Remedies Available to Review Ruling on Claim of Privilege in Committal Proceedings<br><br>ADMINISTRATIVE LAW – DISTINCTION BETWEEN ADMINISTRATIVE AND JUDICIAL FUNCTIONS – whether committal proceedings administrative or judicial in nature<br><br>ADMINISTRATIVE LAW – JUDICIAL REVIEW LEGISLATION – JURISDICTIONAL ERROR – Distinction between administrative tribunals and inferior courts<br><br>*Drugs Misuse Act 1986* (Qld), s 119 and s 120<br>*Police Powers and Responsibilities Act 2000* (Qld), s 454<br>*Judicial Review Act 1991* (Qld), part 5<br><br>*R v Murphy* (1985) 59 ALJR 682, considered<br>*Sankey v Whitlam* (1978) 142 CLR 1, considered<br>*Craig v South Australia* (1994 – 1995) 184 CLR 163, applied<br>*Hot Holdings Pty Ltd v Creasy* (1995 – 1996) 185 CLR 149, applied |

*R v Electricity Commissioners; ex parte London Electricity Joint Committee Co (1920) Ltd* [1924] 1 KB 171, cited
*R v Schwarten; ex parte Wildschut* [1965] Qd R 276, considered
*R v Stipendiary Magistrate at Brisbane and Mahoney; ex parte Kidd and Robinson* [1981] Qd R 462, considered
*R v Bjelke-Petersen; ex parte Plunkett* [1978] Qd R 305, cited
*R v Stipendiary Magistrate at Brisbane; ex parte Kornhauser* [1992] 2 Qd R 150, considered
*R v Stipendiary Magistrate at Southport; ex parte Gibson* [1993] 2 Qd R 687, cited
*Potier v DPP* (2001) 123 A Crim R 176, considered
*Ex parte Attorney-General; Re Cook* (1967) 69 SR (NSW) 247, considered
*Potter v Turval* [2000] 2 VR 612, considered
*Yooyen, Tait & Poompiriyapinte* (1991) 57 A Crim R 226, discussed
*Attorney-General for New South Wales v Stuart* (1994) 34 NSW LR 667, cited

COUNSEL: G Beacham for the Applicant
A C Guest, Solicitor for the Second Respondent

SOLICITORS: Queensland Police Service Solicitor for the Applicant
Price & Roobottom for the Second Respondent

[1] **WILSON J:** The Commissioner of the Police Service ("the applicant") seeks review of the decision of a magistrate ("the first respondent") in the course of a committal hearing that Shane Michael Harrison be directed to answer the question "*Was Craig at anytime during this operation aware that you were a police officer?*" The second respondent to the application is the defendant in the committal proceeding.

[2] The second respondent has been charged with offences under the *Drugs Misuse Act* 1986, namely one count of carrying on the business of unlawfully trafficking in a dangerous drug, one count of possession of a dangerous drug and twelve counts of supply of a dangerous drug. On 23 November 2001 Harrison, a police officer, was called by the prosecution to give evidence. His evidence was that he was involved in a covert police operation called "Operation Vapour". On a number of occasions in the course of that operation he purchased drugs from the second respondent. During the course of cross-examination, Harrison said that he "hung around with" one Craig, who introduced him to the second respondent. He said Craig was not a police officer. The questions and answers went on –

> *"Godbolt (for the second respondent)*: And what was your understanding of the purpose of that introduction?
>
> *Harrison*: Well, I was involved that Matt [the second respondent] was able to supply [indistinct] with dangerous drugs.

*Godbolt*: That - I apologise?

*Harrison*: Matt - Mr Dunk was able to supply [indistinct] with dangerous drugs.

*Godbolt*: Okay. And that's been told to you by Craig, has it?

*Harrison*: I think so, yeah

.....

.....

*Godbolt*: All right. Now, was - was Craig aware that you were a covert operative?"

Harrison claimed privilege under the *Police Powers and Responsibilities Act* 2000 (transcript page 31 line 60). Argument ensued. The hearing was adjourned.

[3] The committal hearing was resumed on 28 May 2002. After some preliminary discussion with the first respondent, Mr Guest (who was then appearing for the second respondent) asked Harrison -

> "Was Craig at any time during this operation aware that you were a police officer?"

Harrison claimed privilege under s 454(2)(b) of the *Police Powers and Responsibilities Act* and the *Drugs Misuse Act* 1986 (Transcript page 44 line 50, page 47 lines 20 - 35). Before the first respondent ruled on the claim of privilege, Mr Guest asked Harrison some further questions. He agreed that he had given evidence in another proceeding, that of Mark James, in relation to the same operation, in the course of which he had divulged the name of Craig Lane (the person referred to as Craig in the proceeding against the second respondent). (Transcript page 48 lines 38 and following). After hearing further argument, the first respondent found that there was no proper basis for any claim of privilege under s 46 of the *Drugs Misuse Act*, and was satisfied that the disclosure of the information was necessary under both (a) and (b) of s 454(1) of the *Police Powers and Responsibilities Act*. She directed Harrison to answer the question.

[4] The committal hearing was further adjourned to allow the ruling to be tested in the Supreme Court.

[5] The applicant seeks an order under part 5 of the *Judicial Review Act 1991* in the nature of certiorari, quashing the impugned decision, and or a declaration that the decision was contrary to law and that the witness is not required to answer the question. (Supplementary outline of submissions for the applicant 13 November 2002).

[6] Section 454 of the *Police Powers and Responsibilities Act* provides –

**"454 Protection of methodologies**

**(1)** In a proceeding, a police officer can not be required to disclose information mentioned in subsection (2), unless the court is satisfied disclosure of the information is necessary –

(a) for the fair trial of the defendant; or

(b) to find out whether the scope of a law enforcement investigation has exceeded the limits imposed by law; or

(c) in the public interest.

**(2)** The information is information that could, if disclosed, reasonably be expected –

(a) to prejudice the investigation of a contravention or possible contravention of the law; or

(b) to enable the existence or identity of a confidential source of information, in relation to the enforcement or administration of the law, to be ascertained; or

(c) to endanger a person's life or physical safety; or

(d) to prejudice the effectiveness of a lawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law; or

(e) to prejudice the maintenance or enforcement of a lawful method or procedure for protecting public safety; or

(f) to facilitate a person's escape from lawful custody.

**(3)** Subsection (1) does not affect a provision of another Act under which a police officer can not be compelled to disclose information or make statements in relation to the information.

*Example for subsection (3) –*

*Drugs Misuse Act 1986, section 120*

**(4)** In this section –

**"police officer"** includes a police officer of another State or the Australian Federal Police.

**"proceeding"** does not include –

(a) a hearing under the *Crime and Misconduct Act* 2001; or

(b) another proceeding of the CMC in which a police officer is being examined; or

(c) a commission of inquiry under the *Commissions of Inquiry Act 1950*; or

(d) a hearing of the NCA for a special investigation under the *National Crime Authority (State Provisions) Act* 1985, section 16."

[7] Sections 46 and 47 of the *Drugs Misuse Act* have been renumbered as sections 119 and 120. They are as follows –

**"119 Protection of informers**

**(1)** Where an informer supplies information to a police officer in respect of the commission of an offence defined in part 2 the informer's identity at all times shall be kept confidential.

**(2)** A person who discloses the name of an informer, or any other particular that may be likely to lead to the informer's identification, is guilty of a crime.

Maximum penalty – 5 years imprisonment.

**(3)** A person is not criminally responsible for an offence defined in subsection (2) if the person proves that the disclosure was made in good faith for the protection of the interests of the informer or for the public good.

**120 Source of information not to be disclosed**

**(1)** Where an informer supplies information to a police officer in respect of the commission of an offence defined in part 2 then in any proceedings whether under this Act or otherwise –

(a) the prosecutor; or

(b) a person who appears as a witness for the prosecution; or

(c) where a police officer appears as witness for the defence, that police officer;

shall not be asked and if asked shall not be compelled to disclose the name of an informer, or other particular that may be likely to lead to the informer's identification, or the fact that in respect of the offence he or she received information from an informer or he or

> she furnished information to an informer or the nature of the information.
>
> **(2)** In any proceedings arising out of a charge of having committed an offence defined in part 2 a police officer appearing as a prosecutor or witness shall not be compelled to produce any reports or documents, made or received by the police officer in the police officer's official capacity or containing confidential information in relation to such offence, or to make any statement in relation to such reports, documents or information."

[8] The Court may make a prerogative order in the nature of certiorari if it had jurisdiction to grant certiorari before the commencement of the *Judicial Review Act*: s 41(2). Certiorari was a discretionary remedy available "wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, [acted] in excess of their legal authority": *R v Electricity Commissioners; ex parte London Electricity Joint Committee Co (1920) Ltd* [1924] 1 KB 171 at 205. That is, it was available to correct jurisdictional errors. It was also available to correct errors of law on the face of the record, but "the record" has been narrowly defined for this purpose, and does not include the transcript of proceedings or the reasons for decision unless expressly incorporated into the record: *Craig v South Australia* (1994 - 1995) 184 CLR 163 at 181.

[9] In *Hot Holdings Pty Ltd v Creasy* (1995 – 1996) 185 CLR 149 at 159 Brennan CJ, Gaudron and Gummow JJ considered what is meant by the determination of questions affecting the rights of subjects. They said -

> "Thus, for certiorari to issue, it must be possible to identify a decision which has a discernible or apparent legal effect upon rights. It is that legal effect which may be removed for quashing.
>
> This formulation encompasses two broadly typical situations where the requirement of legal effect is in issue: (1) where the decision under challenge is the ultimate decision in the decision-making process and the question is whether that ultimate decision sufficiently 'affects rights' in a legal sense; (2) where the ultimate decision to be made undoubtedly affects legal rights but the question is whether a decision made at a preliminary or recommendatory stage of the decision-making process sufficiently 'determines' or is connected with that decision."

[10] Whether prerogative remedies are available to review committal proceedings has been debated in the cases. Committal proceedings are administrative rather than judicial in character. In *R v Murphy* (1985) 59 ALJR 682 at 686 - 687 the High Court described them in these terms:

> "The hearing of committal proceedings in respect of indictable offences by an inferior court is a function which is sui generis. Traditionally committal proceedings have been regarded as non-judicial on the ground that they do not result in a binding determination of rights. At the same time they have distinctive

> judicial character because they are curial proceedings in which the magistrate or justices constituting the court is or are bound to act judicially and because they affect the interests of the person charged: *Sankey v. Whitlam* (1978) 142 C.L.R. 1 at 83-84. The procedure followed on the hearing of committal proceedings is similar to that followed on the hearing of judicial proceedings: see, e.g., 11 & 12 Vic. C. 42 s. 17; *Justices Act* 1902 (N.S.W.), s. 36. Subject to the provisions of applicable Bail Acts, the ordinary consequence of an adverse determination of them is, as their name implies, the commitment to prison of the accused until the sittings of the court before which he is to be tried: see 11 & 12 Vic. C. 42, s. 25 *Justices Act*, s. 42. Even though they are properly to be regarded as non-judicial in character, committal proceedings themselves traditionally constitute the first step in curial process, possibly culminating in the presentation of the indictment and trial by jury. They have the closest, if not an essential, connection with an actual exercise of judicial power: see *Ammann v. Wegener* at 437; *Barton v. The Queen* (1980) 147 C.L.R. 75 at 99."

[11] In *Sankey v Whitlam* (1978) 142 CLR 1, Mason J expressed a preference for the view that prohibition would lie to a committing magistrate for want or excess of jurisdiction. In Queensland it seems that prohibition and mandamus are available to correct jurisdictional errors, although the discretion to issue them is not lightly exercised. In *R v Schwarten; ex parte Wildschut* [1965] Qd R 276 the Full Court made absolute an order nisi for prohibition against a magistrate who had intimated that he intended to proceed with the adjourned hearing of committal proceedings that had been commenced before another magistrate. However, in *R v Stipendiary Magistrate at Brisbane and Mahoney; ex parte Kidd and Robinson* [1981] Qd R 462 the Full Court discharged orders nisi for mandamus directed to a magistrate who was conducting committal proceedings ordering him to hear and determine an application to rule upon the admissibility of certain evidence. Lucas ACJ, with whom the other members of the Court agreed, observed that the power of the Court to issue mandamus to a magistrate who was conducting committal proceedings was within fairly narrow limits, and held that the error (if it was such) was not a jurisdictional error. He endorsed the distinction drawn in *R v Bjelke-Petersen; ex parte Plunkett* [1978] Qd R 305 at 311 between a mistake of law as to the proper construction of a statute investing a tribunal with jurisdiction, which leads it to misunderstand the nature of that jurisdiction and so amounts to a constructive failure to exercise it on the one hand, and a mistake as to the proper construction of some other statute or in deciding some matter of fact or law which is incidental to the exercise of the jurisdiction on the other hand.

[12] The availability of certiorari to quash a committal order was discussed in *R v Stipendiary Magistrate at Brisbane; ex parte Kornhauser* [1992] 2 Qd R 150. There the Full Court refused certiorari to quash a committal order made within jurisdiction on the ground of serious error in the reasoning process of the magistrate. The Full Court was not prepared to grant certiorari when it did not have before it the whole of the evidence at the committal so that it could make a considered judgment on the question whether or not the alleged error was such that it called for the remedy.

[13] Elsewhere Courts have taken the view that because a committing magistrate does not determine rights, but merely reaches a considered opinion upon whether there is sufficient evidence to put a defendant on trial for an indictable offence, there is no basis for certiorari to correct error. In *Potier v DPP* (2001) 123 A Crim R 176 O'Keefe J of the New South Wales Supreme Court refused an order in the nature of certiorari to review a decision to commit on the ground of alleged error in refusing to allow cross-examination. He also refused mandamus, finding no actual or constructive non-performance of duty.

[14] In *Ex parte Attorney General; Re Cook* (1967) 69 SR (NSW) 247 the New South Wales Court of Appeal granted certiorari to quash a decision of a magistrate in the course of the summary hearing of a criminal charge to overrule in part a claim of Crown privilege. Of course, the distinction between a committal hearing and a summary hearing is obvious, but the decision is of interest because the error was apparently treated as a jurisdictional one, without any discussion of the distinction between jurisdictional and non-jurisdictional errors.

[15] The Victorian Court of Appeal considered the availability of certiorari to quash a magistrate's decision refusing leave to cross examine a witness in a committal proceeding in *Potter v Tural* [2000] 2 VR 612. At page 614 Callaway JA said –

> "It is well established in this State that an order in the nature of certiorari will not lie to quash the decision of a magistrate to commit, or not to commit, an accused person for trial.[1] The whole of the committal proceeding is directed to that ultimate, non-reviewable decision, even if the proceeding also fulfils the important incidental function of informing the accused of the case against him or her. If the ultimate decision does not affect rights, and therefore does not afford a subject matter to quash, a decision in running can be in no better case from the point of view of an applicant."

Batt JA (with whom Tadgell JA agreed) said at pages 617 – 618 –

> "It is established by a long line of authority in Victoria that a magistrate's order committing for trial or refusing to commit is ministerial and not judicial and also is not amenable either to certiorari (as I shall for convenience call relief in the nature of certiorari to quash)[2] or to appeal under statutory appeal procedures replacing certiorari.[3] The better view as to the ground of the latter

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[1] *Phelan v Allen* [1970] VR 219; *R v Magistrates' Court at Prahran; Ex parte Hamilton* (unreported, Full Court, 21 July 1980); *Brygel v Stewart-Thornton* [1992] 2 VR 387 at 390-1.

[2] *Phelan v Allen* [1970] VR 219 and *R v Magistrates' Court at Prahran; Ex parte Hamilton* (unreported, Full Court, 21 July 1980), and cases respectively there cited; and s 56(9) of the Act. In *Brygel v Stewart-Thornton* [1992] 2 VR 387 at 390-1 J D Phillips J proceeded on the footing that authority to which he referred dictated that certiorari was not available. In *Sedrak v Carney* [1999] 3 VR 95 it was enough for Chernov JA, sitting alone, to state at [24] that the law in Victoria is that the court "will almost never interfere by way of certiorari with the decision of a magistrate to commit or not commit a person for trial". His Honour should not be taken, especially in view of the above authorities and others to which his Honour referred, as deciding that in exceptional cases certiorari is available. Thus, he later said at [31] that the Victorian and other authorities had consistently held that certiorari was not available to review committal proceedings.

[3] Committal proceedings are now expressly excluded from s 92(1) of the Act, which is the current provision providing for appeals on questions of law from criminal proceedings in the Magistrates' Court. Under the

> proposition is now considered to be, not the ministerial nature of the order,[4] but the fact that it determines nothing save the sufficiency, in the magistrate's opinion, of the evidence to put the defendant upon trial for an indictable offence.[5] …….. If a decision or order effectuating that purpose is not amenable to certiorari, it seems to me impossible for a preliminary decision or ruling made on the way to effectuating that purpose, even if denominated an order, to be amenable to certiorari: the greater comprehends the lesser."

[16] Even if certiorari does lie in respect of committal proceedings, the applicant must show that the error (if it be such) was jurisdictional in character and he must show that the particular decision affected rights in the relevant sense.

[17] The distinction between jurisdictional and non-jurisdictional error was discussed at length in *Craig v South Australia.* What constitutes jurisdictional error on the part of an administrative tribunal may not constitute jurisdictional error on the part of an inferior Court. The High Court described jurisdictional error by an inferior court in these terms (at page 177) –

> "An inferior court falls into jurisdictional error if it mistakenly asserts or denies the existence of jurisdiction or if it misapprehends or disregards the nature or limits of its functions or powers in a case where it correctly recognises that jurisdiction does exist. Such jurisdictional error can infect either a positive act or a refusal or failure to act. Since certiorari goes only to quash a decision or order, an inferior court will fall into jurisdictional error for the purposes of the writ where it makes an order or decision (including an order or decision to the effect that it lacks, or refuses to exercise, jurisdiction) which is based upon a mistaken assumption or denial of jurisdiction or misconception or disregard of the nature or limits of jurisdiction."

It went on to consider the position of an administrative tribunal (at pages 179 - 180) –

> "At least in the absence of a contrary intent in the statute or other instrument which established it, an administrative tribunal lacks authority either to authoritatively determine questions of law or to make an order or decision otherwise than in accordance with the law.

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earlier order to review procedure a judge was authorised, amongst other things, to exercise the jurisdiction which the court had certiorari (by s 160 of the Justices Act 1958, for example) despite there being a "no certiorari" clause (in s 164 of the last-mentioned Act, for example); but by virtue of the authorities cited in the first two cases mentioned in the preceding footnote the order to review procedure was not available in relation to committal decisions. Although the Supreme Court has, under s 7 of the Administrative Law Act 1978, power to grant relief in the nature of certiorari, that Act is inapplicable to committal proceedings because the definitions of "decision" and "Tribunal" in s 2 are not satisfied.

[4] Confirmed in *Grassby v R* (1989) 168 CLR 1 esp at 11.

[5] *R v Magistrates' Court at Prahran; Ex parte Hamilton* at 9-10.

> … If such an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.
>
> In contrast, the ordinary jurisdiction of a court of law encompasses authority to decide questions of law, as well as questions of fact, involved in matters which it has jurisdiction to determine. The identification of relevant issues, the formulation of relevant questions and the determination of what is and what is not relevant evidence are all routine steps in the discharge of that ordinary jurisdiction. Demonstrable mistake in the identification of such issues or the formulation of such questions will commonly involve error of law which may, if an appeal is available and is pursued, be corrected by an appellate court and, depending on the circumstances, found an order setting aside the order or decision of the interior court. Such a mistake on the part of an interior court entrusted with authority to identify, formulate and determine such issues and questions will not, however, ordinarily constitute jurisdictional error. Similarly, a failure by an inferior court to take into account some matter which it was, as a matter of law, required to take into account in determining a question within jurisdiction or reliance by such a court upon some irrelevant matter upon which it was, as a matter of law, not entitled to rely in determining such a question will not ordinarily involve jurisdictional error."

[18] Given the administrative character of committal proceedings and the absence of a right of appeal from the magistrate's decision whether to commit, the wider interpretation of jurisdictional error is probably the appropriate one. Error in the interpretation of s 454 of the *Police Powers and Responsibilities Act* and or in the interpretation of s 46 or s 47 of the *Drugs Misuse Act* would probably be jurisdictional in character for this purpose.

[19] In the present case the person seeking an order in the nature of certiorari is not the defendant in the committal proceeding (ie the second respondent in this application) but rather the Commissioner of the Police Service, who has an obvious interest in having the claim of privilege upheld. He may have sufficient standing to seek certiorari: see Aronson and Dyer *Judicial Review of Administrative Action,* 2nd ed., (LBC Information Services, 2000) at pages 541 – 542, if it is otherwise available.

[20] Whether this Court has jurisdiction to make an order in the nature of certiorari to review a decision to commit has not been authoritatively determined, although the availability of certiorari was left open, if not accepted, in *Kornhauser*. There are persuasive decisions in New South Wales and Victoria denying orders in the nature of certiorari in such circumstances. The argument that the magistrate makes no decision affecting the rights of the defendant is a powerful if not compelling one.

[21] This is not a case of an application to review a decision whether to commit. The application is by the Commissioner of the Police Service to review a ruling on a police officer's claim of privilege. The committal proceeding is still part heard: the ultimate decision has not been made. It is doubtful that the first respondent's ruling will have a sufficient connection with the ultimate decision to satisfy the test in *Hot Holdings Pty Ltd v Creasy*, even if the ultimate decision will affect rights in the relevant sense.

[22] Certiorari is a discretionary remedy, and, even where all of the technical requirements for its issue are made out, a Court will decline to grant it where there is a more appropriate remedy. The same is true of an order in the nature of certiorari under part 5 of the *Judicial Review Act.*

[23] Ordinarily in criminal proceedings questions of the admissibility of evidence are best left for determination at trial, but in exceptional circumstances Courts will make declaratory orders about rulings on evidence in committals: *Sankey v Whitlam* at pages 25 - 26. At stake are the interest of the Police Service in the prevention and detection of crime, the interest of the individual police officer in avoiding a potential charge of contempt if he refuses to answer the question in defiance of the first respondent's ruling, and the interest of the second respondent in having the prosecution case exposed as fully as possible at committal.

[24] Even if the first respondent's decision were wrong (a matter I shall address shortly), and even if an order in the nature of certiorari would be available in principle (which I doubt), in the circumstances of this case declaratory relief would be a more appropriate remedy than an order in the nature of certiorari.

[25] A similar situation arose in the course of a trial in *Yooyen, Tait & Poompiriyapinte* (1991) 57 A Crim R 226. In response to questions in cross examination a police officer claimed public interest immunity. The claim was rejected by the trial judge. The Commissioner of the Australian Federal Police applied successfully for a declaration that the answers to the disputed questions were, in the public interest, immune from disclosure. Declaratory relief is discretionary, and in the New South Wales Court of Appeal Gleeson CJ commented (at page 232) that while he could see the force of considerations tending against an exercise of the discretion, he could see no error of fact or principle in the manner in which the discretion had been exercised.

[26] The question asked was whether Craig knew that Harrison was a police officer. It was submitted with respect to s 454(1)(a) of the *Police Powers and Responsibilities Act* that the answer to the question would enable the existence or identity of a confidential source of information to be obtained, and that disclosure was not necessary for the fair trial of the second respondent. (The applicant abandoned reliance on s 454(1)(b).) Further it was submitted with respect to ss 46 and 47 of the *Drugs Misuse Act* that disclosure may be likely to lead to the identification of an informer or of the fact that information had been received from an informer in respect of the offences charged.

[27] The second respondent conceded that once a claim of privilege was made, it was for him to show a legitimate basis for requiring the question to be answered. I do not accept that it was necessary for the second respondent to lead evidence that a ground in s 454(1)(a) was applicable to oppose the claim of privilege. I think this

can be determined from a consideration of the nature of the charges, the evidence in the committal, the terms of the question and the subject of the claim for privilege.

[28] The most serious charge against the second respondent is that he carried on the business of unlawfully trafficking in a dangerous drug. The prosecution must establish that he engaged in conduct of a commercial character for reward. The context in which the question was asked is important. Harrison agreed that Craig's surname had been revealed in another proceeding (against another defendant) arising out of the same operation. Craig was not a police officer. He was someone with whom Harrison (a covert police operative) "hung around". It was Craig who introduced Harrison to the second defendant.

[29] In these circumstances, it was unlikely that Craig would have introduced Harrison to the second respondent if he knew Harrison was a police officer - unless Craig was working for or otherwise assisting the police. However, if does not necessarily follow that Craig was an informer. The applicant submitted that the answer to the question would narrow the search and reduce the possibility of people being informers. He submitted that it might lead to the identification of Craig as an informer against the second respondent.

[30] Both the common law and statute recognise the importance of protecting the identity of police informers. See generally *Attorney-General for New South Wales v Stuart* (1994) 34 NSW LR 667 at 674 - 676 and *R v Stipendiary Magistrate at Southport; ex parte Gibson* [1993] 2 Qd R 687 at 691 - 692, 696 - 697. They have recognised that if the identity of an informer were to be disclosed in Court, the detection and prevention of crime would be hindered, often unduly so. Against that must be balanced the need to ensure that a defendant receives a fair trial, and that includes the opportunity to know the case alleged against him. These competing factors find expression in s 454 of the *Police Powers and Responsibilities Act*.

[31] The second respondent submitted that the answer to the question would be relevant to the issue of entrapment. It was not suggested that entrapment would afford a defence to the charges, but rather that it would be relevant to sentence. Sentence proceedings are part of a criminal trial (*Criminal Code* s 1), and the right to a fair trial extends to the right to a fair sentencing procedure. I accept those submissions.

[32] In all the circumstances I think that the link between possible answers to the question and the potential for identification of an informer or of the fact that someone was an informer against the second defendant, or of the fact that information in relation to these charges was obtained from an informer is too tenuous to meet the tests in s 454 of the *Police Powers and Responsibilities Act* or ss 46 and 47 of the *Drugs Misuse Act.* Further, so far as s 454 is concerned, I think the disclosure is necessary to ensure fair sentencing proceedings in the event of conviction.

[33] The first respondent intimated that she would not allow any question which would reveal how the police identified Craig or how they came to have any contact with him or anything further about him. I agree that no such questions should be allowed.

[34] In summary, if the first respondent were wrong in her ruling, I would not make an order in the nature of certiorari, but I would grant declaratory relief. However, I consider that she did not err in ruling that Harrison must answer the question.

[35] I dismiss the application.