

MAGISTRATES COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Case Title: Peter Dean v Bernard Collaery (No 1); Peter Dean v Witness K (a pseudonym) (No 1)

Citation: [2018] ACTMC 29

Hearing Date(s): 7 November 2018

Decision Date: 9 November 2018

Before: Chief Magistrate Walker

Decision: See [24]-[27]

Catchwords: **CRIMINAL LAW** – JURISDICTION, PRACTICE AND PROCEDURE – Application under National Security Information (Criminal and Civil Proceedings) Act – Attorney-General Certificate – National Security Information – Miscellaneous Practice Cases
STATUTES – ACTS OF PARLIAMENT – Interpretation – Operation and Effect of Statutes

Legislation Cited: *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth)

Parties: Peter Dean (Informant)
Commonwealth of Australia
Bernard Collaery (Defendant)
Witness K (Defendant)

Representation: **Counsel**
Mr R Maidment QC (Informant)
Mr T Begbie (Commonwealth)
Mr C Ward SC with Mr K Archer (Defendant)
Mr H Carmichael (Defendant)

Solicitors
Commonwealth Director of Public Prosecutions (Informant)
Australian Government Solicitor (Commonwealth)
Gilbert + Tobin (Defendant)
Corrs Chambers Westgarth (Defendant)

File Numbers: CC 41084 of 2018; CC 41083 of 2018

CHIEF MAGISTRATE WALKER:

1. In the matters of Witness K and Bernard Collaery notice has been given by the Commonwealth Director of Public Prosecutions dated 30 May 2018 pursuant to section 6 of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) that the Act applies to these proceedings.
2. An issue has arisen as to the procedure now to apply given that different provisions of the Act have been invoked by the defendants and the Commonwealth. The parties contend for differing interpretations of the Act.
3. The Act has as its object, relevantly, the prevention of disclosure of information in federal criminal proceedings where a disclosure is likely to prejudice national security except to the extent that preventing the disclosure would seriously interfere with the administration of justice.¹
4. The defendants submit that a procedure envisaged by section 21, being a national security information hearing, has been invoked by their application and that the hearing pursuant to the application must be held as soon as possible.
5. The defendants submit that the section 21 procedure is available at any stage of the proceedings and that the Court has no discretion as to whether a hearing pursuant to the section may be held. The defendant further submits that the invocation of procedures triggered by section 24 is prejudicial to the defendants' interests and the open administration of justice and ought not to be interpreted as precluding a concurrent section 21 process.
6. The Commonwealth, supported by the prosecutor, submits that availability of the section 21 procedure has been overtaken in light of the Commonwealth's notification to the Attorney-General pursuant to section 24.

Defence Applications

7. Section 21 provides a process by which certain persons may apply to the Court for a hearing to consider issues relating to the disclosure, protection, storage, handling or destruction, in the proceeding, of national security information including the making of an arrangement of the kind mentioned in section 22 and the giving of notice under section 24. Both defendants have made such applications, Mr Collaery's dated 12 October 2018 and Witness K's dated 23 October 2018. These applications are for the Court to conduct a national security information hearing and to give effect to an arrangement of a type envisaged by section 22. Section 22 allows for the parties to agree to such an arrangement but, despite concerted efforts, no such agreement has been arrived at.

Commonwealth Action

8. Section 24 provides that a party knowing or believing that there is a potential disclosure of national security information must, as soon as practicable, give the Attorney-General notice in writing of that knowledge or belief, unless, inter alia, disclosure of the information is the subject of an order in force under either sections 22 or 31. No such orders have yet been made in these proceedings.
9. The Commonwealth gave a section 24(1) notice to the Attorney-General on 1 November 2018. Unfortunately, the Court was not advised, nor the defendants and their legal representatives, until 6 November 2018 after regular sitting hours. The

¹ See *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 3.

notice was not brought to my attention until just prior to court on 7 November 2018 and a copy of it not seen by me until after proceedings adjourned on that day. This effectively left no time for the Court to consider the effect of this notice. No explanation was provided for the untimely provision of this notice, although I note that the Act does not specify a particular time in which the advice must be given.

10. Section 24(4) requires that the advice to the Court, defendant or defendant's legal representative, when given by the prosecutor, must include a description of the information. The advice given by the Commonwealth in this case describes the information as "information contained in the documents in the brief of evidence in the proceedings". I note no brief of evidence has been filed nor served in these proceedings. The descriptor is effectively meaningless to both the defendants and the Court pending provision of that brief.

Consequences of Commonwealth action

11. Pursuant to section 24(5), on receiving advice from the Commonwealth of notice having been given to the Attorney-General, the Court must:
 - (a) adjourn so much of the proceeding as is necessary to ensure that the information is not disclosed; and
 - (b) must continue the adjournment until a copy of the Attorney-General's certificate is received or advice is received to the effect that a certificate will not be issued.
12. I am satisfied that section 24(5) effectively operates to prevent the Court from entertaining a hearing pursuant to section 21. Such a hearing would form part of these proceedings and would necessarily require a consideration of the brief of evidence, that is, disclosure of information described in the notice to the Attorney-General as national security information. These proceedings must be adjourned and that adjournment must continue until either the Attorney-General provides a copy of any certificate he issues or advice is received to the effect that none will be issued.
12. In the event the Attorney-General does not give a certificate, it seems unlikely that the Act would continue to apply to these proceedings. Although, as the Court has very limited information, this is speculation. That eventuality must be addressed if and when it occurs.
13. If, as the Commonwealth anticipates, the Attorney-General does give a certificate, the Court will be required to conduct a hearing pursuant to section 27(3) in order to determine whether to make orders pursuant to section 31.
14. Section 28(7) provides that that hearing must be closed. Provisions for closed hearings are detailed in section 29. Those provisions include the exclusion of all except limited categories of people. That exclusion may extend to any legal representative of the defendant who is not cleared to a security level considered appropriate by the Departmental Secretary in circumstances where the disclosure would likely be prejudicial to national security. The effect of this is that the defendants and their legal representatives may not be entitled to be present during part of the hearing in which details of the national security information is given or argued about.
15. These provisions are clearly potentially prejudicial to the defendants in these proceedings and apply stricter arrangements than those which may operate in relation to a section 21 hearing.

16. It is for this reason, in combination with a submission that section 21 applications may be made and heard at any time during the federal criminal proceeding, that the defendants submit that the section 21 application must and should be heard before a section 27 hearing.
17. There is some force in this submission particularly having regard to the object of the Act, that is the prevention of the disclosure of information which is likely to prejudice national security, except to the extent that preventing the disclosure would seriously interfere with the administration of justice. There are two aspects of the administration of justice which the defendant submits would be interfered with if a section 27 hearing proceeded to the exclusion a section 21 hearing, namely: undermining of public confidence in the justice system because of a lack of transparency given that the section 27 hearing would be in a closed court; and the lack of a fair trial for these defendants having regard to the potential exclusion of their legal representatives.
18. As to the requirement for transparency, whilst that is an extremely important aspect of the criminal justice system, there are circumstances in which it gives way to other competing principles: the protection of children in Childrens Court proceedings is widely accepted as trumping the principle of open justice. The Act lawfully curtails transparency in certain circumstances. The Act also contemplates, however, that even the protection of national security must give way to avoiding serious interference with the administration of justice. It is not difficult to contemplate circumstances where such a balance would mean that a defendant's rights were protected either by orders for disclosure or, in the event that the effect of disclosure was harm to national security, an order that proceedings be stayed as an abuse of process if the defendant could not be given a fair trial.
19. In the current circumstances, section 24(5), in requiring that the Court must adjourn so much of the proceeding as is necessary to ensure that information is not disclosed, operates to require an adjournment of the whole proceedings, including any section 21 application, as there is a real potential for the information as defined, that is the brief of evidence, to be disclosed through such a process.
20. Upon a certificate being issued, the Court will be required to commence the section 27 hearing. The requirements of such a hearing are more restrictive than the process envisaged in section 21 hearing. Proceeding to a section 21 hearing in advance of a section 27 hearing in respect to this same subject matter has the potential to undermine the efficacy of the notice process which, in turn, would defeat the intention of the Act. This is an illogical outcome and could not have been the legislature's intent.
21. If the defendants in due course wish to raise questions of potential evidence other than that in the prosecution brief which might be characterised as national security information, and as to which agreement cannot be reached pursuant to section 22, a further section 21 application may be made at any time after the statutorily mandated adjournment ends. As I understand the present applications, they do not extend to evidence other than that in the prosecution brief which must be addressed through the section 27 hearing and section 31 orders process, if a certificate issues.
22. Further, I cannot conclude at this point that the administration of justice, in particular the defendants' right to a fair trial, will be interfered with by the lack of availability of a section 21 hearing in respect to the brief of evidence particularly as the section 27 process will lead to section 31 orders, being orders of this Court which are themselves appealable in a superior court if productive of unfairness.

23. This interpretation of the interplay between section 21 and the Attorney-General certificate process commenced pursuant to section 24 does not render section 21 otiose. That section clearly has a potential role to play prior to any notice being given to the Attorney-General. In the particular circumstances of this case, that has now been overtaken. Section 21 may also have application to information other than that made the subject of any certificate by the Attorney-General at any point in the proceedings.

Decision

24. I therefore order that determination of the section 21 applications be stayed whilst the proceedings are adjourned pending the issue of a certificate by the Attorney-General or notice to the effect that no certificate will be issued.
25. I further order that in the event the Attorney-General issues a certificate, the parties are to prepare proposed orders for the future progress of the matters by consent having regard to the section 27 process by 4:00pm on the seventh day after receipt of the certificate.
26. In order to facilitate proposed orders, the parties are given liberty to contact the Court's listings clerk to ascertain the availability of up to three days for a section 27 hearing.
27. In the event that the parties are unable to reach consent, the matters are to be relisted at the direction of the Court.

I certify that the preceding 27 numbered paragraphs are a true copy of the Reasons of her Honour Chief Magistrate Walker.

Associate: R. Boughton

Date: 9 November 2018