PARTIES:	RICE, Christopher John v CHUTE, John Henry
TITLE OF COURT:	Justices Appeal
JURISDICTION:	Appeal form the Court of Summary Jurisdiction
FILE NOS:	No. 50 of 1994
DELIVERED:	23 June 1995
HEARING DATES:	2 June 1995
JUDGMENT OF:	Gray AJ

REPRESENTATION:

Counsel:
Appellant: Mr Georgiou
Respondent: Mr Murphy

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. 50 of 1994

BETWEEN:

Christopher John Rice
Appellant

AND:

John Henry Chute
Respondent

CORAM: GRAY AJ

REASONS FOR JUDGMENT

(Delivered 23 June 1995)

On 20 July 1994, the appellant was found guilty by the Court of Summary Jurisdiction of unlawful possession and was fined $400.00.

From that conviction, the present appeal has been brought on a number of grounds. When the appeal was called on for hearing on 2 June 1995, Mr Georgiou, counsel for the appellant, sought leave to abandon some grounds and add others. The grounds, following the adjustment, are expressed as follows:-

> "4. The learned Magistrate erred by refusing the defendant's solicitor access to witness statements that had been produced subject to a summons to produce.

5. The learned Magistrate erred in ruling that it was not possible to use a summons to produce to obtain production of a witness statement.

6. That the learned Magistrate erred in failing to exercise his discretion according to law."

After hearing argument based upon the record of the proceedings below, I was quite satisfied that the error alleged in each of grounds 5 and 6 had been made out. However, I was equally satisfied that no substantial miscarriage of justice had been occasioned by the errors. I shortly stated my reason for these conclusions and dismissed the appeal. This, of course, disposed of the appeal, but I was invited by counsel to express my views upon the broader issue raised by ground 4, with which it had not been necessary to deal. I was told that differences of opinion have been expressed by some magistrates in this area. I accepted counsel's invitation and I now volunteer the following observations.

The appellant was charged with the theft of a 1984 Holden sedan in August 1983 at Alice Springs. An alternative charge of unlawful possession of certain parts from the stolen car was also laid. In the result, the Court of Summary Jurisdiction found the appellant guilty on the alternative count.

The evidence showed that the Holden car disappeared from the premises of Peter Kittle Toyota in early August 1993. It was discovered on 8 August behind the abattoirs in a stripped

condition. The car was discovered by Maxwell Owen, the used car manager of the owner. He summoned police to the scene. Whilst Owen and the Police were examining the wreck, a Toyota Hi Lux Utility arrived. The appellant was the driver and there was a passenger named Chester. The Police spoke to both men. The men's names and addresses were taken and they were both allowed to drive away.

After further investigation, the police went to Chester's house and found a V8 engine in the backyard. The engine was later identified as coming from the stolen car. While the police were at Chester's house it was noticed that Chester was looking over the back fence. He then ran away, though called upon to stop. One of the police officers, Constable Kerr, pursued Chester who ran to the Toyota Hi Lux Utility seen earlier. The appellant was in the driver's seat. Other police arrived and each suspect was handcuffed.

A search of the inside of Chester's house revealed further parts from the stolen car. A search was then conducted at the appellant's house and some parts from the stolen car were discovered in the backyard. The appellant was then taken to Alice Springs Police Station where a recorded interview was conducted, during which the appellant made a number of incriminating admissions.

Before the foregoing evidence was called, Mr Geroe, counsel for the appellant, stated that he proposed to

challenge the admissibility of the interview upon the basis that admissions were induced by various forms of duress and threats. Three of the police witnesses, Constables Kerr, McCarthy and Willets were called on the first day of the hearing. Each was cross examined about various alleged improprieties and each witness denied the suggestions made.

On the second day of the hearing, Mr Jefferson, of counsel, appeared for the appellant in place of Mr Geroe. Mr Jefferson informed the Court that he wished to submit that the evidence of the finding of stolen property at the appellant's house should also be excluded upon public policy grounds because of certain police misconduct which he identified.

Mr Jefferson asked the learned Magistrate to direct the prosecutor to recall Constable McCarthy because the appellant's instructions to counsel had not been adequately put to the witness. This application was refused.

At this point, Mr Jefferson made a application to have access to certain documents which were the subject of a summons to produce directed to the Commissioner of Police at Alice Springs. As things then stood, there was one further police witness yet to be called who was involved in the allegations of police impropriety. He was Sergeant Setter, who was to give evidence denying that the appellant had been kept handcuffed throughout a particular period. Therefore, it can be seen that a clear issue had been raised concerning the

truthfulness of the police witnesses concerning the alleged improprieties.

It appears from the transcript that Mr McBride, a legal practitioner, had appeared for the Commissioner and produced the documents to the Court. It does not appear that Mr McBride raised any objection to the production of the documents or to access to them by the appellant's advisers.

The relevant part of the Summons to produce is as follows:

> "You are hereby summoned to appear at Alice Springs Court of Summary Jurisdiction on 11 February 1994 at 10 o'clock in the forenoon before such Justice or Justices of the Peace for the Northern Territory as shall then be there to produce all books, plans, papers, documents, articles, goods statements, statutory declarations and things likely to be material evidence on the hearing of the said information in particular:
>
> (i) all statements of persons called as witnesses;
>
> (ii) all notes, lists or records concerning property seized by Police at 22 Head Street, Alice Springs on 8 August 1993."

The learned Magistrate drew attention to the width of the first paragraph of the Summons but in response to an inquiry from the bench as to what documents were being sought, Mr Jefferson said:

> "I have had the opportunity, Your Worship, with Mr McBride's indulgence, to examine the exhibit book and I'm satisfied that paragraph 2 there has been dealt with, Your Worship. The outstanding issue is the question of whether I can have access to the witness statements, which have been produced to the Court. But I understand my friend, Sergeant Dredge, does not believe they are matters that are legitimately available to defence counsel by way of a summons."

It can thus be seen that Mr Jefferson made it clear that all he sought was access to the witness statements. It further appears that the only objection was taken by Sergeant Dredge, who was the Police Prosecutor in the proceedings. I repeat that no objection was taken on behalf of the person who had produced the documents.

As the witness statements had been produced to the Court by the Commissioner, the learned Magistrate was obliged to consider whether counsel for the appellant should be given access to them. As no objection had been taken by the Commissioner, the only remaining question was whether the documents were relevant to an issue which had been raised in the proceedings.

In this case, an issue had been clearly raised as to the veracity of the police witnesses who gave evidence about their dealings with the appellant on the day of his arrest. This issue was specifically raised by Mr Geroe at the outset of the proceedings. Therefore, it seems clear that the witness statements were relevant to that issue.

If the learned Magistrate had turned his mind to this question, His Worship's discretion could hardly have been exercised other than favourably to the application for access. But, in the event, the learned Magistrate did not consider whether access should be granted because he concluded that the procedure adopted was inappropriate. His Worship stated

emphatically that the only way a cross examiner could obtain access to the statement of a witness was by calling for it while the witness was giving evidence. His Worship's refusal to consider Mr Jefferson's application for access was an error of law. It was on this basis that the appeal was decided.

Turning to the broader questions raised by the appeal, it is, I think, correct to say that the law in this area has become well settled. The following propositions can be stated:-

1. The power to issue a summons to produce documents under Sec. 23 of the Justices Act is exercisable when the Justice or clerk is satisfied that a person has in his possession or power any document providing material evidence and a party to a proceeding requires the document and seeks the issue of the summons. For this purpose, "material evidence" means evidence which is relevant to an issue raised or likely to be raised in the proceeding.

2. The document does not have to be shown to be admissible in evidence. It may, for example, be a document useful to a cross examiner or it may disclose relevant facts which can be proved by other admissible evidence *Carter v Hayes S.M and Another* (1994) 61 SASR 451 per King CJ at 453.

3. An objection to the lack of particularity of the Summons may be overcome by counsel identifying the documents or class of documents to which he seeks access. *R v Saleam* [1989] 16 NSWLR 14 per Hunt J at 18, *Maddison v Goldrick* [1976] 1 NSWLR 651 per Samuels JA at 656.

4. The Summons may require production of a document either prior to the proceeding commencing or at any time during the proceeding. *Carter v Hayes* (supra) per King CJ at pp454-5.

5. The person upon whom the Summons is served may seek to have the Summons set aside on the ground that it is oppressively wide or is otherwise an abuse of process. Such an application must be made to the Supreme Court because the Court of Summary Jurisdiction has no power to set aside the Summons. *Llewellyn v Commissioner of Police for the N.T. and Ors*, unreported judgement of Martin C.J., delivered 2 September 1994.

6. Subject to proposition 5, the person served with the Summons must produce the documents to the Court. He may then take any legitimate objection to disclosure, such as legal or medical professional privilege or public interest immunity. The Court must rule on the objection after its own examination

of the documents, if that proves necessary.

7. If the person served with the Summons makes no objection or if his objection is overruled, the Court must exercise its discretion as to whether the document should be disclosed to the party seeking access. This will involve the Court in a consideration of the relevance of the documents to any issue raised or likely to be raised in the proceeding. In considering this question, the Court should apply a liberal test of relevance. It is sufficient if it is "on the cards" that the documents would materially assist the party seeking access. *Alister v R* [1983-1984] 154 CLR 404 per Gibbs C.J. at p 44. The Court should not refuse access simply because the Magistrate does not believe that the documents will assist the party concerned. *R v Saleam* (1989) 16 NSWLR 14 per Hunt J at 18. Nor should access to a relevant document be refused because the applicant for access has no knowledge of the contents of a particular document or even of its existence. *National Employers Mutual General Association Ltd v Waind* [1978] 1 NSWLR 372 at 382.

An application of the above propositions to a prosecution in the Court of Summary Jurisdiction should, in my view, lead to the inspection of statements of prosecution witnesses being

"allowed as a matter of course" *Carter v Hayes* (supra) per King C.J. at 456. There should be no need for recourse to the Summons to Produce procedure. The prosecuting officer should, in my view, be equipped with copies of the statements of prosecution witnesses so that they can be provided to the defendant or his practitioner upon request.

It is true that an accused person does not have a legal right to be provided with statements of prosecution witnesses. *R v Charlton* 1972 VR 758. But I was informed by counsel, and I confirmed it by my own enquiries, that it is the policy of the Director of Public Prosecutions to provide the defence with a copy of the statement of each intended Crown witness. This occurs at the committal proceedings and, if additional evidence is to be called, at the trial. The policy extends to providing, not only the final statement upon which the evidence of a witness is to be based, but any earlier statement of the witness even if totally inconsistent with the Crown case. This policy is, to my mind, entirely consistent with the sentiments expressed in the cases to which I have referred.

Many weighty criminal cases are nowadays dealt with in the Court of Summary Jurisdiction and, in my view, it is desirable that the practice in that Court should conform to that prevailing in other criminal proceedings.

The foregoing remarks are confined to statements by

prosecution witnesses. Other documents, such as a police notebooks or running sheets are not ordinarily in the possession of the prosecutor. If access to such a document is sought, it will be necessary to resort to a summons under Sec 23. In that event the question of access will be determined in accordance with the principles I have endeavoured to express. I should add that, in my opinion, there is nothing about Section 23 which distinguishes it from any other statute or rule which provides for the issue of subpoenas.

I have been informed that some Magistrates have treated the Judgement of Martin C.J. in *Llewellyn* (supra) as authority for the view that a defendant should not ordinarily be allowed access to statements of prosecution witnesses even when a summons to produce has been employed.

An examination of that judgement persuades me that it should not be given the wide application which has been attributed to it in some quarters.

In *Llewellyn*, Martin C.J. was not considering whether documents produced to the Court upon Summons should be disclosed to the defendant. His Honour was dealing with an application to set aside the Summons itself. This raised the question of the powers of the Justice or Clerk who issued the Summons under Section 23 of the Justices Act. The striking out application was based upon a contention that the documents were not sufficiently particularised and, in any event, were

not relevant to any issue likely to arise at the hearing. The first ground was rejected, but His Honour upheld the ground that the documents had not been shown to be relevant.

The Summons sought production of, inter alia, statements of prosecution witnesses, but counsel for the defendant does not seem to have submitted that the statements would be of assistance to him in cross examining the makers of the statements. Counsel put forward a number of reasons why access to the documents were sought but, in the result, His Honour concluded that the purpose of the summons was merely "an attempt to identify whether any relevant issue might arise." His Honour said that this was not a purpose which fell within Section 23 and, accordingly, the Summons was set aside. In my opinion, the judgement of Martin C.J. does not run counter to the views I have expressed.