

*The Commissioner of the Police Force for the Northern Territory v Cassidy
& Anor [2013] NTCA 01*

PARTIES: The Commissioner of the Police Force
for the Northern Territory

v

CASSIDY, Nicholas Frank

and

The Queen

TITLE OF COURT: COURT OF APPEAL OF THE
NORTHERN TERRITORY

JURISDICTION: CIVIL APPEAL FROM THE SUPREME
COURT EXERCISING TERRITORY
JURISDICTION

FILE NO: AP 1 of 2013 (21122226)

DELIVERED: 25 FEBRUARY 2013

HEARING DATES: 4 FEBRUARY 2013

JUDGMENT OF: MILDREN ACJ, KELLY &
BLOKLAND JJ

APPEAL FROM: BARR J

CATCHWORDS:

PRACTICE AND PROCEDURE – Subpoena – “legitimate forensic purpose identified” – “on the cards” or “reasonably possible” that documents will assist the case of the issuing party – description of documents in the subpoena wider than warranted to fulfil the identified legitimate forensic purpose – appeal allowed – subpoena set aside

Hudson v Branir Pty Ltd (2005) 15 NTLR 35, applied

Ragg v Magistrates' Court of Victoria (2008) 18 VR 300, considered

REPRESENTATION:

Counsel:

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| Appellant: | M Maurice QC with G Macdonald |
| Respondent: | T Berkley |

Solicitors:

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| Appellant: | Solicitor for the Northern Territory |
| Respondent: | LBLLB Louise Bennett Criminal Lawyer |

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| Judgment category classification: | B |
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IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

*The Commissioner of the Police Force for the Northern Territory v Cassidy
& Anor* [2013] NTCA 01
No. AP 1 of 2013 (21122226)

BETWEEN:

**THE COMMISSIONER OF THE
POLICE FORCE FOR THE
NORTHERN TERRITORY**
Appellant

AND:

NICHOLAS FRANK CASSIDY
First Respondent

AND:

THE QUEEN
Second Respondent

CORAM: MILDREN ACJ, KELLY & BLOKLAND JJ

REASONS FOR JUDGMENT

(Delivered 25 February 2013)

THE COURT:

- [1] On or about 4 June 2011 Levi Griffiths died as a result of injuries he sustained in a hit and run motor vehicle collision.
- [2] Nicholas Francis Cassidy has been charged on an indictment dated 17 October 2012 with a number of charges including dangerous driving causing Mr Griffiths' death.

- [3] The trial was due to begin on 18 February 2013 before Barr J. The major issues in the trial are likely to be whether the accused, Mr Cassidy, and/or his vehicle were involved in the collision that caused the death of Mr Griffiths.
- [4] The accused has issued a subpoena directed to the appellant, The Commissioner of Police, seeking “all PROMIS records in the name of Nicholas Frank Cassidy in relation to CFN 21122226 and CFN 21130569”.¹
- [5] The Commissioner produced the PROMIS records in relation to CFN 21122226 without objection and counsel for the accused has inspected those documents. However, after producing those records, the Commissioner made application to set aside the subpoena on the grounds that it was too wide.
- [6] The matter came on for hearing before Barr J on 7 January 2013 at which time his Honour declined to set aside the subpoena but in an *ex tempore* judgment made an order modifying the subpoena so as to require the appellant to produce “the PROMIS records in relation to the death of Levi Griffiths on or before 10 January 2013”.
- [7] In that *ex tempore* judgment his Honour said:

¹ These numbers refer to file numbers in the Police Real-Time Online Management Information System (“PROMIS”), an internal investigation management data base which interfaces with a range of other NT Police and NT Government data bases, and in which each investigation carried out by police is given a separate number. This Court received affidavit evidence explaining the basic operation of this system. It was common ground on the appeal that CFN 21122226 was the PROMIS file on an investigation into assault charges against the accused; and that CFN 21130569 was the file on the investigation into the death of Mr Griffiths in a hit and run motor vehicle collision.

“I propose to announce my decision now so that the parties can do what needs to be done. On the basis of the matter deposed to in para 4 of the affidavit of Commander Richard Bryson sworn 7 January 2013, in particular that the NT Police policy and practice is to ensure that all relevant information obtained in any investigation is entered or uploaded onto the PROMIS system and the fact I infer from that that all relevant information in the present case either was, or should have been uploaded to the system in relation to the death of Levi Griffiths on 3 June 2011.

Further, on the basis that in my view, the accused person is entitled to know in order to ensure that he has a fair trial, all or any evidence which is inconsistent with the alleged link between the accused’s vehicle and the deceased person and the accused himself and deceased person. Because of that combination of matters, I propose to order that the commissioner of police on or before close of business on 10 January 2013 and subject to any claim of the kind referred to in the schedule to the affidavit of Mr MacDonald – sorry, to the submissions of the affidavit of Mr MacDonald that identified in the schedule to the submissions of Mr MacDonald dated 3 January 2013 will produce the PROMIS records for the investigation into the death of Levi Griffiths on 3 June 2011.”

- [8] On 10 January, his Honour made a formal order dismissing the Commissioner’s application to set aside the subpoena.
- [9] The Commissioner has made application for leave to appeal against this decision contending that the subpoena ought to have been set aside as being too wide. On 24 January 2013 Blokland J ordered that the application for leave and the appeal would be heard together and given an expedited hearing date.
- [10] In the meantime, in obedience to the order made by Barr J on 7 January 2013, the Commissioner has produced to the Court all of the documents which answer the description in the subpoena as modified by Barr J. In

order to preserve the status quo pending the outcome of this appeal, those documents have been divided by the Commissioner into four envelopes. Envelopes one and two contain documents which are relevant to the forensic purpose found by his Honour in the paragraph set out above. Envelope one contains those documents in relation to which the Commissioner does not object to inspection by the accused; envelope two contains documents which are the subject of a claim for public interest immunity. The claim for public interest immunity is to be heard by the trial judge and does not concern this Court. Envelopes three and four contain the balance of the documents which answer the description in the subpoena but which do not relate to the forensic purpose identified by his Honour. Envelope three contains those in relation to which the Commissioner does not object to inspection (subject to this appeal) and envelope four contain those over which a claim for public interest immunity has been made.

[11] The appeal was heard on 4 February 2013. On that date the Commissioner gave an undertaking not to seek the return of the documents produced to the Court in envelopes one and two, and not to object to inspection saving for any claim for public interest immunity, any other claim for privilege, or any claim for confidentiality, and subject to any terms that may be set by Barr J upon granting inspection. On noting that undertaking, this Court made the following orders.

1. Leave to appeal is granted.

2. The appeal is upheld.
3. Other than in relation to CFN 21130569, the subpoena issued on 17 December 2012 is set aside.
4. The orders of Barr J made on 7 January and 10 January 2013 are set aside.
5. The documents produced to Barr J in envelopes 3 and 4 be returned to the Commissioner of Police.

[12] The Court indicated that reasons would be published at a later date. These are those reasons.

[13] The relevant principles are not in doubt. When an application is made to set aside a subpoena as too wide, the party issuing the subpoena must establish three things. First, the party must show that the subpoena itself describes the documents being sought with sufficient particularity.²

[14] Second, the party issuing the subpoena must identify expressly and with precision the legitimate forensic purpose for which he seeks access to the documents³ of that description. It is not sufficient that there may be a legitimate forensic purpose for production of some of the documents answering the description in the subpoena. The subpoena must not cast a

² *Lucas Industries Ltd v Hewitt* (1978) 18 ALR 555 at p 570

³ *R v Saleam* (1989) 16 NSWLR 14 per Hunt J at p18

net wider than is necessary to catch documents required for the identified forensic purpose.⁴

[15] Third the party issuing the subpoena must show that it is “on the cards” that the documents would assist the party’s case.⁵ It is not sufficient for a party seeking production of documents to establish, merely that such documents are or may be relevant to the proceeding, for example because they may establish the case against the party issuing the subpoena or support the case of another party.⁶ If it is not “on the cards” that the documents described in the subpoena would assist the issuing party’s case, the subpoena may be set aside as a “fishing expedition”.⁷

[16] It was argued by the accused on the basis of *DPP (Vic) v Selway*⁸ and *R v Law*⁹ that the correct test is not whether it is “on the cards” that the documents would assist the party’s case, but whether there was “a reasonable chance” that it would do so. We agree with the view expressed

⁴ *Hudson v Branir Pty Ltd* (2005) 15 NTLR 35 per Martin (BR) CJ at p 43 para [25]

⁵ *ibid*; *Alister v R* (1984) 154 CLR 404 per Gibbs CJ at p 414; *Hudson v Branir Pty Ltd* (2005) 15 NTLR 35 per Martin (BR) CJ at p 47-48 paras [38] to [41]. Additional considerations may apply where it is objected that the subpoena is otherwise oppressive or should be set aside for another reason. No such additional issues arise on this case.

⁶ *Alister v R* per Gibbs CJ at p 414 para [7]; see also *Attorney General (NSW) v Chidgey* (2008) 182 A Crim R 536 paras [59]-[60]; *Carroll v Attorney General (NSW)* (1993) 70 A Crim R 162 at pp 181-182

⁷ *Alister v R* at 414; *Hudson v Branir* at p 46 para [38]

⁸ (2007) 16 VR 508 at 513-514 paras [9] and [10]

⁹ (2008) 23 NTLR 1

by Martin (BR) CJ in *Hudson v Branir*¹⁰ that this is, essentially, a distinction without a difference.

[17] It was further argued by the accused that there was no need to match the identified legitimate forensic purpose to the description of the documents sought in the subpoena, and that the only purpose to be served by the requirement that the documents sought be identified in the subpoena with sufficient particularity was to enable the receiving party to know what documents were required to be produced. We reject that submission. As Martin (BR) CJ said in *Hudson v Branir Pty Ltd*:¹¹ “There must be a legitimate forensic purpose relating to the ... action and a reasonable chance that the documents sought by the subpoena will further that purpose.” [underlining emphasis added]

[18] The accused relied on the following extract from *Ragg v Magistrates’ Court*¹² adopted by Martin (BR) CJ in *R v Law*¹³ to contend that the subpoena as modified by Barr J was not too wide.

“A legitimate purpose is demonstrated where the court considers, having regard to its fundamental duty to ensure a fair trial, that there is a reasonable possibility the documents will materially assist the defence. That is a low threshold, but it is a threshold.

The ‘reasonable possibility’ test does not apply in all cases in a fixed manner as if the relevant considerations always have the same value.

¹⁰ *ibid* at para [41]

¹¹ *Supra* at p 43 para [25]

¹² (2008) 18 VR 300 p 324 paras [96] and [97]

¹³ *Supra* at p 24

It is necessary to consider “the importance of the issue to which it is said the subpoena relates and the importance of the document in question in the determination of that issue” and, more generally, “the circumstances as a whole”. In doing so, it is necessary to give a “broad interpretation” to the issues of the case, or, to put it another way, the “parties” respective cases should not be restrictively analysed. It is also important to pay due regard to the fact that “defence lawyers are in a better position than a judge to make an appraisal of the information contained”. Lastly, as Pinkus JA said in *R v Spizzirri*: “... courts should be careful not to deprive the defence of documents which could be of assistance to the accused.”

[19] We do not think there is anything in this passage which assists the accused.

His Honour says nothing in that passage to suggest that it is not necessary for the party issuing the subpoena to identify with precision the legitimate forensic purpose for which the documents described in the subpoena (also with sufficient particularity) are required. True it is that, once the party issuing the subpoena has shown that it is “on the cards” that documents described in the subpoena will assist that party’s case, then (absent a successful claim for public interest immunity) a judge should not withhold access to documents simply because, in his or her view, those documents would not in fact assist the party’s case,¹⁴ but that is not the issue on this appeal.

[20] It appears from the portion of his Honour’s judgment quoted above that the legitimate forensic purpose found by his Honour to exist was for the accused to obtain “all or any evidence which is inconsistent with the alleged link

¹⁴ *R v Saleam* (supra) at p 18

between the accused's vehicle and the deceased person and the accused himself and the deceased person".

[21] The contention of the appellant in this case is a simple one: that the description of the documents ordered to be produced by the trial judge is wider than warranted in light of the forensic purpose identified by his Honour. We agree. The legitimate forensic purpose identified was to obtain "all or any evidence which is inconsistent with the alleged link between the accused's vehicle and the deceased person and the accused himself and the deceased person". However, his Honour ordered production of all PROMIS records in relation to the death of Levi Griffiths on or before 10 January 2013. It seems to us that this potentially encompasses many more documents than those which would be required to meet the identified forensic purpose. The only documents which, it seems to us would be required to meet that purpose are those that relate to any evidence which is inconsistent with the alleged link between the accused's vehicle and the deceased person and/or the accused himself and the deceased person. There is no dispute that it is "on the cards" or that there is "a reasonable possibility" that documents meeting that description would assist the respondent's case. Those are the documents contained in envelopes one and two, envelope two being those documents to which a claim for public interest immunity has been made. For these reasons, subject to the Commissioner's undertaking set out above, we allowed leave to appeal,

upheld the appeal, and ordered the return of the documents in envelopes three and four.