IN THE SUPREME COURT OF QUEENSLAND No. 366 of 1990

FULL COURT

BEFORE:

Mr Justice McPherson SPJ

Mr Justice Ryan

Mr Justice Dowsett

BRISBANE, 10 MAY 1991

BETWEEN:

SANTO ANTONIO COCO (Plaintiff) Respondent

-and-

NOEL RONALD NEWNHAM (First Defendant)

-and-

RONALD JOSEPHE REDMOND (Second Defendant)

-and-

JOHN ROBERT MUHLDORFF SHAW (Third Defendant) Appellant

-and-

KENNETH CHARLES SCANLAN (Fourth Defendant)

JUDGMENT

MR JUSTICE McPHERSON: For reasons I now deliver, the appeal should, I consider, be allowed with costs. The judgment given in favour of the plaintiff should be set aside. The plaintiff should be ordered to pay the third defendant's costs of the motion, including reserved costs if any.

Mr Justice Ryan authorises me to say that he would allow the appeal, set aside the orders but not the declaration made below, and subject to that he would dismiss the appeal with costs. I am authorised to deliver his reasons, which I do.

MR JUSTICE DOWSETT: I agree with the orders proposed by the learned presiding judge. I publish my reasons.

MR JUSTICE McPHERSON: The order will be as I have stated it.

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FULL COURT

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AND:

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-and-

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JOHN ROBERT MUHLDORFF SHAW (Third Defendant) Appellant

-and-

KENNETH CHARLES SCANLAN (Fourth Defendant)

_____

McPHERSON SPJ

RYAN J

DOWSETT J

_____

Reasons for judgment delivered by McPherson SPJ, Ryan J and Dowsett J on 10 May 1991.

Dowsett J agreeing with the orders proposed by McPherson SPJ.

_____

"APPEAL ALLOWED WITH COSTS, THE JUDGMENT GIVEN IN FAVOUR OF THE PLAINTIFF IN THE ACTION BE SET ASIDE, AND THE PLAINTIFF BE ORDERED TO PAY THE THIRD DEFENDANT'S COSTS OF AND INCIDENTAL TO THE MOTION IN THE ACTION."

IN THE SUPREME COURT OF QUEENSLAND No. 366 of 1990

FULL COURT

Before the Full Court

Mr Justice McPherson S.P.J.

Mr Justice Ryan

Mr Justice Dowsett

BETWEEN:

SANTO ANTONIO COCO (Plaintiff) Respondent

AND:

NOEL RONALD NEWNHAM (First Defendant)

-and-

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-and-

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KENNETH CHARLES SCANLAN (Fourth Defendant)

JUDGMENT - McPHERSON S.P.J.

Delivered the Tenth day of May 1991

CATCHWORDS

Justices - Committal proceedings - Recordings of private conversations by use of listening devices - Use by Federal Police - Proposal to tender in evidence - Whether appropriate for Supreme Court to restrain - Invasion of Privacy Act 1971-1988, ss. 43, 46; Australian Federal Police Act 1979, s. 12(a).

Counsel: W. Sofronoff Q.C. with him S. Herbert and H.B. Fraser for the Respondent.
K.C. Fleming Q.C. with him K. Holmes for the Appellant.
Solicitors: Gilshenan & Luton for the Respondent.
Commonwealth Director of Public Prosecutions Solicitor for the Appellant.
Hearing Date: 12-14 March, 1991.

IN THE SUPREME COURT OF QUEENSLAND No. 366 of 1990

FULL COURT

BETWEEN:

SANTO ANTONIO COCO (Plaintiff) Respondent

AND:

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-and-

JOHN ROBERT MUHLDORFF SHAW (Third Defendant) Appellant

-and-

KENNETH CHARLES SCANLAN (Fourth Defendant)

JUDGMENT - McPHERSON S.P.J.

Delivered the Tenth day of May 1991

The immediate and, I suspect, the only questions for decision on this appeal are, first, whether certain evidence is admissible in the course of committal proceedings being conducted by a magistrate at Brisbane by way of examination of witnesses in relation to some 11 indictable offences against laws of the Commonwealth that are alleged to have been committed by the plaintiff respondent to the appeal; and, secondly, whether it is appropriate for the Supreme Court to enjoin the reception of that evidence if tendered at the examination. The evidence in question consists of tape recordings of oral conversations said to have taken place between the respondent plaintiff and another at the premises of Cosco Holdings Pty. Ltd. at Carole Park, Brisbane.

The basis on which the tape recordings are said to be not admissible in evidence is s. 46(1) of the Invasion of Privacy Act 1971-1988 ("the State Act"). The terms of that section are set out in full in the reasons for judgment on this appeal of my brother Ryan, which I have had the advantage of reading, and it is consequently not necessary for me here to do more than state their effect. Section 46(1) provides that evidence of a private conversation may

under certain defined circumstances not "in any civil or criminal proceedings" be given by the person identified in that section. For present purposes I will assume that committal proceedings answer that description. Section 46(2) contains specified exceptions to the prohibition in s. 46(1); but none of them is directly relevant to the present appeal. The expression "private conversation" is defined in 4, and it is not disputed that the conversations here in question satisfy the description in that section. The "person" identified in s. 46(1) is a person to whom knowledge of that conversation has come "as a result, direct or indirect, of the use of a listening device used in contravention of s. 43 of" the State Act. There is no dispute that a listening device was used to record the conversations alleged to have taken place at Carole Park to which the plaintiff is said to have been a party.

The primary question on the appeal is, or is said to be, whether the listening device was used in contravention of s. 43. Again, the terms of that section are set out in the reasons of Ryan J., thus dispensing with the need to reproduce them here in full. Section 43(1) makes a person guilty of an offence if he uses a listening device to overhear, record, monitor or listen to a private conversation. Section 43(1) is, it will be seen, not expressed in the form of a prohibition capable of being contravened. It simply states the consequence of using the device for the purpose of overhearing such a conversation; namely, that the user is guilty of an offence and liable on conviction to specified punishment. Despite this, I think the intention of s. 46(1) is that a person who is guilty of using a listening device to overhear a private conversation must be side to do so in contravention of s. 43(1) unless he is exempted under s. 43(2) of the State Act. In determining whether under s. 46 the device has been used "in contravention of" s. 43, it will therefore be necessary to look to the whole of that section and not merely at s. 43(1).

Section 43(2) does not in so many words exempt a user in accordance with its provisions, but that is its effect. It says that s. 43(1) does not apply to designated persons using a listening device in defined circumstances. The exemption relevant here is in para. (c) of s. 43(2). Its effect is that s. 43(1) does not apply:—

"(c) to or in relation to the use of any listening device by-

(i) a member of the police force acting in the performance of his duty if he has been authorized in writing to use a listening device by-

(a) the Commissioner of Police;

(b) ...an officer of police of or above the rank of Inspector who has been appointed in writing by the Commissioner to authorise the use of listening devices,

under and in accordance with an approval in writing given by a judge of the Supreme Court in relation to any particular matter specified in the approval;

(ii) An officer employed in the service of the Commonwealth in relation to customs authorized by a warrant...

(iii) a person employed in connexion with the security of the Commonwealth..."

In the present case an order giving such an approval in writing was made by Hon. Mr. Justice Carter, then a Supreme Court Judge, on 26 October 1989. The duration of the order was extended by another order made on 20 November 1989, when further conditions were added. It was in reliance on those orders that the listening device was used to record the conversations at Carole Park.

The persons who used the listening device for that purpose/were not members of the Queensland Police Force but of the Australian Federal Police and some other persons who assisted them. It was submitted that "a member of the police force" in s. 43(2)(c)(i) of the State Act refers only to a member of the Queensland Police and not the Federal Police, and that consequently the specific exemption in sub-para. (i) of s. 43(2)(c) did not apply to those members of the Federal Police who used the listening device on the occasions in question. In fact the orders of Carter J. approved the use of listening devices by K.C. Scanlan, an Inspector of Queensland Police, "by himself or by means of any other person engaged in or assisting the investigation of" the matter of the alleged offences. The orders were made ex parte; but they have not been the subject of appeal, as I am inclined to think that under s. 10 of the Judicature Act of 1876 they might have been (cf. Re Earl of Radnor's Will Trusts (1890) 45 Ch.D. 402), even if in character such orders are not judicial but administrative: see Love v. Attorney-General (N.S.W.) (1990) 169 C.L.R. 307.

The orders of Carter J. approving the use of listening devices by persons not members of the Queensland Police therefore remain unchallenged. But viewed even as orders of a superior court of record of general jurisdiction, they are, as the respondent submits, nevertheless not sufficient to exempt such persons from the provisions of s. 43(1). What s. 43(1) does, it is submitted, is to make it an offence, and correspondingly a contravention of s. 43 as a whole, for a person to use a listening device to record a private conversation, unless he is exempted under s. 43(2)(c)(i) in the character of "a member of the police force", meaning a member of the Queensland Police Force, appropriately authorised in writing. The orders do not alter this state of affairs, irrespective of any authority that by their terms they affect to confer on "any other person engaged in or assisting" the investigation.

Accepting as I do this construction of s. 43, the question is whether a member of the Australian Federal Police is within the description "a member of the police force" in s. 43(2)(c)(i), and so capable of being authorised in writing under that sub-paragraph. The strength of the argument that a Federal Police member is not within that description lies partly in the use, in what is a Queensland enactment, of the definite article "the" before "police force"; and partly in the presence in succeeding provisions of s. 43(2)(c)(i) of references that, it must be said, are, by virtue of the interpretative presumption in s. 35 of the Acts Interpretation Act 1954-1989, descriptive of "officers" and "offices" in and for this State; that is, Commissioner of Police, Assistant Commissioner of Police, "or an officer of police of or above the rank of Inspector". The last is, we were told, not a rank or office in the Australian Federal Police. A third consideration, namely that Commonwealth officers in the customs and the security services are particularly identified in sub-paras. (ii) and (iii) of s. 43(2)(c), does not seem to me to carry much weight either for or against the contention advanced. Including them specifically can be seen to manifest an intention to exclude a Federal Police member from s.43(2)(c); or, conversely, it can be used to demonstrate that the draftsman of the legislation considered that such a police force member was already covered by s. 43(2)(c)(i) and consequently did not merit further attention elsewhere. This third consideration is therefore in my view neutral in effect.

The strength of the submission that "a member of the police force" is confined to a member of the Queensland Police cannot be denied. But the contrary view merits closer consideration. It is perhaps surprising that the legislation does not disclose its intention more clearly by using the official title, which appears to be the Police Force of Queensland (see s. 6(1) of The Police Act of 1937), or at least by employing capital letters for Police Force. Comparisons with "judge of the Supreme Court" in ss.

43(2)(c)(i), s. 43(3), and s. 43(4) are not helpful, because these provisions are concerned with the exercise of jurisdiction conferred by the Act, which it is presumed is intended to be territorial: cf. City Finance Co. Ltd. v. Matthew Harvey & Co. (1915) 21 C.L.R. 55, 60. It is scarcely likely that the intention was to invest judges of Supreme Courts outside Queensland with jurisdiction to approve the use of listening devices within the State. On the other hand, it cannot with the same degree of confidence be predicated that s. 43(2)(c)(i) means to exclude the use of listening devices in Queensland by a member of a police force of the Commonwealth, or of another State, or even of another country. In an era in which criminal activities are increasingly carried on nationally and internationally, occasions may be expected when a member of some other police force may legitimately wish to overhear and record a private conversation in Queensland between persons one or more of whom may be suspected of committing offences outside the State. Interstate and even international co-operation in such a process might be helpful to the detection of crime in Queensland, and also perhaps raise an expectation of future assistance from other police forces in similar circumstances elsewhere. Safeguards against abuse by other police agencies are insured by the requirements that the use in Queensland of listening devices must under s. 43(2)(c) be authorised by the Commissioner of the Police Force of Queensland or one of the other officers of that Force identified in s. 43(2)(c)(i)(b); and that approval for their use must first be obtained from a Judge of the Supreme Court of this State. The underlying philosophy may very well be that it is preferable to regulate by law such covert eavesdropping in Queensland by members of other forces rather than that it should take place in a manner that may be uncontrolled and lawless, and perhaps also likely to threaten or obstruct parallel investigations being undertaken by members of the Queensland Police Force.

I am therefore not persuaded that the expression "the police force" in s. 43(2)(c)(i) of the State Act should be

read as referring only to the Police Force of Queensland. The consequences of adopting the respondent's more limited interpretation are not without relevance. Disregarding for the present any possible effects of s. 24 of the Criminal Code (Qld.), they are that Federal Police members, who on these and other occasions in the past have used, or have given orders for the use of, listening devices in reliance on authorities and judicial approvals given under s. 43(2)(c)(i), have committed offences under s. 43(1) and are liable to the not inconsiderable penalties imposed by that sub-section and no doubt also by s. 44. In addition, under s. 43(7) of the Act the court may on conviction order that the listening device (which in this instance may be assumed to be the property of the Commonwealth) be forfeited to Her Majesty and delivered up by the person in possession of it. Apart from s. 43(1), using a listening device to overhear or record private conversations would not be criminal; and it still remains neither criminal nor a civil wrong to do so without using such a device. The interpretive presumption against criminalising and penalising conduct not unlawful at common law may now have lost some of its vitality; but the interpretation of "a member of the police force" in s. 43(2)(c)(i) may nevertheless be an appropriate occasion for applying it. The Commonwealth Parliament has, at a time after these conversations were recorded, moved by ss. 12B to 12L of the Australian Federal Police Act 1979 expressly to authorise members of the Federal Police to use listening devices in defined circumstances in the future. Those provisions now prevail over the State Act by virtue of s. 109 of the Constitution. Legislatures of other Australian States and Territories lack means to achieve the same result. Members of their police forces therefore do not enjoy the same advantage.

Section 43 is contained in Part IV of the State Act, which by s. 41 of the Act is expressed to bind the Crown. If "police force" in s. 43(2)(c)(i) refers only to Queensland Police Force, one would expect "the Crown" in s. 41 to refer only to Crown in right of the State of Queensland. That might be thought to carry the implication

that Part IV including s. 43 and s. 46 do not bind the Crown in right of the Commonwealth. The point was not addressed in the argument on appeal and it is therefore not appropriate to consider it. Instead, it was submitted on behalf of the appellant that, in any event in a matter like this, State legislation cannot bind the Commonwealth.

The proposition that State legislation cannot bind the Commonwealth raises questions that have engrossed the attention of acute minds: see, for example (1980) 54 A.L.J. 25 (R.P. Meagher & W.M.C. Gummow). Those learned authors assemble the relevant authorities supporting the proposition and offer reasons for not accepting them. Stated at its widest the doctrine would preclude the Parliament of a State from enacting any legislation binding on the Commonwealth: Commonwealth v. Bogle (1953) 89 C.L.R. 229, 259-260; Commonwealth v. Victoria (1971) 122 C.L.R. 353, 373, 410 (the Pay-roll Tax Case). For my part I consider we should consider ourselves bound by Pirrie v. McFarlane (1925) 36 C.L.R. 170, until that decision is overruled by higher authority, to hold that a servant of the Commonwealth acting in the course of his duty is subject to State legislation that would apply to him were he not acting as a Commonwealth officer. This accords with the approach adopted by Byrne J. in Re Commissioner of Water Resources and Leighton Contractors Pty. Ltd. ((1990): unrep. Sup. Ct. of Qld.).

To a degree the doctrine relied upon may be linked to theories of Crown prerogative. "It springs", said Dixon C.J. in Commonwealth v. Cigamatic Pty. Ltd. (1962) 108 C.L.R. 372:

> "from the nature of the Commonwealth as a government of the Queen. Therefore to treat those rights as subject to destruction or modification or qualification by the legislature of a State must mean that under the Constitution there resides in a State or States a legislative power to control legal rights and duties between the Commonwealth and its people."

According to his Honour's view of it, "a fundamental error in constitutional principle", is involved in such a proposition. It was on the authority particularly of this passage and others like it that counsel for the appellant ultimately took his stand. "Intelligence-gathering" was identified as the relevant activity said in this instance to be protected from legislative interference by the State. Whether the privilege so claimed is referred to the common law prerogative of the Crown in right of the Commonwealth or, as counsel sought to describe it, more broadly to "essential functions of government", it is plain that the protection claimed here cannot be sustained in either of the characters ascribed to it. Helpful though it no doubt is, either generally or for the purpose of executing and enforcing laws, eavesdropping is not a Crown prerogative that has ever been recognised by the common law. Nor is it a matter that in any relevant sense impinges on relations between the Commonwealth and its people, or affects rights and duties that such relations may be thought to entail. The privilege from incrimination is, as I suggested in R. v. McDonnell, ex parte Attorney-General [1988] 2 Qd.R. 189, 198, not a right of that character. No more, in my opinion, is the susceptibility of a citizen to having his conversations overheard and recorded by agents of the executive. Impunity from the restraints of the law for executive actions professedly undertaken in the interests of public safety is a perennial claim of government. Since members of the executive and their agents are, no less than others, subject to law, such claims are destined to fail. Entick v. Carrington (1765) 2 Wils. 275; 95 E.R. 807, is an early decision, but it continues to underlie judicial attitudes on such matters. See George v. Rocket (1990) 170 C.L.R. 104, 110-111; Plenty v. Dillon (1991) 65 A.L.J.R. 231, 236.

From this I turn to the other grounds of invalidity imputed by the appellant to s. 43. I respectfully agree with Ryan J. in thinking that s. 43(1) does not, within the terms of the authorities referred to by his Honour (to which I would add only a reference to Queensland

Electricity Commission v. Commonwealth (1985) 159 C.L.R. 192), single out the Commonwealth or its police force as objects of differential treatment by laying upon them special burdens or disabilities; nor is that conclusion affected by s. 8 of the Australian Federal Police Act 1979. On the other hand, the applicability of s. 9(2) of that Act to the state of affairs disclosed here depends ultimately upon whether the provisions of s. 43, and, it may be also s. 46 of the State Act, can be said to apply "in relation to offences", like those being presented here, against the laws of the Commonwealth. The coincidence is by no means exact; but the expression "in relation to" admits of an extremely wide, even perhaps remote, connexion between the two. When read in conjunction with s. 8(1)(b)(i) of the Australian Federal Police Act 1979, I am disposed to accept the interpretation adopted by Dowsett J. in his reasons on this point in the present case. This has the consequence, as he points out, that s. 43(2) of the State Act is to be construed as including members and officers of the Australian Federal Police.

Section 12 of the Australian Federal Police Act (the Federal Act) does, in my opinion, merit further attention. It is as follows:

> "12. A member is not required under, or by reason of, a law of a State or Territory-
>
> (a) to obtain or have a licence or permission for doing any act or thing in the exercise of his powers or the performance of his duties as a member; or
>
> (b) to register any vehicle, vessel, animal or article belonging to the Commonwealth."

It may in passing be noticed that the section evidently envisages the application of State law to Federal Police, for it sets out to displace its operation only in a particular respect. In Pirrie v. McFarlane (1925) 36 C.L.R. 170, it was held by a majority of the High Court that a serving member of the Commonwealth defence force was liable to conviction under s. 6 of the Motor Vehicles Act 1915

(Vic.) for the offence of driving a motor car on a highway without being licensed for that purpose. It is reasonable to suppose that s. 12 of the Federal Act was designed to dispense with licensing and registration requirements under State legislation of such a character.

Whether, apart from s. 9(2) of the Federal Act, s. 43 of the State Act applies to a member of the Australian Federal Police depends on whether it is displaced by s. 12(a) of the Federal Act, so that under s. 109 of the Constitution the latter prevails and the former is, to the extent of any inconsistency, invalid. The outcome depends in turn on the meaning in s. 12(a) of the Federal Act of the expression "required ... to obtain or have a licence or permission" and its impact if any on the prohibition implicit in s. 43(1), read in conjunction with provisions of s. 43(2)(c) exempting designated persons if "authorized" in writing or by warrant as provided in ss. 43(2)(c)(i) or (ii). Of course, it is true to say of s. 43 that it does not "require" anything of a member of the Federal Police Force as such, and certainly not that he obtain a licence for doing anything in the performance of his duty. The implied prohibition in s. 43(1) is perfectly general, and simply precludes any person, including a Federal Police member, from using a listening device to overhear or record a private conversation. If a device of that kind is used for such a purpose, the user commits an offence under s. 43(1) unless he acts under an authority answering one of the descriptions in s. 43(2)(c).

But this in my respectful opinion is to mistake both the function of s. 12(a) and the effect of s. 43. The correct view of s. 12(a) of the Federal Act is I consider that, for doing any act or thing in the exercise of a power or the performance of his duties, a member of the Australian Federal Police is not required under State law to obtain or have a licence or permission. Without having an appropriate authority under s. 43(2)(c), a member of the Federal Police may not use a listening device to overhear or record private conversations; if he does so, he commits

an offence under s. 43(1) of the State Act. To avoid that consequence an appropriate authority (or, what is the same thing, a licence or permission) is needed under s. 43(2)(c)(i). For the act of using a listening device in the lawful exercise of his powers or the lawful performance of his duty a Federal Police member is thus required under State law to obtain a licence or permission under s. 43(2)(c)(i), or he will suffer prosecution under s. 43(1) of the State Act. This is precisely what s. 12(a) of the Federal Act says is not to be required of him.

As appears from the form in which I have expressed it, such an interpretation of s. 12(a) necessarily assumes that the act is done in the lawful exercise of powers or the lawful performance of duties by the Federal Police member. The word "lawful" does not appear in s. 12(a); but there can be no doubt that it is implicit in the sub-section. Parliament is not prone to sanctioning the exercise of powers or performance of duties in a manner that is unlawful, and should not be assumed to have done so in the case of s. 12(a): cf. Morris v. Beardmore [1981] A.C. 446; Plenty v. Dillon (1991) 65 A.L.J.R. 231, 236-237. In so far as in this case Federal Police members acted under orders of a superior in using listening devices, s. 12(a) of the Federal Act would not avail in a prosecution under s. 43(1) of the State Act unless those orders were lawful. The effect of regs. 4 and 18(1) of the Australian Federal Police Regulations 1979 is that a member of the Federal Police is bound to carry out an instruction or order, but only if it is "lawful". As was said by Knox C.J. in Pirrie v. McFarlane (1925) 36 C.L.R. 170, 183:

> "A command, to be lawful, must not be contrary to the ordinary civil law; and the civil law in Victoria as to the use of highways and the regulation of traffic thereon includes all enactments of the Parliament of Victoria relevant to those matters, subject always to the qualifications introduced by s. 109 of the Constitution..."

Given in this instance that in enacting s. 12(a) of the Federal Act Parliament was speaking of acts or things to be done in lawful exercise of powers or duties, I do not see how, consistently with that provision, a Federal Police member can under s. 43 of the State Act be required to have or obtain a licence, permission or "authority" to use a listening device to overhear or record a private conversation. He may by force of s. 12(a) do so without it provided he is otherwise acting lawfully.

To reach this conclusion involves reading s. 43(1) and s. 43(2) of the State Act as integers of a single entity. Seeing that they are subsections of the same section, that course presents no real difficulty. The construction favoured here might be superficially more attractive if the provisions of s.43(1) and (2) had been welded together in a single provision instead of being, as they are, cast in the form of an offence-creating first subsection, followed by a second subsection that renders the first subsection inapplicable to persons answering particular designations who enjoy the benefit of particular authorisation. The State legislation governing driver's licences is a simple example of a single provision of that kind. Section 15(1) of the Traffic Act 1949-1989 (Qld.) provides:

> "(1) A person shall not at any time drive a motor vehicle on a road unless at that time he is the holder of a driver's license authorising him to drive that vehicle on that road."

There is, of course, a sense in which that subsection can be read that under its provisions would deny to a Federal Police member the benefit of s. 12(a) of the Federal Act even in this case. Section 15(1) of the Traffic Act does not in terms require a person to have a licence authorising him to drive a vehicle on a road. What it does is to impose a general prohibition against driving without the authority of a licence. Its practical effect nevertheless is to impose an obligation to have or to obtain the authority of a licence as a condition of or

requisite for lawful driving of a vehicle on a road. Another example is s. 36 of the Firearms and Offensive Weapon Act 1979-1989 (Qld.), providing that a person shall not have in his possession a concealable firearm unless he holds a licence under the Act. If in such cases s. 12(a) does not displace the licence requisite, its scope and utility is largely nullified. The author of the Federal Act had, it must be remembered, the unenviable task of catering for a range of different drafting techniques and forms that might be used in legislative provisions dealing with a variety of topics in the six States of Australia. Section 12(a) must therefore be permitted some degree of operation or effect that is functional rather than purely literal. Section 43 of the State Act is, I think, therefore to be construed as requiring an authority in accordance with s. 43(2)(c) as a requisite for the lawful use by a person of a listening device to overhear or record private conversations. In the case of a member of the Australian Federal Police, s. 12(a) of the Federal Act dispenses with any such requirement.

Having decided that a member of the Australian Federal Police is "a member of the police force" within s. 43(2)(c)(i) of the State Act, it follows from s. 12(a) of the Federal Act that none of the Federal Police members who used the listening device or devices to overhear and record the subject conversations at Carole Park were, in order to do so, required to have or obtain the written authority required by that paragraph of the State Act, provided that his or her act was done "in the exercise of his powers or the performance of his duties" as a member of the Federal Police. For the reasons given earlier, I think that the portion just quoted from s. 12(a) of the Federal Act is to be read as if qualified by the word "lawful". The material in the appeal record before this Court leaves very little doubt that those Federal Police members were acting in the exercise of their powers or the performance of their duties as such. Whether or not they were doing so "lawfully" may be another matter. The material speaks of the listening device being "installed" on or at the premises at Carole

Park. Precisely what the nature of the device was and how it was installed does not appear. The point may be important in determining whether the powers were exercised or the duties performed "lawfully". The orders made by Carter J. purported to authorise police officers to "enter and remain upon" those premises for the purpose of installing, maintaining and retrieving the listening devices. Nowhere in the State Act is there any express provision enabling a Judge to confer to such authority. In two decisions of the Supreme Court of Canada a majority of Judges of that Court held that it was implicit in the relevant provisions of the Canadian Criminal Code authorising the interception by means of listening devices of private communications that a judge granting such authorisation might sanction a surreptitious entry on particular premises for the purpose of installing and using such a listening device. See Lyons v. The Queen (1984) 15 C.C.C. (3d) 417, and Reference re an Application for an Authorization (1984) 15 C.C.C. (3d) 466. A different view had previously prevailed in the Alberta Court of Appeal: see Reference re an Application for an Authorization (1983) 10 C.C.C. (3d) 1. It is, however, clear that the Canadian decisions are distinguishable because the legislation in question contains indications that the use of particular species of listening devices at particular places might be authorised, which was not capable of being done unless an entry was made on the premises without the consent of the owner. Without consent, such an entry would have amounted to the tort or civil wrong of trespass, and hence, in the opinion of the minority of the Court, would not have been "lawfully made" within the meaning of s. 178.16(1)(a) of the Canadian Criminal Code: see per Dickson J. in Lyons v. The Queen (1984) 15 C.C.C. 417, 425; and in Reference re an Application for an Authorization (1984) 15 C.C.C. (3d) 466, 474-476.

The State Act here in question contains none of the indications discernible in the Canadian legislation considered in those decisions. Without them, the view of the majority in the Canadian Supreme Court might well have

been different. If the minority view in the Supreme Court of Canada were to be adopted here, the result may be that the user of the listening devices in this instance contravened s. 43(1) of the State Act. Furthermore, it was submitted that even if "a member of the police force" in s. 43(2)(c)(i) includes a member of the Australian Federal Police, any authority in writing obtained by Federal Police members in this case was defective. It was derived from Inspector Scanlan who, although, "of the rank of Inspector" within the meaning of s. 43(2)(c)(i)(b) of the State Act, had, it was submitted, been appointed in writing by the Acting Commissioner pursuant to that provision only to use, and not himself to authorise the use of, the listening devices in question.

There are, as I consider, several reasons why this is not an appropriate occasion on which to determine any of these questions. The first is that the material before us discloses nothing about the place or the means used to install the device or devices at the premises at Carole Park, or indeed about the general nature of those premises. It might, for example, conceivably make a difference to the result whether the method of installing the devices involved only the civil wrong of trespass to land, or went further and contravened s. 70 of the Criminal Code (Qld.) relating to forcible entry (cf. Prideaux v. Director of Public Prosecutions (1987) 163 C.L.R. 483); or the provisions of the Inclosed Lands Act 1854 (N.S.W.), which continues to apply in Queensland; and so, technically at least, constituted a criminal offence under that Act. For that to be determined, one would need to know whether the premises at Carole Park were "inclosed lands" within the meaning of s. 6 of the Act. There is before us no evidence that would enable that question to be decided; and equally nothing to say whether or not the listening device may not have been placed on the premises by an employee of Cosco Holdings Pty. Ltd., who by his act in doing so may have become a trespasser ab initio within the now largely discredited doctrine in the Six Carpenters' Case (1610) 8

Co. Rep. 46a; 77 E.R. 695; cf. Barker v. The Queen (1983) 153 C.L.R. 338, 364.

In addition to these matters, it may also be necessary to consider the impact of s. 22 of the Criminal Code (Qld.). It declares a person to be not criminally responsible for an act done by him with respect to any property in the exercise of an honest claim of right and without intention to defraud. A Federal Police member, who entered the premises at Carole Park in the honest and reasonable belief that in doing so his act was validly authorised in that behalf by the order of Carter J., would gain the benefit of s. 22. He would be exculpated from criminal responsibility in respect of that act of entry: cf. R. v. Pollard [1962] Q.W.N. 13; Walden v. Hensler (1987) 163 C.L.R. 561, 567, 569, per Brennan J. Likewise, if he honestly and reasonably believed he was validly authorised by Inspector Scanlan to use the listening device, his mistaken belief in the existence of that "state of things" may operate to exculpate him under s. 24 of the Criminal Code from any guilt of the offence constituted by s. 43(1) of the State Act. In that event, the listening device could, for the purpose of s. 46(1) of the Act, be said not to have been "used in contravention of" s. 43 of the Act. If so, s. 43(1) would not prevent that person from giving evidence of the private conversation at Carole Park that was overheard or recorded on tape.

It is evident, therefore, that much more needs to be known about the individuals and the circumstances associated with the installation of the device on the premises before it will become possible to make a valid ruling on the admissibility or otherwise of tape recordings of the conversation, whether an objection to their admission in evidence is to be based on s. 46 of the State Act, or more generally on the principle in Bunning v. Cross (1978) 141 C.L.R. 54. In the present case no attempt has been made to tender the tape recordings at the committal hearing. It is not even yet possible to say who the person is who will be called to identify them or the voices

audible on them; whether he or she satisfies the description in s. 46(1) of a person to whom knowledge of the private conversation has come "as a result, direct or indirect, of the use of a listening device"; and whether, in the case of that individual, the device was used in contravention of s. 43 of the Act.

These considerations raise two further and important matters of principle involved in the practice adopted here of inviting the Supreme Court to intervene by injunction to decide a question of admissibility of evidence that may in due course be tendered at committal proceedings. The first is whether it is strictly speaking part of the function of an examining magistrate acting under s. 104 of the Justices Act 1886-1988 in relation to an indictable offence to make rulings having the effect of excluding from consideration evidence tendered at committal proceedings. The procedure now in use in Queensland can be traced to the Indictable Offences Act 1848; 11 & 12 Vict, c. 42, which was one of the statutes known in England as Jervis's Acts that was introduced in New South Wales in 1850 by the Act 14 Vic. No. 43, by the expedient of adopting those English statutes by reference. Before 1848 the examining justices were directed by 7 Geo. 4, c. 64, s. 2, to take an examination of the information upon oath of those "who shall know the facts and circumstances of the case", and to "put the same, or as much as shall be material, into writing". The result was that in some instances the depositions taken omitted matters that might afterwards be found at trial to be most material: see R. v. Weller (1846) 2 Car. & K. 223; 175 E.R. 93.

In consequence, when the Indictable Offences Act was passed the duty of the examining magistrates was expressed not merely to take and record "material" facts and circumstances, but under s. 17 of the Act to take and reduce to writing the statements of those "who shall know the facts and circumstances of the case". Speaking of this change, the 12th edition of Taylor on Evidence, vol. 1,

para. 485, continued even as late as 1931 to carry the following statement:—

> "485. In directing the magistrate to take down the statements of the witnesses, and not merely 'so much thereof as shall be material', the Legislature, of course, did not intend that the depositions should be loaded with every idle word let fall by the persons under examination, though obviously having no reference to the charge against the accused, but it certainly meant to fetter the discretion of the justices, who, under the old law, were apt to reject as immaterial much valuable information. Regarded in this light, the change is salutary; for it may happen, that facts, which on a preliminary inquiry appear to be of trifling importance, turn out in the sequel to be extremely relevant; and, where all the evidence is not given, the Court, the prosecutor, and the prisoner, are alike kept in the dark, and much time may be wasted in endeavours to throw discredit upon the testimony of witnesses by showing that they have made statements at the trial which are not to be found in the depositions returned."

Section 104(2) of the Justices Act now speaks of "all the evidence to be offered on the part of the prosecution". The section attained its present form in 1964; but it is unlikely that by using the word "evidence" it was intended to make any substantial change in the examining function of justices conducting committal proceedings. Section 104(4) speaks of "admissible" evidence; but only in relation to evidence tendered on behalf of the defendant. Section 111 speaks, if rather clumsily, of "the deposition of any person taken before justices...with respect to the transaction or set of circumstances out of which has arisen the charge on which the defendant has been committed to be tried...". It thus preserves a traditional purpose of enabling the depositions to be read as evidence on the trial provided that the statutory conditions have been complied with, and if certain specified additional circumstances (such as death, insanity or illness of the witness) also prevail. Under the Act of 1848 it was originally held that even hearsay statements in the depositions taken under s. 17 were to be read at the trial:

R. v. Launt (1865) 4 S.C.R. (N.S.W.) 84, where Stephen C.J. was for this reason inclined to prefer the earlier statutory formula. The better view now is that only such statements in the depositions as are admissible and relevant to the charge ought to be read at trial: R. v. Glover (1928) 28 S.R. (N.S.W.) 482; R. v. Bulmer [1960] S.R. (N.S.W.) 637; but, subject to that and to the overriding discretion and duty of the trial judge of ensuring a fair trial, there is said to be no discretion to exclude the reading of such depositions at the trial: see R. v. Lynch [1979] 2 N.S.W.L.R. 775.

To my mind, these cases serve to illustrate that it is not, and never has been, a function of examining justices to make refined rulings on objections with a view to excluding evidence of witnesses at committal proceedings. Those are essentially matters to be decided by the judge at the trial of the defendant if committed. Of course, it is self-evident that, if some control is not exercised by the examining justices or magistrate over both prosecution and defence, the examination will, to use Taylor's description "be loaded with every idle word let fall by the persons under examination, though obviously having no reference to the charge against the accused". The function of the justices or magistrate remains that of determining "whether the evidence is sufficient to put the defendant upon his trial for an indictable offence", for which purpose he is to receive, examine and permit the evidence to be tested: R. v. Grassby (1988) 15 N.S.W.L.R. 109, 118; but, in doing so it is neither expected nor desirable that they or he or she should attempt to emulate the learning or acuity of a Wigmore or a Phipson.

This brings me to the second matter of principle. Apart from the cases concerning depositions read at the trial, there is little direct authority on the limits of the examining justices' or magistrate's duty to rule on the admissibility or exclusion of evidence at committal proceedings. That is not surprising when it is recalled that superior courts only recently began to intervene by

means of declarations or injunctions in the conduct of such proceedings. We have of late twice had occasion to comment upon the growing tendency to seek rulings on matters of procedure and evidence, its form and admissibility, before the trial if any takes place: see R. v. Judge Noud, ex parte Macnamara and Gray; and Rockett v. Smith, ex parte Smith. The tendency, which is also evident elsewhere, has been condemned or at least discouraged in other jurisdictions: see Sankey v. Whitlam (1978) 142 C.L.R. 1, 26; Acs v. Anderson [1975] 1 N.S.W.L.R. 212; Walker v. Corporate Affairs Commission (1988) 13 N.S.W.L.R. 550, 556. While not doubting that the jurisdiction exists and may be exercised, occasions calling for the interposition of this Court in proceedings being conducted within the jurisdictional limits of another tribunal appointed by Parliament must necessarily be relatively infrequent. The present is, I am satisfied, not such an occasion. As I have already said, the evidence complained of has not yet even been tendered at the proceedings for committal of the appellant; its ultimate admissibility may depend on facts, circumstances and considerations not yet proved or even fully identified; and the person or persons who are to give it in evidence have so far not been pointed out so as to enable it to be seen whether he, she or they answer the description in s. 46. In so far as the admission of their testimony may depend on the exercise of a discretion in accordance with Bunning v. Cross, the matter is essentially one for determination by the judge at trial if any: see R. v. Grassby (1988) 15 N.S.W.L.R. 109, 118.

Finally, it may be added that we were informed that the evidence in question is critical only to one of the 11 charges now confronting the respondent. Even if in the end it turns out to be fatal to that charge, it scarcely justifies the delays that have been imposed upon the committal proceedings by the institution of this action by the respondent and by the present appeal from the judgment given in it. More than 12 months have now elapsed since the hearing of the committal proceedings began on 12 March 1990. That is plainly excessive having regard to the

incontrovertible circumstance that it is possible for a prosecution to proceed on an indictment presented without prior committal proceedings, and that the Court has little if any power to prevent it from doing so: see R. v. Grassby (1988) 15 N.S.W.L.R. 109, 114; cf. Grassby v. The Queen (1989) 168 C.L.R. 1, 14-15; Jago v. District Court of New South Wales (1989) 168 C.L.R. 23.

It follows in my opinion that the learned judge in this case was wrong in exercising his discretion, as he did, to make declarations in the action instituted by the plaintiff respondent to the appeal that the use of the listening devices at the Carole Park premises was not a use authorised by s. 43(2) of the State Act; that the instruments of authority purporting to have been given by Inspector K.C. Scanlan were not valid under that Act; and that the tape recordings of the conversations so recorded, and any copies or transcripts thereof, were inadmissible in evidence in any proceedings at all. His Honour went on to order that (with an immaterial exception) those tape recordings and copies be delivered up to the plaintiff; that the appellant third defendant refrain from publication of any matters that had come to his attention as a result of the listening devices; and that the appellant direct any person over whom he has authority to refrain from making any such publication. He further ordered that the appellant third defendant be restrained from "putting into evidence in any proceedings" what are described as "the proceeds of the use of the said device" and from "disseminating the said proceeds elsewhere". Finally, he ordered that all of the tape recordings and transcripts, and copies, in the appellant's possession, power or control be placed in a sealed container to be retained at the Brisbane office of the Federal Police, etc.

The precise basis on which these further orders were made is perhaps not entirely plain. Section 44 of the Sate Act makes it an offence for a person to communicate or publish a private conversation, or a report of it, that has come to his knowledge as a result, direct or indirect of

the use of a listening device in contravention of s. 43 of the Act. Some at least of the orders made were evidently based on this section and so follow the declarations granted by his Honour and resulting from his finding of a contravention of s. 43. To that extent they fall and should be set aside together with the declarations themselves. As is evident from his Honour's reasons and from submissions on appeal, however, it was also sought to sustain the foregoing orders on the basis that the conversations themselves were private and consequently confidential; and, as such, merited protection by the court in the exercise of its equitable jurisdiction to restrain breaches of confidence. In response, the appellant relied on the proposition that there is "no confidence as to the disclosure of iniquity": see Malone v. Metropolitan Police Commissioner [1979] Ch. 344, 361; A. v. Hayden (1984) 156 C.L.R. 532, 544, 587, 597; and that there was accordingly no right in the respondent to invoke the protection of the court.

In my respectful opinion the submissions on both sides are misconceived. It was conceded below that the conversation was private but not that it was confidential. The law does not protect from disclosure conversations as such, whether private or otherwise. What it protects from disclosure is information; and not even all information, but only such as properly justifies and attracts judicial protection. Formulations of the criteria for the intervention of equity in this field have in the past tended to concentrate on requirements of "confidentiality" and unauthorised use: cf., for example, Coco v. A.N. Clark Engineers Ltd. (No. 2) [1969] R.P.C. 41, 47. To say with Megarry V.-C. in that case only that the information must be the product of the "human brain" cannot, however, be enough, because all, or at least most, communications and conversations are the product of human intelligence, however slight; and yet the information they impart is, not by virtue of that circumstance alone necessarily such as would warrant the protection of the law: cf. Fractionated Cane Technology Ltd. v. Ruiz-Avila [1988] 1 Qd.R. 51, 62;

affd. [1988] 2 Qd.R. 610. Not even all that is said by a solicitor to his client is protected as confidential: Packer v. Deputy Commissioner of Taxation [1985] 1 Qd.R. 275. The point with respect to confidentiality was conceded in R. v. Lewis [1987] 2 Qd.R. 710, 726-727, and therefore as Dowsett J. observed did not in that case require decision, although in the particular circumstances of communications there, it would not have been difficult to discover reasons for thinking them to be confidential. Inevitably, much if not all depends on the nature of the information conveyed as well as the circumstances in which it is disclosed. By way of illustration, information that water is available within walking distance would scarcely if ever qualify as confidential under prevailing conditions in suburban Brisbane; it obviously falls squarely within the public domain: cf. O'Brien v. Komesaroff (1982) 150 C.L.R. 310, 326; but in some seasons and in some parts of Queensland information of that kind can be critical to the survival of the stock and even of the lives of an outback pastoralist and his family. If communicated under circumstances imposing a confidence, information like that might expect to receive protection in equity.

In the present case we have no idea at all what the information was that was communicated in the course of the conversations that took place at Carole Park and were recorded by means of listening devices. All we know is that there are some eighteen 12-hour "reel to reel" tape recordings. One may with some assurance assume that few of the contents could now be of interest or utility to the persons who participated; even less of it is likely to be relevant as evidence of the charges in the committal proceedings. Whatever information it contains (and it may, as no doubt the appellant hopes, constitute the res gestae of conspiracy), neither his Honour below, nor senior counsel on appeal, nor the members of this Court, have any inkling of what it is. The contention of the appellant that it is the fruit, or even the core, of "iniquity" therefore falls to the ground; but so also does that of the respondent that the contents of the conversation are such

as to merit protection. Having hitherto so successfully concealed from disclosure, even from those whose protection he seeks for it, the content of the conversations, the respondent cannot now fairly complain if in consequence the law is quite unable to assist him.

In my respectful view there was no basis at law or in equity on which the learned judge could have made the injunctions granted, much less the order requiring delivery to the respondent or destruction of the tape recordings which, whatever their value may or may not be, continue to be the property of the Commonwealth.

My opinion is that the appeal should be allowed with costs; the judgment given in favour of the plaintiff in the action should be set aside; and the plaintiff should be ordered to pay the third defendant's costs of and incidental to the motion in the action.

IN THE SUPREME COURT OF QUEENSLAND No. 366 of 1990

FULL COURT

Before the Full Court

Mr Justice McPherson S.P.J.

Mr Justice Ryan

Mr Justice Dowsett

BETWEEN:

SANTO ANTONIO COCO (Plaintiff) Respondent

-and-

NOEL RONALD NEWNHAM (First Defendant)

-and-

RONALD JOSEPH REDMOND (Second Defendant)

-and-

JOHN ROBERT MUHLDORFF SHAW (Third Defendant) Appellant

-and-

KENNETH CHARLES SCANLAN (Fourth Defendant)

JUDGMENT - RYAN J.

Delivered the Tenth day of May, 1991

Counsel:	Mr. F.C. Fleming Q.C. with him Ms. K. Holmes for Appellant
	Mr. W. Sofronoff Q.C. with him Mr. S. Herbert and Mr. H.B. Fraser for the Respondent
Solicitors:	Commonwealth Directors of Public Prosecutions for Appellant
	Gilshenan & Luton for Respondent
Hearing dates:	12-14 March, 1991.

IN THE SUPREME COURT OF QUEENSLAND No. 366 of 1990

FULL COURT

BETWEEN:

SANTO ANTONIO COCO (Plaintiff) Respondent

-and-

NOEL RONALD NEWNHAM (First Defendant)

-and-

RONALD JOSEPH REDMOND (Second Defendant)

-and-

JOHN ROBERT MUHLDORFF SHAW (Third Defendant) Appellant

-and-

KENNETH CHARLES SCANLAN (Fourth Defendant)

JUDGMENT - RYAN J.

Delivered the Tenth day of May, 1991.

This is an appeal by which the appellant seeks to set aside certain declarations and orders made by Lee J. on 17 August 1990.

His Honour made declarations that the use of listening devices at the premises of Cosco Holdings Pty Ltd. at Carole Park purportedly under an approval by Carter J. was not a use authorised under s. 43(2) of the Invasion of Privacy Act 1971-1988 (the Act); that documents by which the fourth defendant purported to appoint or authorise various persons to use any of the listening devices were not valid authorities within s. 43(2)(c) of the Act; and that pursuant to s. 46 of the Act, any tape (or any copy thereof or transcript) or other evidence of any conversation recorded by the use of any such listening device, (save for any conversation to which two officers of the Taxation Department and the plaintiff were parties), was inadmissible in evidence in any proceeding. He ordered that the third defendant deliver up to the plaintiff all tapes and transcripts within his possession, power or control, of any conversation recorded by the use of any such listening device (save for a conversation to which the two Taxation Department officers and the plaintiff were parties) and that the third defendant refrain from any publication of any matters which had come to his attention or knowledge as a result of the listening device installed at the plaintiff's place of business at Cosco Holdings and that he direct any person over whom he had authority to refrain from making any such publications. He further ordered that in any instance in which information the subject of the Order had been recorded on computer, or recorded in print in such a fashion that it was intermingled with information not the subject of the Order, the third defendant should have the right to cause its destruction in lieu of making delivery. He further ordered

that the third defendant be restrained from putting into evidence or attempting to put into evidence in any proceedings the proceeds of the use of the listening device or from disseminating the proceeds elsewhere. He further ordered that these orders be stayed pending the hearing and determination of any appeal instituted by the third defendant, and that pending the determination of the Appeal the third defendant was to place the tapes and transcripts in a sealed container to be retained at the Brisbane office of the Australian Federal Police. He ordered that the defendants pay the plaintiff's costs of the action and notice of motion to be taxed.

On 26 October 1989, Carter J. made an order in these terms:

> "I hereby approve pursuant to Section 43 of the Invasion of Privacy Act 1971-1988 the use of listening devices in connection with the matter of police investigations relating to corruption including an offence of corruptly influencing Commonwealth officers under Section 73(3) of the Crimes Act 1914, such approval being as follows:
>
> 1. That Kenneth Charles Scanlan of the Queensland Police Force by himself or by means of any other person engaged in or assisting the investigation of the said matter, use any listening device or devices capable of recording, overhearing, monitoring or listening to a private conversation simultaneously with its taking place, such listening device or devices to be installed in premises occupied by Santo Antonio Coco at 11 Anzac Road, Carina, and premises occupied by Cosco Holdings Pty. Ltd. at corner of Antimony and Emery Streets, Carole Park in the State of Queensland.
>
> 2. That this authorisation apply until 12 noon on 23 November 1989 or until further order.
>
> And I do order that such approval be subject to the following conditions:
>
> 1. That any authorised police officer or persons engaged in, or assisting the investigation of the said offence, to enter and remain upon the said premises

for the purpose of installing, maintaining, servicing and retrieving the said listening device or devices.

2. That no such listening device or devices shall be used to record any conversation between Santo Antonio Coco and his legal advisers.

3. That no notice or report relating to this application shall be published and no record of the application, summons and affidavit, or of any approval or order given or made thereon shall be available for search by any person except by direction or order of a Judge of this Honourable Court.

4. That the intended procedures set forth in the affidavits of Kenneth Charles Scanlan and John William Adams both sworn the 26th day of October 1989 be complied with."

The affidavit by Scanlan, a Detective Inspector of the Queensland Police Force, stated that he had been instructed by Mr Redmond, Acting Commissioner of Police for the State of Queensland, to assist in investigations being conducted by the Australian Federal Police in relation to offences under the provisions of the Commonwealth Crimes Act 1914 and other State offences. Subject to an approval being granted he would be involved in supervising the installation of the listening devices and the monitoring of conversations which took place during the period when the listening devices were installed. He listed three members of the Australian Federal Police Technical Unit authorised in writing by him who would assist in the installation of the listening devices. He stated that certain listed persons would be authorised in writing by him to monitor the listening devices and to listen and record and act on information relevant to the investigation under and in accordance with any approval given in writing by a Justice of the Supreme Court of Queensland.

Information obtained from the listening devices would not be used except as provided for in s. 45(2) of the Invasion of Privacy Act. The originals of all tapes made in accordance with the approval would be held under the

control of Detective Superintendent John William Adams in a secure area within the Australian Federal Police Headquarters at Brisbane.

Mr Adams deposed that he had been informed by Detective Sergeant Shaw of the Australian Federal Police that since 31 August 1989 the Australian Federal Police had been investigating a complaint referred from the Australian Taxation Office, Brisbane, that two of its auditors had been approached by Coco, a company director of Cosco Holdings Pty. Ltd. who had offered remuneration in return for information from the Australian Taxation Office. A police investigation was being conducted into an offence of corruptly influencing Commonwealth Officers contrary to s. 73(3) of the Commonwealth Crimes Act 1914, and he was engaged in that investigation.

On 27 October 1989, a document was issued by Mr Redman, Acting Commissioner of Police for the State of Queensland authorising Scanlan in the use of listening devices under and in accordance with the approval given by Carter J. on 26 October 1989. Scanlan appointed a number of persons to use a listening device under and in accordance with the approval given by Carter J. These persons were members of the Australian Federal Police, Australian Taxation Officers, an interpreter, and two unsworn staff members of the Australian Federal Police employed to perform administrative duties.

On 6 November 1989, certain electronic equipment capable of transmitting sound was installed by officers of the Australian Federal Police at the offices of Cosco Holdings.

On 20 November 1989, Carter J. made an order extending the approval until 7 December 1989 on the conditions of the approval given on 26 October 1989 and upon the further conditions (a) that a listening device shall not be used to overhear, record, monitor or listen to a conversation on and from 12 noon on 7 December 1989 and (b) that unless

removed earlier the device be removed as soon as practicable after that time.

The equipment was removed on 4 January 1990.

The plaintiff was charged with 11 offences against laws of the Commonwealth, which were alleged to have been committed at times between 1 July 1989 and 12 December 1989. Committal proceedings in relation to the hearing of these charges commenced on 26 February 1990 and then the hearing was adjourned to 12 March 1990.

At the committal proceedings, evidence was given by the third defendant Shaw (the present appellant), a member of the Australian Federal Police, that in accordance with the orders made by Carter J. a listening device was installed at the premises of Cosco Holdings Pty. Ltd., that tape recordings were made of the conversations which were being monitored by the listening device, and that there were 18 × 12 hour reel to reel tape recordings of the conversations, the majority of which had been transcribed and which it was intended to tender in evidence against the plaintiff. Only persons authorised by Scanlan had made use of the listening device. Only officers of the Australian Federal Police not being unsworn Staff Members authorised by Scanlan used the listening device to record conversations on the tape recordings on 12 March 1990. Evidence was given also by Scanlan (the fourth defendant). The committal proceedings were then adjourned. On 14 March 1990, a writ was issued and a notice of motion was filed, seeking final relief in the action in terms of the writ. The matter was heard by Lee J. as the Chamber Judge. On 10 August 1990 his Honour delivered judgment. The terms of the order made have been already set out.

On 7 February 1991, the appeal was listed for hearing by the Full Court. On that occasion counsel for the appellant informed the Court that notices pursuant to s. 78B of the Judiciary Act 1903 (Cth.) had been given that morning. As a reasonable time had clearly not elapsed since the giving of the notices for consideration by the

Attorneys-General of the question of intervention in the proceedings or removal of the cause to the High Court, the matter was stood over to the next sittings of the Full Court, and it was ordered that the respondent have the costs thrown away by the adjournment which had been sought by the appellant.

Section 43 of the Invasion of Privacy Act provides so far as is relevant

(1) A person is guilty of an offence against this Act if he uses a listening device to overhear, record, monitor or listen to a private conversation and is liable on conviction on indictment to a penalty not exceeding $2,000.00 or to imprisonment for not more than two years or to both such penalty and imprisonment.

(2) Subsection (1) of this Section does not apply-

(a) where the person using the listening device is a party to the private conversation;

(b) to the unintentional hearing of a private conversation by means of a telephone;

(c) to or in relation to the use of any listening device by

(i) a member of the police force acting in the performance of his duty if he has been authorized in writing to use a listening device by-

(a) the Commissioner of Police;

(b) an Assistant Commissioner of Police; or an officer of police of or above the rank of Inspector who has been appointed in writing by the Commissioner to authorise the use of listening devices,

under and in accordance with an approval in writing given by a judge of the Supreme Court in relation to any particular matters specified in the approval;

(ii) an officer employed in the service of the Commonwealth in relation to customs authorized by a warrant under the hand of the Comptroller-General of Customs and Excise to use a listening device in the performance of his duty;

(iii) A person employed in connection with the security of the Commonwealth when acting in the performance of his duty under an Act passed by the Parliament of the Commonwealth relating to the security of the Commonwealth.

(3) In considering an application for approval to use a listening device pursuant to subparagraph (i) of paragraph (c) of sub-section (2) of this section a judge of the Supreme Court shall have regard to-

(a) the gravity of the matters being investigated;

(b) the extent to which the privacy of any person is likely to be interfered with; and

(c) the extent to which the prevention or detection of the offence in question is likely to be assisted,

and the judge may grant his approval subject to such conditions, limitations and restrictions as are specified in his approval and as are in his opinion necessary in the public interest.

No appeal was made against the validity of the approval given by Carter J. In Love v. The Attorney-General for New South Wales (1990) 169 CLR 307, it was said that the exercise of a power to issue a warrant under State legislation purporting to authorise Australian Federal Police officers to install and use listening devices in the course of investigating alleged narcotic offences was

essentially administrative in nature. It is unnecessary to determine whether an appeal would lie pursuant to s. 10 of the Judicature Act 1870 from the grant of approval by Carter J., since no such appeal has been instituted. It was however submitted for the respondent that there had not been compliance with the conditions imposed by Carter J. and accordingly that the tape recordings were obtained in contravention of s. 43 of the Invasion of Privacy Act.

The use of a listening device by a member of the police force acting in the performance of his duty will not fall within the prohibition expressed in s. 43(1) of the Act only if (a) he has been authorized in writing to use a listening device by the Commissioner of Police, an Assistant Commissioner of Police or an officer of police of or above the rank of Inspector who has been appointed in writing by the Commissioner to authorize the use of listening devices; and (b) he uses the device under and in accordance with an approval in writing given by a judge of the Supreme Court in relation to any particular matter specified in the approval. In the instant case, use of the listening device was made only by certain persons who were members of the Australian Federal Police. The question whether they were members of the police force acting in the performance of their duty will be considered later. On the assumption that they were, the question arises whether they were duly authorized in writing to use a listening device. Such authorization as they possessed consisted in an authority signed by Detective Inspector Scanlan appointing them to use a listening device under and in accordance with the approval given in writing by Carter J. This would be effective only if Mr Scanlan had been appointed in writing by the Commissioner to authorize the use of listening devices. The authority given to him by the Commissioner was however in the use of listening devices under and in accordance with the approval given by Carter J; it was not to authorise the use by others of listening devices.

The approval given by Carter J. was that Kenneth Charles Scanlan of the Queensland Police Force by himself

or by means of any other person engaged in or assisting the investigation use a listening device. That order was made on the basis of affidavits which deposed that Redmond had instructed Scanlan to assist in investigations being conducted by the Australian Federal Police, that Scanlan would, if approval was granted, be involved in supervising the installation of the listening devices and the monitoring of conversations, and that certain persons would be authorised by him to monitor the listening devices. The order did not however, as it could not, obviate the necessity for a proper authorization to use a listening device to be given to a member of the police force to use a listening device. As such authorization was not given the use of listening devices by the persons who used them was not exempt from the prohibition imposed in s. 43(1) of the Act.

It would be a further ground for concluding that the listening devices used were in contravention of s. 43 of the Act if the Australian Federal police who used the listening device were not "members of the police force". The principal submission for the appellant was that s. 43 of the Act had no operation in relation to the Australian Federal Police. That submission will be examined later. It was however further submitted that it was wrong to interpret the words "a member of the Police Force" in s. 43(2)(c)(i) as being restricted to a member of the Queensland Police Force, and that s. 12 of the Australian Federal Police Act removed any illegality on the part of the Australian Federal Police in not having an authorization pursuant to s. 43(2) of the Act.

A number of considerations led Lee J. to conclude that the words related only to members of the Queensland Police Force. These include:

(a) The use of the word "the" introducing the expression "Commissioner of Police" and "member of the Police Force" is apt to refer to only one Police Force, and not to any Police Force from any country or place.

(b) Section 35 of the Acts Interpretation Act (Qld) provides that in the absence of a contrary intention, where the term "office" or "officer" is used it is to be read as a reference to office or officer in and for the State of Queensland. There is no contrary intention in the Act.

(c) Section 43(2)(c) is structured so as to specify with particularity those people employed by the Commonwealth to whom s. 43(1) does not apply, and this does not include Australian Federal Police.

It was submitted for the appellant that s. 9(2) of the Australian Federal Police Act had the effect that the words "members of the police force" included Australian Federal Police.

The provision is in these terms.

> "Where any provisions of a law of a State apply in relation to offences against the laws of the Commonwealth or of a Territory, these provisions so apply as if-
>
> (a) any reference in. those provisions to a constable or to an officer of police included a reference to a member; and
>
> (b) any reference in those provisions to an officer of police of a particular rank included a reference to a member holding the rank that is, or is declared by the regulations to be, the equivalent of that rank."

That sub-section applies only in cases where provisions of a law of a State apply in relation to offences against laws of the Commonwealth or a territory. It is impossible to read s. 43 of the Invasion of Privacy Act as such a provision. It is simply a provision which creates an offence under State Law.

There is nothing in the Judiciary Act 1903 (Cth) or in any other legislation by which it is applied in relation to Commonwealth offences.

I consider that Lee J. was correct in concluding that the words "a member of the Police Force" in s. 43(2)(c)(i) of the Act refers only to members of the Queensland Police Force, for the reasons he gave.

If this is so, s. 43 would apply to make a person guilty of an offence if he used a listening device to overhear, record, monitor or listen to a private conversation, even though he had an approval in writing given by a judge of the Supreme Court. Subsection (1) of s. 43 is inapplicable only if he is a member of the police force, or if it is otherwise made non-applicable. It may be noted that the approval did not purport expressly to authorise federal police officers to use a listening device, though the affidavits placed before the Judge indicated that they would be employed to use them.

Before departing from this aspect of the case, it should be observed that the approval given on 26 October 1989 was on the condition that any authorised police officer or person engaged in or assisting the investigation of the offence enter and remain upon the premises occupied by the plaintiff and premises occupied by Cosco Holdings for the purpose of installing, maintaining, servicing and retrieving the listening devices. The question whether s. 43(2)(c) authorised entry upon premises without the consent of the occupier was discussed, but it is unnecessary to determine it in these proceedings. It may be observed that there is nothing in s. 43 which corresponds to s. 27 of the Drugs Misuse Act 1986-1987 which enables an interception warrant to authorise a police officer to exercise powers of entry, and that in the recent decision of the High Court in Plenty v. Dillon (judgment delivered on 7 March 1991) it was said that the presumption is that, in the absence of express provision to the contrary, the legislature did not intend to authorise what would otherwise be tortious conduct. If the entry was unlawful, this may provide a basis for the rejection of the evidence obtained by an unlawful act as a matter of discretion: Bunning v. Cross

(1978) 141 CLR 54; but it would not warrant the making of orders of the kind made by Lee J. in this case.

It was contended on behalf of the appellant that if s. 43 applied to the Australian Federal Police s. 12 of the Australian Federal Police Act removed any obligation to obtain an approval. It provides:

> "A member is not required under, or by reason of, a law of a State or Territory-
>
> (a) to obtain or have a licence or permission for doing any act or thing in the exercise of his powers or the performance of his duties as a member; or
>
> (b) to register any vehicle, vessel, animal or article belonging to the Commonwealth."

The short answer to that contention is that s. 43 does not require a member of the Australian Federal Police Force to obtain a licence or permission for doing anything in the performance of his duty. It imposes a general prohibition on persons from using listening devices to listen to private conversations, and then provides that this prohibition is not to apply in certain circumstances. One such circumstance is that an approval is given by a judge of the Supreme Court in accordance with s. 43(2)(c)(i), but this is relevant only to members of the Queensland Police Force for reasons already stated.

It was further argued that s. 43(1) did not apply to the Australian Federal police officer by virtue of s. 43(2)(iii), which provides that s. 43(1) does not apply to a person employed in connection with the security of the Commonwealth when acting in the performance of his duty under an Act passed by the Parliament of the Commonwealth relating to the security of the Commonwealth.

The functions of the Australian Federal Police are stated in s. 8 of the Australian Federal Police Act 1979. They are:

(a) the provision of police services in relation to the Australian Capital Territory;

(b) the provision of police services in relation to

(i) laws of the Commonwealth;

(ii) property of the Commonwealth (including Commonwealth places) and property of authorities of the Commonwealth; and

(iii) the safeguarding of Commonwealth interests; and

(c) to do anything incidental or conducive to the performance of the foregoing functions.

An Act providing for the establishment of a police force to enforce the laws of the Commonwealth may be properly characterised as a law relating to the security of the Commonwealth inasmuch as the laws to be enforced may include such laws. The question in this case however is whether Australian Federal Police officers who are engaged in the investigation of possible offences of the kind charged are "employed in connection with the security of the Commonwealth" and "acting in performance of their duty" to enforce the law relating to the security of the Commonwealth. The term "security" is not defined in the Invasion of Privacy Act or the Australian Federal Police Act but it should be understood as bearing a sense broadly the same as that contained in s. 4 of the Australian Security Intelligence Organisation Act 1979, namely the protection of, and of the people of, the Commonwealth and the several states and Territories from espionage, sabotage, politically motivated violence, promotion of communal violence, attacks on Australia's defence system, or acts of foreign interference, whether directed from, or committed within Australia or not. The alleged offences are of an altogether different character. They relate to such matters as defrauding the Commonwealth, preventing the course of justice in relation to the judicial power of the Commonwealth, inciting Commonwealth officers to divulge

information about the income tax affairs of certain persons; offering benefits in order to influence Commonwealth officers; threatening the lives of Commonwealth officers; and offering money to Commonwealth officers in order to influence them in the exercise of their duty.

The main contention by the appellant was that s. 43 could not apply to the Australian Federal Police. The submission was that, while Commonwealth officers may be subject to the general law applicable to the ordinary affairs of the community, s. 43 was a law which, if applied to the Australian Federal Police, purported to regulate the functions of officers of that force. It was said that it purported to control a function of law enforcement agencies, namely the gathering of information through the installation and use of listening devices. It was claimed that no state law can limit the exercise of such a peculiarly or characteristically governmental function as Commonwealth law enforcement.

Before considering these submissions, it is necessary to consider whether s. 43 should be held on its proper construction not to prohibit members of the Australian Federal Police from installing and using listening devices, or to require them to obtain an approval in accordance with the section. I am unable to conclude that it should be so construed. The prohibition in s. 43(1) is completely general. It applies to all persons who use a listening device to listen to a private conversation. It then excepts from the prohibition certain officers, but the exception does not on the view I have already expressed, cover members of the Australian Federal Police in performing their duties in the investigation of offences alleged to have been committed by the plaintiff.

In Pirrie v. McFarlane (1925) 36 CLR 170, it was decided that a state Act which prohibited any person from driving a motor car on a public highway without being licensed for that purpose was not invalid and inoperative

to the extent that it fettered, interfered with or controlled the performance by a member of the Royal Australian Air Force of his duties as an officer of the Commonwealth. An argument denying the power of the States to affect Commonwealth officers could be sustained only if immunity was accorded by a Commonwealth law, which by virtue of s. 109 of the Constitution would prevail and invalidate the state law to the extent of any inconsistency.

This is the position as stated in Pirrie v. McFarlane by Starke J., at p. 227. He added however (at p. 229) that all that the State had done was:—

> "to regulate the use of motor cars and to require all citizens to observe provisions for the preservation of public safety and security. The Act is directed to acts of a purely local character, and its object is peculiarly within the authority of the State. It is not aimed particularly at the Defence Forces of the Commonwealth, nor was it in opposition to any express provision of the laws of the Commonwealth. A civil duty is, no doubt, established for all citizens using the public highways of Victoria, reasonable in itself and in no wise interfering with or infringing the military duties and obligations of the Military Forces of the Commonwealth."

That passage suggests that the State Act might have been held invalid if it was one which was "aimed particularly at the Defence Forces of the Commonwealth", or if it "interfered with the military duties and obligations of the Defence Force of the Commonwealth". It was submitted that s. 43 of the Act was invalid both as discriminating against members of the Australian Federal Police and as interfering with the performance of their duties.

In West v. Commissioner of Taxation (N.S.W.) (1936) 56 CLR 657, Dixon J. said (at p. 681) that if a state tax discriminated against pensions, salaries or other payments made by the Commonwealth, it could not be supported. He gave two reasons for this. One was that the State tax would be inconsistent with the law of the Commonwealth in making

enjoyment of the right or benefit conferred by the latter the special occasion of a burden. The invalidity of the State law would then be a result of s. 109 of the Constitution. The other was that it was implicit in the power given to the Executive Government of the Commonwealth that the incidents and consequences of its exercise should not be made the subject of special liabilities or burdens under State law. See also the discussion by Dixon J. of this point in Melbourne Corporation v. The Commonwealth (1947) 74 CLR 31 at pp. 81-82.

It is not enough, in my opinion, to invoke the principle referred to by Starke J. and Dixon J. that State legislation deals in a differential way with State and Commonwealth officials. It must be shown that the State legislation imposes special liabilities or burdens upon the Commonwealth officials.

There are several passages in judgments of members of the High Court where a distinction is drawn between State laws which may incidentally affect Commonwealth administrative action and those which affect governmental rights and powers belonging to the Federal executive as such. See for example F.C.T. v. Official Liquidation of E.D. Farley (Ltd.) (1940) 63 CLR 278 at p. 308; Uther v. F.C.T. (1947) 74 CLR 508 at 528; Commonwealth v. Bogle (1952-53) 89 CLR 229 at 290. The essential question in my opinion is whether s. 43 imposes restrictions upon the functioning of the Australian Police Force. I consider that it does not do so. Section 43(1) is not a provision which relates to the carrying out of investigations by police officers. It provides rather a general prohibition against certain conduct. This prohibition may have an impact upon the carrying out of investigations, and in recognition of this fact certain exemptions are accorded from the operation of the Acts. But the failure to extend the exemptions to cover investigations by officers of the Australian Federal Police (other than those related to the security of the Commonwealth) does not have the consequence that the State law can be said to be "aimed particularly at

the Australian Federal Police" or that it "interferes with the duties and obligations of the Australian Federal Police". It incidentally affects the action which may be taken by such officers, but that does not make it invalid.

It may be observed that if the submission made on behalf of the appellant that Australian Federal Police are included within the scope of s. 43(2)(c)(i) is correct, the provision would nevertheless be invalid on the submission put forward by him, since it would make the exercise of the functions of Australian Federal Police subject to controls imposed by State law.

I have concluded that the use of the listening devices by the Australian Federal Police contravened s. 43 of the Act. It is therefore necessary to consider the effect of s. 46 of the Act. Section 46(1) provides:

> "Where a private conversation has come to the knowledge of a person as a result, direct or indirect, of the use of a listening device used in contravention of s. 43 of this Act, evidence of that conversation may not be given by that person in any civil or criminal proceedings."

A preliminary question is whether committal proceedings fall within the scope of this provision.

There are several cases in which members of the High Court have referred to committal proceedings as being ministerial or administrative or executive in nature.

They have also said that such proceedings are part of the criminal process, though they have distinguished between the preliminary enquiry which is the committal proceedings and the commencement of criminal proceedings with the presentation of the indictment. See for example Sankey v. Whitlam (1978) 142 CLR 1; Barton v. The Queen (1980) 147 CLR 75; The Queen v. Murphy (1985) 158 CLR 596; and Grassby v. The Queen (1989) 168 CLR 1. None of these cases was concerned to determine whether committal proceedings were criminal proceedings in the context of a

statute which made certain evidence inadmissible in any civil or criminal proceedings.

It is no doubt possible to classify proceedings as comprising civil, criminal and other proceedings. This is done, for example, in s. 5 of the Evidence Act 1977, which defines "proceeding" as meaning any civil, criminal or other proceeding or inquiry, reference or examination in which by law or by consent of parties evidence, is or may be given, and includes an arbitration. The question however is whether in s. 46 of the Act the words "any civil or criminal proceedings" are intended to include administrative proceedings which may result in committal for a trial. In my opinion, they are intended to include such proceedings.

The function of justices in committal proceedings is prescribed in s. 108 of the Justices Act 1886-1988. It is to determine upon a consideration of all the evidence adduced upon an examination of witnesses in relation to an indictable offence whether or not the evidence is sufficient to put the defendant upon his trial for any indictable offences. In The Queen v. Murphy at p. 616, it was said in the judgment of the Court that even though committal proceedings are properly to be regarded as non-judicial in character, they traditionally constitute the first step in the curial process, possibly culminating in the presentation of the indictment and trial by jury. It would in my opinion be too restrictive a reading of the words "any civil or criminal proceedings" in s. 46 of the Act to limit them to curial proceedings and to exclude proceedings at the stage when it is determined whether curial proceedings may be instituted.

I conclude therefore that the effect of s. 46 is that evidence of private conversations which came to the knowledge of the Australian Federal Police or any other person as a result of the use of the listening device may not be given in evidence in the committal proceedings. It has the consequence that there is an absolute bar to the

giving of such evidence; no room exists for the exercise of any discretion to admit the evidence.

I now turn to the question of the exercise by the learned Chamber Judge of the discretion to hear the application to give to the plaintiff the declaratory and injunctive relief he sought.

In Sankey v. Whitlam (1979) 142 CLR 1 at p. 25-26 Gibbs A.C.J. said:

> "In any case in which a declaration can be and is sought on a question of evidence or procedure, the circumstances must be most exceptional to warrant the grant of relief. The power to make declaratory orders has proved to be a valuable addition to the armoury of the law. The procedure involved is simple and free from technicalities: properly used in an appropriate case the use of the power enables the salient issue to be determined with the least possible delay and expense. But the procedure is open to abuse, particularly in criminal cases, and if wrongly used can cause the very evils it is designed to avoid. Applications for declarations as to the admissibility of evidence may in some cases be made by an accused person for purposes of delay, or by a prosecutor to impose an additional burden on the accused, but even when such an application is made without any improper motive it is likely to be dilatory in effect, to fragment the proceedings and to detract from the efficiency of the criminal process ... Once criminal proceedings have begun they should be allowed to follow their ordinary course unless it appears that for some special reason it is necessary in the interests of justice to make a declaratory order."

His Honour quoted the above passage, but held that there were special circumstances existing and good reasons why the court in this particular case should embark upon a consideration of the merits of the plaintiff's application for relief. Matters to which he referred to coming to this conclusion included the following (a) that a declaration if now made in favour of the plaintiff would conclusively determine at least one serious charge and may assist in the disposal of some others; (b) that the reluctance of the

Court to interfere with committal proceedings by way of declaration may be outweighed by the desirability of a prompt and authoritative decision upon a question of law, particularly where there was no dispute as to the facts; (c) the plaintiff was not claiming a mere declaration that evidence proposed to be tendered before the Stipendiary Magistrate was inadmissible; he was also claiming a proprietary or similar right in confidential information in the tapes and transcript and an injunction.

None of these considerations, in my opinion, warranted the course takes which involved interruption of the committal proceedings, and the numerous authorities referred to and analysed in His Honour's judgment seem to me to indicate that the discretion should in this case have been exercised adversely to the applicant. In Seymour v. Attorney-General (1984) 57 A.L.R. 68, it was said by Beaumont J. (with whom Fox J. expressed agreement) at p. 74:

> "It is true that the court may well decide to intervene where the very jurisdiction of the magistrate to proceed to committal can be questioned. A clear illustration is where the information discloses no offence known to the law (See Sankey v. Whitlam (1978) 142 CLR 1). That raises a bare question of law which may be appropriately dealt with by another court on judicial review. But questions relating to the admissibility of evidence raise special problems which are best left to the tribunal receiving the evidence."

The effect of the orders made in the present case is that the committal proceedings were delayed for five months in the first instance, and they have been delayed for a further eight months as a consequence of the appeal to this Court. They may be further delayed if the matter is taken in appeal from the decision of this Court. It has had the effect that the committal proceedings have been so delayed although the exclusion of the impugned evidence would conclusively dispose of only one charge, and the Stipendiary Magistrate had not ruled upon the question whether the evidence obtained by use of a listening device

may not be given. If the Magistrate erred in his ruling, this would not prevent the issue being raised again at the trial; and against the interest of an accused person in the result of the committal proceeding and in the conduct of that proceeding according to law must be weighed the public interest in the expeditious resolution of accusations of crime: Seymour v. Attorney-General (1987) 57 A.L.R. 68 at p. 71, per Jenkinson J. Moreover, the secondary claim by the plaintiff based upon an alleged proprietary right in confidential information in the tapes and transcript for an injunction provided no reason why the claim for a declaration should have succeeded if otherwise it would fail.

Though in my opinion His Honour should have declined to make the orders sought in the summons, it can be said, in the words used by Gibbs A.C.J. in Sankey v. Whitlam (1978) 142 CLR at p. 26, that "the very fact that the questions have been argued in this Court after the proceedings have already been long delayed is a cogent reason for putting them finally to rest". I consider that in the circumstances this Court should not be deterred from makings orders which confirm or set aside those made by His Honour.

For reasons I have already given, I consider that the declarations made by His Honour should stand. But I can see no basis upon which the order for a delivery up of the tapes could properly be made. His Honour proceeded upon the assumption that it was conceded by the defendants that the information contained in the tapes and transcripts was confidential information, and considered that an order may be founded either on the plaintiff's proprietary right in the tapes and transcripts or on the basis that the Court acts on the conscience of the defendants. It seems clear however from an examination of the transcript that this assumption was mistaken. See the transcript at pp. 178-9. The position then is that, while there is no dispute that the conversations were private, there is no evidence that the information is confidential, so as to make applicable

the principle that the court will "restrain the publication of confidential information improperly or surreptitiously obtained or of information imparted in confidence which ought not to be divulged" (Lord Ashburton v. Pape [1913] 2 Ch. 469 at 475 per Swinfen Eady L.J. quoted by Mason J. in The Commonwealth v. John Fairfax & Son. Ltd. (1980) 147 CLR 39 at 50). The substance of the private communications which were recorded has not been disclosed though it appears that the prosecution intended to rely upon them to prove a conspiracy to pervert the course of justice. If the substance of the conversations had been disclosed, it may be that the relevant principle to be applied would be that stated by Gibbs C.J. in A. v. Hayden (1984) 156 CLR 532 at 544-5, namely that "the Court will refuse to exercise its discretion in favour of granting equitable relief, such as an injunction to enforce an obligation of confidentiality when the consequence would be to prevent the disclosure of criminality which in all the circumstances it would be in the public interest to reveal. But it is enough to say that in this case the plaintiff failed to establish that any confidential information had been improperly obtained.

I would allow the appeal to the extent that I would set aside the orders made by Lee J., (including the order as to costs) but not the declarations made by him. Subject to that I would dismiss the appeal, and order the appellant to pay the respondent's costs of the appeal to be taxed.

IN THE SUPREME COURT OF QUEENSLAND No. 366 of 1990

FULL COURT

Before the Full Court

Mr. Justice McPherson

Mr. Justice Ryan

Mr. Justice Dowsett

BETWEEN:

SANTO ANTONIO COCO (Plaintiff) Respondent

-and-

NOEL RONALD NEWNHAM (First Defendant)

-and-

RONALD JOSEPH REDMOND (Second Defendant)

-and-

JOHN ROBERT MUHLDORFF SHAW (Third Defendant) Appellant

-and-

KENNETH CHARLES SCANLAN (Fourth Defendant)

JUDGMENT - DOWSETT J.

Delivered the Tenth day of May, 1991.

Counsel: W. Sofronoff Q.C. with him S. Herbert and H.B. Fraser for the Respondent
K.C. Fleming Q.C. with him K. Holmes for the Appellant

Solicitors: Gilshenan & Luton for the Respondent
Commonwealth Director of Public Prosecutions Solicitor for the Appellant

Hearing dates: 12-14th March, 1991.

IN THE SUPREME COURT OF QUEENSLAND No. 366 of 1990

FULL COURT

BETWEEN:

SANTO ANTONIO COCO (Plaintiff) Respondent

-and-

NOEL RONALD NEWNHAM (First Defendant)

-and-

RONALD JOSEPH REDMOND (Second Defendant)

-and-

JOHN ROBERT MUHLDORFF SHAW (Third Defendant) Appellant

-and-

KENNETH CHARLES SCANLAN (Fourth Defendant)

JUDGMENT - DOWSETT J.

Delivered the Tenth day of May, 1991.

I have read the reasons prepared by McPherson S.P.J., and Ryan J. I agree with their Honours that it was not appropriate for the learned Chamber Judge to intervene in pending criminal proceedings and that there was no evidentiary basis for the conclusion that the tape recordings contained confidential information able to be protected in equity.

I also agree with McPherson S.P.J. as to the approach to be taken to questions of admissibility of evidence in committal proceedings. No point is served by a committing Magistrate considering such questions if they are dependent upon findings of fact or the exercise of a discretion. These are matters for determination at the trial. There will also be little value in a committing Magistrate giving detailed consideration to arguable questions of relevance. Such issues will be re-ventilated at trial in any event. A Magistrate should, however, uphold any objection to evidence which is clearly irrelevant or inadmissible. To do so will often be the only way to prevent an abuse of process or a significant waste of time.

Section 46 of the "Invasion of Privacy Act" poses problems in committal proceedings. As the section prohibits the giving of evidence, once the point is taken, the

Magistrate must resolve it. Perhaps one solution would be to allow the defendant to cross-examine as to surrounding circumstances without actually receiving the evidence said to have been obtained in breach of s. 43 if that objection appears to have substance. Where committal cannot be justified without reference to such material, and a magistrate excludes it pursuant to s. 46, there could be no objection to the Crown later proceeding by way of ex officio indictment if there be a reasonable prospect that the trial Judge may take a different view.

Although I consider that the course taken at first instance was erroneous for procedural reasons, in view of the time expended to date and as the matter will have to be considered by the trial Judge, I intend to indicate my attitude to the substantive issue.

This is an appeal from a decision of the Chamber Judge declaring that certain tape recordings were made contrary to the terms of the "Invasion of Privacy Act 1971-1988" and that the contents of the tapes are not admissible in evidence in certain proceedings against the respondent to this appeal. There were other consequential orders, including orders designed to protect the alleged confidentiality of the contents of the tapes. The real point of the appeal is whether or not members of the Australian Federal Police were, at the time of making the tapes, subject to the general prohibition on the use of listening devices contained in s. 43(1) of that Act and whether such officers could be authorised as contemplated by s. 43(2). The matter is now expressly regulated by federal legislation, but the position was otherwise at the relevant time.

Section 43 of the "Invasion of Privacy Act 1971-1988" provides as follows:—

> "(1) A person is guilty of an offence against this Act if he uses a listening device to overhear, record, monitor or listen to a private conversation...

(2) Sub-section (1) of this section does not apply-

(a) ...;

(b) ...;

(c) to or in relation to the use of any listening device by-

(i) a member of the police force acting in the performance of his duty if he has been authorised in writing to use a listening device by-

(a) the Commissioner of Police;

(b) an Assistant Commissioner of Police; or an officer of Police of or above the rank of Inspector who has been appointed in writing by the Commissioner to authorise the use of listening devices,

under and in accordance with an approval in writing given by a Judge of the Supreme Court in relation to any particular matter specified in the approval;

(ii) An officer employed in the service of the Commonwealth in relation to customs authorised by a warrant under the hand of the Comptroller-General of Customs and Excise to use a listening device in the performance of his duties;

(iii) a person employed in connection with the security of the Commonwealth when acting in the performance of his duty under an Act passed by the Parliament of the Commonwealth relating to the security of the Commonwealth.

(3) In considering any application for approval to use a listening device pursuant to sub-paragraph (i)(c) of subsection (2) of this section a Judge of the Supreme Court shall have regard to-

(a) the gravity of the matters being investigated;

(b) the extent to which the privacy of any person is likely to be interfered with; and

(c) the extent to which the prevention or detection of the offence in question is likely to be assisted,

and the Judge may grant his approval subject to such conditions, limitations and restrictions as are specified in his approval and as are in his opinion necessary in the public interest.

(4) ...

(5) ...

(6) ...

(7) ...

(8) ..."

Section 46(1) of the Act provides:—

> "Where a private conversation has come to the knowledge of a person as a result, direct or indirect of the use of a listening device used in contravention of section 43 of this Act, evidence of that conversation may not be given by that person in any civil or criminal proceedings."

The fourth defendant was an inspector in the Police Force of Queensland. On 26th October, 1989 he applied to Carter J. in chambers for an approval pursuant to s. 43 of the "Invasion of Privacy Act". As a result, an order was made in the following form:—

> "... I hereby approve pursuant to Section 43 of the Invasion of Privacy Act 1971-1988, the use of listening devices in connection with the matter of police investigations relating to corruption including an offence of corruptly influencing Commonwealth officers

under s. 73(3) of the Crimes Act 1914, such approval being as follows:

(1) that Kenneth Charles Scanlan of the Queensland Police Force by himself or by means of any other person engaged in or, assisting the investigation of the said matter, use any listening device or devices capable of recording, overhearing, monitoring or listening to a private conversation simultaneously with its taking place, such listening device or devices to be installed in premises occupied by Santo Antonio Coco at 11 Anzac Road, Carina, and premises occupied by Cosco Holdings Pty. Ltd. at corner of Antimony and Emery Street, Carole Park in the state of Queensland.

(2) that this authorisation apply until 12 noon on the 23rd day of November, 1989 or until further order.

AND I do further order that such approval be subject to the following conditions-

(1) that any authorised police officer or person engaged in, or assisting the investigation of the said offence, to enter and remain upon the said premises for the purpose of installing, maintaining, servicing and retrieving the said listening device or devices.

(2) that no such listening device or devices shall be used to record any conversation between Santo Antonio Coco, and his legal advisers.

(3) that no notice or report relating to this application shall be published and no record of the application, summons and affidavit, or of any approval or order given or made thereon shall be available for search by any person except by direction or order of a judge of this honourable court.

(4) that the intended procedures set forth in the affidavits of Kenneth Charles Scanlan and John William Adams both sworn on the 26th day of October, 1989 be complied with."

With McPherson S.P.J. and Ryan J., I doubt the validity of the authorization of access and the legality of any access pursuant thereto. Such illegality may be a basis

for the discretionary exclusion of evidence pursuant to the decision in Bunning v. Cross (1978) 141 C.L.R. 54. There has been no appeal against the order of Carter J., although some doubt has been expressed as to whether an appeal lies. I am inclined to think that there is a right of appeal pursuant to s. 10 of "The Judicature Act of 1876". It is not presently necessary to resolve this point.

The Order of Carter J. refers to the affidavit of Kenneth Charles Scanlan sworn on 26th October, 1989. In that affidavit Inspector Scanlan stated that-

> "The following members of the Australian Federal Police Technical Unit authorised in writing by me will assist in the installation of the listening devices at the premises..."
>
> (A list of names followed.)
>
> Scanlan further stated that:—
>
> "To provide sufficient resources to cover monitoring, listening, recording and to act on information relevant to the investigation for the period the listening devices are in use, the following persons will be authorised in writing by me to monitor the listening devices and to listen and record and to act on information relevant to the investigation under and in accordance with any approval...
>
> (A list of names followed.)
>
> "Additional persons will only be authorised by me should circumstances so require to cover rostered days off, leave, court commitments, other unforeseen absences and to met investigational requirements should the need arise."

As far as I am aware, nothing depends upon the specific identity of any person allegedly so authorised, nor does anything presently depend upon the fact that some of the nominated persons were not police officers. The issue before us is whether or not the purported authorization of officers of the Australian Federal Police

under s. 43 was valid and whether or not such officers required such authorisation in any event.

The reference in s. 43(2)(c)(i) to, "a member of the police force" suggests an intended reference to a member of an identifiable force, probably that of Queensland. The subsequent references to the Commissioner, an Assistant Commissioner or an officer of or above the rank of Inspector fall within s. 35(a) of the "Acts Interpretation Act 1954-89" which states:—

> "In every act, unless the contrary intention appears:
>
> (a) references to any officer or office shall be construed as references to such officer or office in and for this state;
>
> ..."

In each case, the reference is therefore, a reference to an officer of that rank in the Queensland Police Force. Consistently the expression, "a member of the police force", should be similarly construed.

The Australian Federal Police is constituted by the "Australian Federal Police Act 1979" (A.F.P.A.). This Act repealed the "Commonwealth Police Act 1957" (C.P.A.), pursuant to which the Commonwealth Police Force had been constituted.

Section 9(2) of the A.F.P.A. provides:—

> "Where any provisions of a law of a State apply in relation to offences against the laws of the Commonwealth or of a Territory, those provisions so apply as if:—
>
> (a) any reference in those provisions to a constable or to an officer of police included a reference to a member;
>
> (b) any reference in those provisions to an officer of police of a particular rank included a reference to a member holding the rank that is, or is declared by the regulations to be, the equivalent of that rank."

I consider that s. 43 of the "Invasion of Privacy Act" contains references of the kind identified in paras. (a) and (b) of s. 9(2), leaving for determination the question as to whether the provision applies, "in relation to offences against the laws of the Commonwealth..."

Section 12 of the A.F.P.A. provides:

> "A member or staff member is not required, under, or by reason of, a law of the State or Territory:—
>
> (a) to obtain or have a licence or permission for doing any act or thing in the exercise of his powers or the performance of his duties as a member or staff member; or
>
> (b) to register any vehicle, vessel, animal or article belonging to the Commonwealth."

Both sections appeared in nearly identical terms in s. 6 of the C.P.A..

Section 9(2) must be construed in the context in which it appears. The A.F.P.A. establishes the Australian Federal Police, prescribes its functions and confers appropriate powers upon its members. The principal function is the provision of police services in the Australian Capital Territory and other federal territories and in relation to laws of the Commonwealth and property of the Commonwealth (s. 8). Section 9 confers power on members for the performance of their duties. I infer that important functions of the Australian Federal Police are the prevention, investigation and detection of breaches of federal law. It is in this context that the application of a law of a State, "in relation to offences against the laws of the Commonwealth" must be identified for the purposes of s. 9(2).

Obviously, a State law cannot impose liability for offences against the laws of the Commonwealth nor exonerate any person in respect of such offences. Thus section 9(2) cannot be intended to deal with State laws which affect the

liability or immunity of members of the Australian Federal Police or other persons under federal law. What is the intended ambit of operation of section 9(2)? Once it is established, as it is by the reasoning of McPherson S.P.J. and Ryan J., that officers of the Australian Federal Police are subject to the laws of the States to the extent that those laws are not rendered inoperative by inconsistent federal legislation or otherwise invalidated or overridden by the Constitution, it follows that members of the Australian Federal Police will, on occasions, need the same statutory assistance as is extended to police in the various States. To the extent that State police require statutory powers and immunities, so will Federal police in the absence of federal legislative assistance.

I have demonstrated that s. 9(2) cannot be directed to the question of liability under, or immunity from federal law. In the context of the present legislation, it is clear that s. 9 is concerned with the provision of police services by the Australian Federal Police in relation to offences against federal laws, in other words, the prevention, inspection and detection of offences against such laws. It is when State laws apply "in relation to" the provision of such services "in relation to" offences against laws of the Commonwealth that s. 9(2) operates. Section 43 obviously applies to the investigation of the offence against Commonwealth law referred to in the order of Carter J., otherwise no approval would have been necessary, subject to the general submission that a member of the Australian Federal Police is not subject to State law in the discharge of his duty (which submission is demonstrated to be erroneous by McPherson S.P.J. and Ryan J.) and subject to the argument concerning the application of s. 12 of the A.F.P.A..

In the present case, s. 43 prima facie prevents an officer of the Australian Federal Police from using listening devices to investigate suspected breaches of federal law. Thus the "Invasion of Privacy Act" applies in relation to such offences in the way prescribed by s. 9(2)

of the A.F.P.A. For this reason, the reference to "a member of the police force" in s. 43(2)(c) includes a reference to a member of the Australian Federal Police by virtue of s. 9(2). Similarly, the references to the Commissioner, an Assistant Commissioner or an officer of or above the rank of Inspector in s. 43 include references to ranks in the Australian Federal Police which are, or are declared by regulation to be the equivalents of those ranks. In the absence of such regulations, evidence may be led to establish equivalence.

The effect of this construction of s. 43 is not simply to empower senior officers of the Australian Federal Police to authorise other officers of that force in accordance with s. 43. Section 43 is not merely to be read mutatis mutandis as if it referred to Australian Federal Police instead of Queensland Police. The section is to be construed as including references to members of the Australian Federal Police and to members of that force holding equivalent ranks. Thus a senior officer in the Queensland Police may authorise a member of the Australian Federal Police pursuant to s. 43(2)(c)(i).

In the present case, it was appropriate for the Acting Commissioner of the Queensland Police Force to appoint Scanlan to authorise the use of listening devices and for Scanlan to authorise members of the Australian Federal Police to use such devices, assuming of course that this was done in the performance of their duties.

This interpretation of s. 9(2) explains the absence of any reference to the Australian Federal Police or the Commonwealth Police in s. 43(2)(c), which absence is otherwise curious in light of the inclusion of the Commonwealth officers referred to in paras. (ii) and (iii) of sub-s. 2(c). At the time of enactment of the "Invasion of Privacy Act", a section similar to s. 9(2) was already in place in the C.P.A.. Probably, it was not thought necessary to make any specific reference to the Commonwealth Police because of that provision.

This leaves for consideration the extent of the authorisation given by the Acting Commissioner to Scanlan. In order that the use of a listening device be lawful pursuant to s. 43(2)(c), there must be an approval in writing by a Judge of the Supreme Court, and the use by a particular police officer must be authorised by the Commissioner, an Assistant Commissioner or an officer of or above the rank of Inspector who, in the latter case, has been appointed in writing by the Commissioner to authorise the use of such devices. The appellant relies upon a form of authority dated 27th October, 1989 as appointing Scanlan for this purpose. The authority is in the following form:—

> "I, Ronald Joseph Redmond, Acting Commissioner of Police for the State of Queensland, hereby authorise Kenneth Charles Scanlan, Detective Inspector of Police in the use of listening devices under and in accordance with an approval given in writing by Mr. Justice W. Carter, a Judge of the Supreme Court of Queensland at Brisbane on the Twenty-sixth day of October, 1989, in connection with the investigation referred to in the said approval.
>
> A copy of the said approval is attached hereto.
>
> This authority extends as from the time and date of this authority until the conclusion of the investigation in connection with which the said approval has been given pursuant to the said section."

It should be noted that the authority is, "in the use of listening devices under and in accordance with an approval given in writing by Mr. Justice W. Carter". A copy of that approval is attached to and, by implication incorporated into the authority. The authority is, "in the use of ...", not "to use ...".