

HIGH COURT OF AUSTRALIA

GAGELER CJ,
EDELMAN AND BEECH-JONES JJ

CHIEF COMMISSIONER OF POLICE

APPLICANT

AND

VINCENZO CRUPI & ANOR

RESPONDENTS

Chief Commissioner of Police v Crupi
[2024] HCA 34
Date of Hearing: 20 August 2024
Date of Judgment: 11 September 2024
M83/2023

ORDER

- 1. Special leave to appeal is granted in respect of the applicant's first proposed ground of appeal.*
- 2. Appeal allowed.*
- 3. Set aside the orders of the Supreme Court of Victoria made on 16 November 2022.*
- 4. Remit the matter to the Supreme Court of Victoria for determination.*

On appeal from the Supreme Court of Victoria

Representation

S J Maharaj KC with C J Tran for the applicant (instructed by Victorian Government Solicitor's Office)

D A Dann KC with L Z Richter for the first respondent (instructed by Stary Norton Halphen)

C T Carr SC with H L Canham appearing as amici curiae

Submitting appearance for the second respondent

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Chief Commissioner of Police v Crupi

Practice and procedure – Adequacy of reasons – Public interest immunity – Where s 130 of *Evidence Act 2008* (Vic) required weighing of competing public interests for and against disclosure of information or documents – Where first respondent charged with murder – Where applicant resisted disclosure of documents concerning an informer – Where disclosure likely to lead to identification of informer and seriously risk informer's safety – Where primary judge found some documents likely to be of substantial assistance to first respondent's defence – Where primary judge's reasons consisted of five paragraphs – Whether primary judge complied with obligation to give adequate reasons by not disclosing process required by s 130(1).

Words and phrases – "adequate reasons", "balancing exercise", "disclosure", "document", "forensic significance", "informer", "public interest", "public interest immunity", "weighing process".

Evidence Act 2008 (Vic), ss 130, 131A.

1 GAGELER CJ, EDELMAN AND BEECH-JONES JJ. This is an application for special leave to appeal from a decision of the Supreme Court of Victoria that ordered the Chief Commissioner of Police to produce documents concerning an informer in circumstances where it was found that the information in at least some of the documents was likely to be of substantial assistance to the defence of a person charged with murder. The Chief Commissioner objected to the production, contending that, inter alia, such production was likely to lead to the identification of the informer and seriously risk his or her safety.

2 The reasons of the primary judge were extremely brief. They did not disclose any process of weighing the competing public interests for and against production as required by s 130(1) of the *Evidence Act 2008* (Vic), and they did not justify the order for production that was made. In not doing so, the primary judge did not comply with his obligation to give adequate reasons. A purported appeal from the primary judge's decision to the Court of Appeal of the Supreme Court of Victoria (Emerton P, Niall and Taylor JJA) was dismissed for want of jurisdiction.¹ In the exceptional circumstances of this case, special leave to appeal to this Court from the primary judge's decision should be granted and the appeal allowed.

Background

3 On 9 November 2018, the first respondent, Vincenzo Crupi, was charged with the murder of Giuseppe "Pino" Acquaro. The first respondent has been on bail since March 2021. Mr Acquaro was a solicitor who had provided information to the police. He was shot on 15 March 2016 and died from his wounds. The Court of Appeal noted that it was likely that, at his trial, the first respondent would submit that there were other persons who had a motive to kill Mr Acquaro.

4 The applicant in this Court, the Chief Commissioner of Police, disclosed a substantial number of documents to the first respondent about Mr Acquaro and the threats to his life. However, the applicant sought to resist disclosure of additional documents, comprising approximately 600 pages ("the PII material"), on the ground of public interest immunity because disclosure might reveal the identity of an informer ("Informer Z") or enable his or her identity to be ascertained. An application to resist disclosure of the PII material was heard and dismissed by the primary judge on 16 November 2022.

5 The second respondent to this application, the Director of Public Prosecutions (Vic), did not play any active part in the application before the primary judge. The first respondent did not have access to the PII material and,

1 *Chief Commissioner of Police v Crupi* (2023) 72 VR 280.

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accordingly, did not take any active part in that application either. However, the primary judge had the assistance of submissions from amici curiae who had access to the PII material. The primary judge's reasons consisted of five paragraphs. The only substantive reasoning of the primary judge was as follows:

"I am persuaded by the written submissions and the oral submissions of the amici that in relation to [Informer Z] that there is good reason to think that should *that information* ... be disclosed to the defence, that it may be of substantial assistance to the defence in the conduct of their case.

Indeed I would go further and say that based on the reasons advanced by the amici - I make particular reference to their written submissions - it seems to me that *it* is likely to be of substantial assistance to the defence in the conduct of their case.

I am therefore of the view that the [applicant] ... has not made good his claim in relation to what I will call the [Informer Z] material, and ... I reject his application." (emphasis added)

6 The primary judge did not expressly state what "that information" was. It can be inferred that it was a reference to information concerning Informer Z and the death of Mr Acquaro set out in the written submissions of the amici curiae that was obtained from some of the PII material.

7 The primary judge ordered that the applicant serve a redacted version of the PII material on the amici curiae, but ordered that the redactions be limited to material that was *not* identified in the submissions of the amici curiae as "possibly" being of substantial assistance to the first respondent in the conduct of his defence to the charge of murder. The balance of the PII material was required to be produced in an unredacted form. The amici curiae were ordered to notify the Supreme Court as to whether the redacted material would constitute sufficient disclosure to the first respondent.

8 Although the decision was of considerable importance, as the applicant was not a party to the proceeding he was unable to bring an appeal to the Court of Appeal from the decision.² The applicant thus sought to have the primary judge reserve a question of law for the Court of Appeal. After the first proposal for reserved questions was rejected by the Court of Appeal as not raising questions of

2 Criminal Procedure Act 2009 (Vic), s 295.

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law,³ on 9 March 2023 the primary judge again purported to reserve two questions of law for the Court of Appeal under s 302 of the *Criminal Procedure Act 2009* (Vic), namely whether it was "open" to the primary judge to find that the public interest in disclosure outweighed the public interest in resisting disclosure of the PII material, and whether the primary judge committed an error of law "by failing to give adequate reasons". On 13 October 2023, the Court of Appeal held that the reserved questions were not questions of law for the purposes of s 302 and, thus, that it had no jurisdiction to answer them. Even so, the Court of Appeal noted that a decision to uphold or reject a claim for public interest immunity "can, and often will, have the potential to produce very grave consequences" and that "[t]hat is the situation in this matter".⁴ The Court of Appeal also expressed concern about the adequacy of the primary judge's reasons.⁵

Application for special leave to appeal

9 The applicant now seeks special leave to appeal from the primary judge's decision directly to this Court.⁶ The applicant seeks to raise two proposed grounds of appeal. The first ground concerns the inadequacy of the primary judge's reasons. The second ground concerns various matters relating to "the merits of the public interest immunity claim", including contentions that the public interest in maintaining the secrecy and confidentiality of the PII material was "at its highest" because "the uncontested evidence [was] that [Informer Z] faced a real risk of death and reprisals" and that, contrary to the primary judge's conclusion, the PII material would only be of "slight assistance" to the first respondent.

10 Initially, neither of the respondents took an active part in this application. However, as was the case before the primary judge, the Court received the benefit of careful and thorough written and oral submissions from amici curiae who had access to the PII material. The submissions of the amici curiae raised several matters that weighed against a grant of special leave to appeal, in particular the fragmentation of the process of criminal justice caused by interlocutory appeals⁷ and the substantial ongoing delay caused by this application to the first

3 *Chief Commissioner of Police v Crupi* (unreported, Court of Appeal of the Supreme Court of Victoria, 13 February 2023).

4 *Chief Commissioner of Police v Crupi* (2023) 72 VR 280 at 305 [105].

5 *Chief Commissioner of Police v Crupi* (2023) 72 VR 280 at 305-306 [106].

6 *Constitution*, s 73(ii). See also *Dimitrov v Supreme Court (Vic)* (2017) 263 CLR 130 at 143 [27].

7 See, eg, *R v Elliott* (1996) 185 CLR 250 at 257.

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respondent's trial. In addition, at the hearing of this application, senior counsel for the first respondent emphasised this delay and its causes in that it has been almost six years since the first respondent was charged and that numerous trial dates have been vacated for various reasons, including concerns over disclosure. It was also submitted that the absence of an available means of appeal by the applicant to the Court of Appeal was a factor weighing against a grant of special leave to appeal.

11 The application for special leave to appeal was referred to an oral hearing. The parties and amici curiae were advised that the hearing would be restricted to the first ground of the application, and that the parties and the amici curiae should be prepared to argue the full merits of that ground. The applicant and the amici curiae filed additional written submissions in relation to that ground and briefly supplemented those submissions. The first respondent also filed written submissions that were consistent with those of the amici curiae.

12 As noted, there are almost 600 pages of PII material, and their forensic significance is to be assessed by considering the contents of the 3,500 pages that have been disclosed to the first respondent during the pre-trial process against what is known about the issues in the trial. To assist the Court in determining the special leave application, the applicant and the amici curiae filed a selected portion of 130 pages of primary material that consisted of some of the material that has been disclosed to the first respondent and some redacted PII material.

13 Two matters are apparent from a review of the material that was provided. First, while there may be some reason to doubt the primary judge's conclusion about the value of the PII material to the first respondent, and leaving aside other matters tending against a grant of special leave to appeal, resolving a challenge to the primary judge's assessment of the forensic value of the PII material to the first respondent is a task this Court should not undertake. The requisite inquiry would be factually intensive as well as procedurally difficult given the extent of material that would need to be the subject of suppression orders. The inquiry would also not involve any matter of principle. Accordingly, special leave to appeal in respect of the second proposed ground of appeal is refused.

14 Second, the overwhelming likelihood is that the disclosure of the PII material would enable the identity of Informer Z to be ascertained and would therefore give rise to a real threat to his or her safety. Given the potential for a grant of special leave to appeal in cases such as this to fragment the process of criminal justice and delay criminal trials, it will only be an exceptional case in which this Court will grant special leave to appeal direct from a decision of a trial judge in criminal proceedings. However, as it is indisputable that, if the primary judge's orders are given effect to, it is highly likely that Informer Z will be identified, giving rise to a serious risk to his or her safety, and given the strength

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of the complaint about the adequacy of the primary judge's reasons, special leave to appeal on that ground should be granted.

The primary judge's reasons were inadequate

15 Section 130 of the *Evidence Act* is the Victorian legislative equivalent of the common law doctrine of public interest immunity. It applies to the admission of "information or a document" into evidence. However, its application is extended by s 131A to a circumstance where the production of material is required by a "disclosure requirement" that would result in the disclosure of the contents of a document or other information of a kind referred to, inter alia, in s 130. If the production is objected to, the court must determine the objection by applying the provisions in Pt 3.10, which includes s 130, "with any necessary modifications as if the objection to giving information or producing the document were an objection to the giving or adducing of evidence".⁸ A "disclosure requirement" means a "process or order of a court that requires the disclosure of information or a document".⁹ The Court of Appeal said that the applicant's objection was to be determined having regard to s 130. The parties and the amici curiae proceeded on that basis in this Court.

16 Section 130(1) provides that "[i]f the public interest in admitting into evidence information or a document that relates to matters of state is outweighed by the public interest in preserving secrecy or confidentiality in relation to the information or document, the court may direct that the information or document not be adduced as evidence". Section 130(4) provides a non-exclusive list of circumstances in which "information or a document may be taken for the purposes of [s 130(1)] to relate to matters of state", including that, if such information or document was adduced as evidence, it would "disclose, or enable a person to ascertain, the existence or identity of a confidential source of information relating to the enforcement or administration of a law of the Commonwealth or a State".¹⁰ Section 130(5) provides a non-exclusive list of matters to be considered for the purposes of s 130(1), including: the importance of the information or the document in the proceeding; the nature of the offence; and "the likely effect of adducing

8 *Evidence Act 2008* (Vic), s 131A(1).

9 *Evidence Act*, s 131A(2).

10 *Evidence Act*, s 130(4)(e).

evidence of the information or document, and the means available to limit its publication".¹¹

17 The applicant contended that the primary judge's reasons were inadequate as they failed to explain his Honour's finding that the material was "likely to be of substantial assistance" to the first respondent in the conduct of his defence. Although the applicant noted authority to the effect that the adoption of one party's submissions by a judge, and the acknowledgement of that adoption, "is one method of providing adequate reasons",¹² it was nevertheless contended that the primary judge's approach meant that various issues in dispute about the forensic significance of the PII material were not addressed. The applicant also contended that the primary judge failed to explain: why the balancing exercise contemplated by s 130(1) favoured disclosure; how the primary judge contemplated the material sought being of forensic utility to the first respondent; and why each contested document had to be disclosed, rather than only some of them. In relation to the latter contention, the applicant submitted that the primary judge's reasons did not explain the basis for making an order for the production of all the documents that were described by the amici curiae as "possibly being of substantial assistance" to the first respondent.

18 The amici curiae contended that the primary judge's adoption and acceptance of their submissions was sufficient to explain the forensic utility of the PII material to the first respondent. In relation to the balancing exercise, the amici curiae contended that the matters that tended against disclosure and the weight that should be given to them were not in dispute before the primary judge. The amici curiae contended that the applicant put his case on the basis that the outcome of the dispute about whether the material would be of any forensic assistance to the first respondent would be decisive of the balancing exercise required by s 130(1). The amici curiae further contended that the primary judge's orders of 16 November 2022 provided a regime for the identification, redaction, and subsequent disclosure of only part of the PII material, and that the applicant resisted any other form of disclosure, including by the use of an agreed statement of facts in lieu of disclosure. The first respondent's submissions were to similar effect.

19 Although the "content and detail of reasons 'will vary ...'" according to the jurisdiction of the court and the subject matter being considered, the usual baseline for adequacy of reasons is that they "identify the principles of law applied by the

11 *Evidence Act*, s 130(5)(d).

12 *James v Surf Road Nominees Pty Ltd* [2004] NSWCA 475 at [168].

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judge and the main factual findings on which the judge relied".¹³ In cases involving an assessment of public interest immunity, such as the balancing exercise in s 130(1) of the *Evidence Act*, the reasons that are publicly given or available will generally need to be expressed in a form that does not compromise the very interest that is held, or might be held on appeal, to be in need of protection. Nevertheless, the reasons must still reveal that the court has, in relation to the relevant part of each document or class of document, "evaluate[d] the respective public interests and determine[d] whether on balance the public interest which calls for non-disclosure outweighs the public interest in the administration of justice that requires that the parties be given a fair trial on all the relevant and material evidence".¹⁴

20 In *AB (a pseudonym) v CD (a pseudonym)*,¹⁵ this Court observed that "it is of the utmost importance that assurances of anonymity" given to informers are honoured and that, "[i]f they were not, informers could not be protected and persons would be unwilling to provide information to the police which may assist in the prosecution of offenders".¹⁶ The precise operation of s 130 need not be considered in this case as, on any view, the proper application of the provision involves a balancing exercise,¹⁷ and an extremely weighty consideration in that exercise is whether the material sought to be disclosed has any tendency to reveal the identity of a police informer, especially in circumstances where there is a risk to the informer's safety from disclosure.

21 It is also unnecessary to consider all of the applicant's complaints in relation to the primary judge's reasons. It suffices to conclude that, whether those reasons are construed in their own right or by reference to the amici curiae's submissions, they do not disclose any reasoning in relation to whether the public interest in the production (with or without redaction) of the PII material was "outweighed" by the public interest in preserving its secrecy or confidentiality as required by s 130(1). Further, there is no evidence to suggest that the primary judge engaged in that balancing exercise at the appropriate level for each individual document or class

13 *DL v The Queen* (2018) 266 CLR 1 at 12 [32].

14 *Sankey v Whitlam* (1978) 142 CLR 1 at 95-96.

15 (2018) 93 ALJR 59; 362 ALR 1.

16 *AB (a pseudonym) v CD (a pseudonym)* (2018) 93 ALJR 59 at 62 [12]; 362 ALR 1 at 5.

17 *Madafferi v The Queen* (2021) 287 A Crim R 380 at 389 [41].

of document in order to consider whether redactions in each document were required by the proper performance of the exercise in s 130(1).

22 It is true, as the amici curiae contended, that before the primary judge the weight to be attached to the preservation of the secrecy of the PII material was not in dispute. Before the primary judge, the amici curiae accepted that there was "credible material suggesting that an informer's safety is at real risk, and public knowledge that a source's expectations of confidentiality had been breached would certainly undermine the ability of police to recruit informers in future" and that "[t]hose matters require very significant weight in the balancing process". However, it was not accepted that, if the primary judge accepted the amici curiae's submissions concerning the forensic significance of the PII material, then no further assessment was required. To the contrary, the amici curiae submitted the matter was "close to the margins" and that "with such weighty matters on both sides of the scales, it is *open to conclude* that a fair trial requires disclosure of significant parts" of the material concerning Informer Z (emphasis added). The applicant's submissions were to no different effect on that point. Thus, the task of balancing the competing public interests was left to the primary judge to undertake.

23 Even accepting the primary judge's assessment of the forensic significance of the PII material, the potential for serious harm to be occasioned to Informer Z should disclosure be ordered, and the impact on the provision of criminal intelligence by other informers, were extremely weighty factors against ordering production. Even though the primary judge's decision was interlocutory, his Honour was obliged to explain how the balancing exercise was undertaken and what its outcome was. For example, was the consequence of refusing production of some or all of the documents that the first respondent would be denied a fair trial? In light of the material that had been disclosed, was there any means of disclosing parts of some of the documents that would still enable a fair trial to be had without disclosing the identity of Informer Z or the means of establishing his or her identity? How did the process of weighing the competing interests address the real potential for harm to Informer Z? His Honour's judgment did not reveal any reasoning in relation to the balancing exercise that his Honour undertook, much less the outcome of that exercise. The only remaining possibility is that his Honour did not undertake the balancing exercise at all. If his Honour undertook the balancing exercise, then his reasons were clearly inadequate in failing to reveal any aspect of how that was undertaken and the result. If, which is less likely, his Honour did not undertake that exercise then his Honour fundamentally failed to apply s 130(1). Either way, his Honour's decision cannot stand.

24 The applicant's complaint concerning the inadequacy of the reasons as a basis for supporting the orders made should also be upheld. Section 130(1) refers to undertaking a weighing process in relation to the admission of "information or a document" (emphasis added). His Honour's reasons only referred to the

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"information" identified in the submissions of the amici curiae and accepted the submission that the *information* was "likely to be of substantial assistance" to the first respondent. However, his Honour's orders required the production in unredacted form of all *documents* identified by the amici curiae as "possibly" being of substantial assistance to the first respondent. In the ordinary course, even if his Honour had provided adequate reasons for the disclosure of information that could be discerned from some of the documents that was likely to be of substantial assistance to the first respondent and which would or might tend to disclose the identity of Informer Z, there would still need to be a separate document by document (or class of document by class of document) analysis undertaken as to what documents were required to be produced and in what form. In the end result, the parties, the amici curiae and this Court are left to speculate as to how the primary judge's reasons justified the orders that were made.

25 It follows that the primary judge's orders will need to be set aside and the matter will need to be remitted to be decided afresh, either by the primary judge or by another judge at first instance. Though the procedure to be adopted on remitter will be for the judge conducting the hearing to determine, the judge might well be assisted were counsel for the applicant and the amici curiae to agree upon a short list of representative documents to which submissions could be directed and upon which the judge could rule and explain as far as possible in open reasons both their forensic significance and how the balancing exercise is undertaken and resolved in relation to them.

Disposition

26 The applicant's challenge to the adequacy of the primary judge's reasons must be upheld. The following orders should be made:

1. Special leave to appeal is granted in respect of the applicant's first proposed ground of appeal.
2. Appeal allowed.
3. Set aside the orders of the Supreme Court of Victoria made on 16 November 2022.
4. Remit the matter to the Supreme Court of Victoria for determination.