IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A.1051/84

IN THE MATTER of Rules 466 and 466A of the Code of Civil Procedure

BETWEEN NIGEL JOHN BARNARD of Auckland, Police Constable

Applicant

A N D ALFRED LORRAINE WILLIAMS and JACK WARWICK DE VERE both of Auckland, Justices of the Peace

First Respondents

A N D JASON RUKA, ARTHUR ARAMA HOUGHTON and DUNCAN KING of Auckland, Prison Inmates

Second Respondents

Hearing: 5 October 1984

Counsel: Fardell and Parker for appellant
Illingworth and Bioletti for Ruka
Koya and Podwin for Houghton and King

Judgment: 31 October 1984

JUDGMENT OF HENRY J.

On 26 July 1984 informations were laid against the Second Respondents charging them with offences of attempted murder and of causing grievous bodily harm, contrary to sections 173 and 188(1) of the Crimes Act 1961

respectively. Those informations are in respect of indictable offences as defined by the Summary Proceedings Act 1957, and a date for the preliminary hearing was set down for 31 August 1984 in the District Court at Henderson. That hearing commenced, being presided over by the First Respondents. At the commencement, counsel for the prosecution applied for certain orders under s.156(2) (a) (ii) and s.156(2) (b) and s.156 (2) (c) of the Summary Proceedings Act 1957 relating to clearing the Court and the forbidding of publication, which orders were granted without objection from counsel for the Second Respondents. Counsel for the prosecution also applied for a further order in the following terms :

> "That the witnesses, other than the alleged victim of the charges mentioned and referred to in paragraphs 3 and 4 hereof whose name was already widely known and had been published at an earlier date, be permitted to give their evidence without stating their names and addresses in open Court and also to be permitted to write their names and addresses on pieces of paper to be shown only to the First Respondents, and that the aforementioned alleged victim be permitted to write his address down on a piece of paper and that the said piece of paper be shown only to the First Respondents in reliance on the inherent jurisdiction vested in the First Respondents as an incident to their jurisdiction pursuant to Section 5 of the Summary Proceediongs Act 1957 to conduct preliminary hearings of indicatable offences."

That application was opposed, and was then refused by the First Respondents. Counsel for the prosecution then made a further application, in terms similar to that set out above, but with the additional provision that the paper

upon which the alleged victim was to write his address could be shown to counsel for the Second Respondents as well as to the First Respondents. That application was also opposed and refused.

The Appellant now seeks relief by way of review under the Judicature Amendment Act 1972, and alternatively by way of certiorari quashing the refusals, and mandamus requiring the First Respondents to hear the applications according to law. Before this hearing the First Respondents properly sought and were granted leave to withdraw, having indicated they would abide the decision of the Court.

The first enquiry is as to the jurisdiction of the First Respondents, in conducting the preliminary hearing of the informations to which I have referred, to make either of the orders sought. It was submitted by Mr Fardell that the District Court has an inherent jurisdiction which would enable it, in appropriate circumstances, to make those orders. For the Second Respondents, it was submitted that there was no such jurisdiction.

The District Court, as it now is, was constituted by s.3(1) of the Magistrates' Courts Act 1947. Its criminal jurisdiction was formerly contained in ss.24-28 of that Act, but is now contained in Part I of

the Summary Proceedings Act 1957. Section 5 of that Act empowers the District Court "presided over by a District Court Judge or by two or more Justices to conduct the preliminary hearing of an indictable offence". Part V of the Act deals with the preliminary hearing of indictable offences.

The question which arises is whether the District Court possesses what is described as an inherent jurisdiction, by which term is meant a power to exercise jurisdiction otherwise than pursuant to some express or implied statutory provision. Such is undoubtedly held by the High Court, and its existence has long been recognized. Section 16 of the Judicature Act 1908 provides :

> "16. General Jurisdiction - The Court shall continue to have all the jurisdiction which it had on the coming into operation of this Act and all judicial jurisdiction which may be necessary to administer the laws of New Zealand."

On the coming into effect of that Act, indeed since 1841, the (now) High Court possessed the same jurisdiction as the common law Courts of England, and that has included the so-called inherent jurisdiction. The latter provision of s.16 is itself wide, giving the Court as it does "all judicial jurisdiction necessary to administer the laws of New Zealand".

This inherent jurisdiction is not anywhere defined, nor are its limits established; it has been and no doubt will continue to be invoked according to the varying demands of circumstances to enable this Court to carry out its full functions as a Court of superior jurisdiction . By contrast, the criminal jurisdiction of the District court is limited by the terms of the statute creating the jurisdiction. There is no s.16 equivalent applicable, and there is no other basis from which the general inherent jurisdiction to which I have been referring could emanate. The broad concept of inherent jurisdicton therefore cannot be relied upon.

That, however, does not end the matter, because Mr Fardell for the applicant recognized that there could be no substantive inherent jurisdiction vested in the District Court, but he argued that there is inherent jurisdiction available for procedural matters, which could be invoked where necessary for the due administration of justice by the Court in exercising its substantive jurisdiction. The ability to exercise the power in question was necessary, it was said, to enable the Court properly to carry out its statutory function of conducting the preliminary hearing. I accept that the District Court has an inherent power to control the conduct of its proceedings. That power is a necessary adjunct to enable it to function effectively, and will cover a wide variety

of matters pertaining to procedure so as to ensure that justice ~~is~~ duly administered. One of the inherent powers exercisable by a court of criminal jurisdiction (subject, of course, to any relevant statutory provisions) is the power to conduct a hearing in camera. That jurisdiction would seem to have been recognized as existing in the inferior as well as superior courts. Such a power was held to exist, for example, in a general court martial in Rex v Governor of Lewes Prison, ex parte Doyle [1917] 2 KB 254, 271. In Attorney-General v Leveller Magazine Limited and Ors [1979] AC 440, Magistrates sitting in committal proceedings acceded to a proposal that a witness was to be referred to by the pseudonym of "Colonel B", with evidence as to his real name and address being written down and disclosed only to the Court, the defendants, and their legal representatives. Lord Diplock did not doubt the power to make such an order existed, even though it derogated from the general principle of open justice. Similarly in Bosch v Ministry of Transport [1979] 1 NZLR 502, Somers J. held that a Magistrate's Court had inherent jurisdiction to dismiss an information on the grounds of abuse of procedure. The existence of an inherent power in an inferior court to enforce its rules of practice and to suppress an abuse of its process would ~~appear to~~ have been recognized in Connelly v Director of Public Prosecutions [1964] AC 1254, ~~Lord Morris saying, at~~ p.1301-1302.

> " There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process.
> ... ...
> The power (which is inherent in a court's jurisdiction) to prevent abuses of its process and to control its own procedure must in a criminal court include a power to safeguard an accused person from oppression or prejudice."

The question which then arises is whether the orders in question can properly be said to be an incident of the control of the Court of its procedure, and if so whether that particular control is in any way affected by statutory provision. For the applicant, reliance was placed on the authorities where, in varying circumstances, the Courts have exercised an inherent jurisdiction to suppress publication of the names of witness or to clear the Court. Examples in New Zealand are Taylor v Attorney-General [1975] 2 NZLR 675, and Broadcasting Corporation of New Zealand & Anor v Attorney-General [1982] 1 NZLR 120. Examples in the United Kingdom are R v Socialist Workers Printers & Publishers Limited & Anor, ex parte Attorney-General [1975] QB 637 and Attorney-General v Leveller Magazine Limited [1979] AC 440. In those cases where the names of witnesses have been suppressed and they have been referred to by letters or symbols only, it seems

that the defendant's counsel were aware of the true identity of the witness. In Taylor, although that fact is not clear from the report, there was an express consent by the defence to the order which it was alleged had been breached by Mr Taylor, resulting in the contempt proceedings. It is also pertinent to note that in Leveller Magazine Lord Diplock noted, at p.447 :

> "On the third day, November 10, counsel for the prosecution made an application that the next witness whom he proposed to call should, for his own security and for reasons of national safety, be referred to as "Colonel A" and that his name should not be disclosed to anyone. The magistrates, upon the advice of their clerk, ruled correctly but with expressed reluctance, that this would not be possible and that although the witness should be referred to as "Colonel A", his name would have to be written down and disclosed to the court and to the defendants and their counsel. The prosecution decided not to call that witness and the proceedings were adjourned." (underlining added)

It is pertinent to note that in no case to which I was referred by counsel has there been made a suppression order which has excluded a defendant without his consent from being informed of the name of a witness testifying against him. In my opinion, there is a great gulf between prohibiting publication of evidence, and of the names of a witness, and denying the right of a defendant to know the identity of a person called to give evidence against him.

The difference, in my view, goes to the very essence of criminal jurisprudence and what is understood to be a basic requirement of fair trial - the right of a person to know the case against him, sometimes referred to as the audi alteram partem rule. If ever there was any doubt that the right to know the evidence was of vital importance it was laid to rest by the Court of Appeal in The Minister of Foreign Affairs and The Minister of Immigration v Benipal (CA.147/83, 20 July 1984) which involved not criminal proceedings but judicial review, and its principles would therefore apply a fortiori. In Benipal, the purported exercise of the High Court's inherent jurisdiction to receive affidavit evidence not available to the other party was held to be without legal justification, and to be an infringement of natural justice. To my mind, the name of a witness, i.e. his identity, is, or may be, just as important to a defendant as the evidence which he gives. The ability to see a witness is insufficient, the visual appearance possibly meaning nothing, and not leading to identification. The name could well lead to a line of enquiry which will throw doubt or even destroy the value of testimony. Two examples will suffice to demonstrate the point. Cross-examination on character and credibility is inhibited, if not rendered impossible, by lack of knowledge of identity: a witness gives evidence of seeing the defendant at a certain place at a certain

time, the witness not being known or familiar to the defendant by sight - the name, however, either triggers a recollection or leads to an enquiry which establishes that the witness was at the crucial time somewhere else altogether.

To make the orders sought is to change the character of the proceedings and to ignore what I believe to be a basic principle. The preliminary hearing is the first step in what is an adversary proceeding in the full sense - a criminal trial, in which the liberty of the subject is in jeopardy. Even allowing the information to be disclosed to counsel is, in my view, no answer. As was said cogently by Richardson J. in Benipal, the giving of an opportunity to counsel to inspect the document - or see the paper with the witnesses' name written on it - is not an acceptable alternative. Exceptional procedural steps taken, but rarely, in civil cases, such as restricting secret process information to counsel, and the special treatment afforded wardship proceedings in the United Kingdom, have no relevance to the present question. Neither do I think the power to clear the Court or to restrict or prohibit publication either of evidence or of the names of witnesses assists to establish the existence of this further power, aimed as it is at something more fundamental than trial in public, something

which in my view is substantive and not procedural. The negation of the right of a defendant to know the identity of a witness is not the control of the procedure of the Court - it is an infringement of a right which may be as important as the right to be present at one's trial, a right which I believe can only be interfered with pursuant to statutory provision, certainly at District Court level.

In addition, there are provisions in the Summary Proceedings Act 1957 itself which to my mind provide strong support for the views I have attempted to express, and which collectively point to the exclusion of any such inherent jurisdiction even if it did formerly exist. I refer first to susbsections (1) and (2) of s.156 which give an express power to clear the Court and to forbid a report of the preliminary hearings. They read as follows:

> "156(1) The room or building in which any preliminary hearing takes place shall not be deemed to be an open Court.
>
> (2) Where the Court is of opinion that the interests of justice, or of public morality, or of the reputation of any victim of any alleged sexual offence or offence of extortion, or of the security or defence of New Zealand so require, and in no other case, it may make any one or more of the following orders :

(a) An order forbidding poublication of any report or account of the whole or any part of -

(i) The evidence adduced; or
(ii) The submissions made:

(b) An order forbidding the publication of the name of any witness or witnesses, or any name or particulars likely to lead to his or their identification;

(c) An order excluding all or any persons other than the informant, the defendant, any barrister or solicitor engage in the proceeings, and any officer of the Court from the whole or any part of the proceedings:

PROVIDED THAT the power conferred by paragraph (c) of this subsection shall not, except where the interests of security or defence so require, be exercised so as to exclude any barrister or solicitor or any accredited news media reporter."

These provisions, which were introduced in 1982, are similar to those contained in the present s.375 of the Crimes Act 1961, also amended in 1982. In the Taylor case a majority of the Court of Appeal held that the old s.375 did not oust the inherent jurisdiction of the High Court to order suppression of names of witnesses. In the Broadcasting Corporation case, again by a majority, the Court of Appeal held that the previous s.375 (1) dealing with the exclusion of persons from proceedings, did not interfere with the High Court's inherent jurisdiction to make exclusion orders. However the 1982 amendment to both statutes added the significant words "and in no other case" to subsection (2).

It seems to me that these provisions now form a code in relation to clearing the Court and to forbidding publication, with no room being left for the exercise of any inherent jurisdiction. Of particular relevance is sub-paragraph (2) (c) of the new s.156, which expressly exempts a defendant and any barrister or solicitor engaged in the proceedings from the exclusionary provisions. Whether or not it could be said that the refusal to divulge the name of a witness to a defendant and his counsel was an exclusion of them from part of the proceedings, and I am inclined to think it could well be, the whole spirit and intent of the section and indeed of the Summary Proceedings Act 1957 itself, is to ensure full participation of defendant and counsel. The orders now in question are in my view clearly in conflict with that general spirit and intent.

Of relevance also is s.161(1), which gives a defendant the unrestricted right of cross-examination. Such cross-examination could well include questions as to the true name and identity of the witness, matters which could hardly be ruled out as not relevant. Also, s.161(2) requires the deposition to be read over and signed by the witness, with a copy of the deposition being an entitlement of the defendant (s.183). Without some measure of erasure or alteration taking place, it is

difficult to see how those provisions could be complied with as the deposition, at least in its original form, must contain the true name and signature of the witness. Whether their erasure from the "copy" would prevent it from being a copy is no doubt open to argument, but again the spirit and intent of the statute would appear to be avoided if that were done.

The conduct of a preliminary hearing in indictable cases is an important part of the trial procedure. It is designed to ensure that a person is not put on trial before a jury without the prosecution having first established to the satisfaction of the District Court that the evidence is sufficient for that purpose. The depositions must form the basis for any indictment which is then presented, and to a large extent they delineate the evidence which can be adduced at the trial. They also serve the important function of advising the defendant not only the nature of the charge against him, but also of the evidence which it is alleged establishes that charge. As I have said, it is my view that the identity of a witness is always relevant and in many cases knowledge of that identity is essential for the purposes of the proper conduct of the defence. Any restriction on the right to that knowledge should, I believe, be clearly laid down by

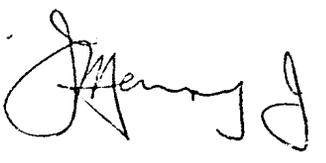
statute, and cannot be imposed by recourse to the procedural powers of the court to control its process.

I appreciate the force behind Mr Fardell's submissions for the Applicant, and the need to ensure the Court's businesss is carried out and witnesses given proper protection to achieve that end, but that cannot override the right of a defendant to a fair trial according to established principle. Interference with the course of justice has always been a serious offence, and the authorities must always be alert to the prevention, as well as the detection, of any such activities. If to achieve that it is thought necessary to interfere with basic or substantive principle, then that should be done by statutory intervention after proper debate as to its appropriateness.

I have therefore reached the conclusion that the Justices had no jurisdiction to make either of the orders in question. It is accordingly unnecessary to consider whether the applicant could obtain the relief sought in either set of proceedings, but I can indicate my view that if grounds had been made out, then relief would have been both available and appropriate.

I mention one further matter. The orders referred to the addresses of witnesses as well as to their names. It is commmon practice for a witness to give, for example, "Auckland" as his address and not to detail his residential abode. This indicates that the residence may not be of particular relevance. It may well be in some circumstances for proper reasons a witness prefers not to disclose those details. Without making any final decision on the issue, it seems to me it may then be proper to allow a witness to refrain from giving those details, but of course still leaving it open for cross-examination, if counsel responsibly considers the ascertainment of them relevant for the proper purposes of the trial. It would not, however, be appropriate for this Court to make any orders in that regard in the present proceedings.

The application for review is dismissed, as is the application for orders for the issue of the prerogative writs of certiorari and mandamus.



Solicitors:

Crown Solicitor, Auckland, for applicant

D C S Reid, Esq., Auckland, for respondent Ruka

M I Koya, Esq., Auckland, for respondents Houghton and Kingi

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A.1051/84

Mr. Fardell (with Parker) appellant
31/10/84

Mr. Illingworth (with Bioletti) — Ruka
Sec/Notified 31/10/84

Mr. Koya (with Podwin) — Houghton King
Sec. Notified 31/10/84

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BETWEEN NIGEL JOHN BARNARD of Auckland, Police Constable

Applicant

A N D ALFRED LORRAINE WILLIAM and JACK WARWICK DE VERE both of Auckland, Justices of the Peace

First Respondents

A N D JASON RUKA, ARTHUR ARAMA HOUGHTON, and DUNCAN KING of Auckland Prison Inmates

Second Respondents

Reserved Decision delivered by me this 31st day of October 1984 at 10:30 am

J Wilson
Deputy Registrar

JUDGMENT OF HENRY, J.

Delivered at AUCKLAND

this 31 day of October 1984