SUPREME COURT OF VICTORIA

COURT OF APPEAL

APPLICATION BY BRIAN WILLIAM SHAW & ANOR.

---

| | |
|---|---|
| JUDGES: | WINNEKE, P., BROOKING, CHARLES, BUCHANAN AND CHERNOV, JJ.A |
| WHERE HELD: | MELBOURNE |
| DATE OF HEARING: | 2 October 2001 |
| DATE OF JUDGMENT: | 12 October 2001 |
| MEDIUM NEUTRAL CITATION: | [2001] VSCA 175 1st Revision - 28 February 2002 |

---

CRIMINAL LAW – Grand jury – Application for – Not to be made *ex parte* – Discretion to refuse to summon – Alleged unlawful oaths of Freemasons – Deficiencies of voluminous and disordered material – Failure to identify alleged offenders or show unlawful oaths taken – Application hopeless.

*Crimes Act* 1958, ss.316 and 354.
*Byrne v. Armstrong* (1899) 25 V.L.R. 126 overruled.

---

| APPEARANCES: | Counsel | Solicitors |
|---|---|---|
| For the Applicants | In person | |
| As amicus curiae | Mr D. Graham, Q.C., S-G | Victorian Government Solicitor |
| | Ms R. Doyle | |

WINNEKE, P.
~~DRAFT 3 OCT.~~
BROOKING, J.A.
CHARLES, J.A.
BUCHANAN, J.A.
CHERNOV, J.A.:

1 The grand jury system never really took root in Australia. It was in use until 1852 in South Australia[1] and until 1883 in Western Australia[2]. In New South Wales grand juries were used for a few years in courts of quarter sessions, but by 1830 the system had been allowed to lapse[3] and as a result they were never employed in Victoria until their introduction by s.21 of the *Judicature Act* 1874, the forerunner of s.354 of the *Crimes Act* 1958. Thus Victoria is and has for many years been the only State[4] in which a grand jury may be summoned.[5] We have been asked to summon one on the application of Brian William Shaw and Carmen Walter. By s.354:

> "Upon the application of any person supported by an affidavit disclosing an indictable offence and either that the same has been committed by some body corporate or that a court has declined or refused to commit or hold to bail the alleged offender or that no presentment was made against him at the court at which the trial would in due course have taken place, or upon the application of the Director of Public Prosecutions, it shall be lawful for the Full Court[6] to order the sheriff to summon a grand jury to appear at a court to be holden at a time and place to be mentioned in the order; and upon receipt of such order the sheriff shall summon not less than twenty-three men to attend at such court at the time and place aforesaid to inquire present do and execute all things which on the

---

1 Abolished by Act No. 10 of 1852.

2 Abolished by 47 Vict. No. 6.

3 J.M. Bennett, "*The Establishment of Jury Trials in New South Wales*", 3 Sydney L.R. 463 at 482-5.

4 Or Colony.

5 The Victorian grand jury is the subject of an interesting article by Elise Histed, "*The Introduction and Use of the Grand Jury in Victoria*", (1987) 8 Journal of Legal History 167. One should also read the editorial in the Victoria Law Times of Saturday 7 June 1856 at page 65 and an address by Barry, J. to those summoned as jurors for the Portland circuit given on Saturday 4 October 1856 and reported at page 321. According to Fox, *Victorian Criminal Procedure* (2000), s.4.5.1.1, less than ten grand juries have been summoned since 1874. The last successful application was made by Lorne Campbell; it was granted on 29 August 1986. The last unsuccessful application was made by Douglas Frederick Robinson, and refused on 15 March 1991. Both these applications are unreported. Bills to abolish grand juries were unsuccessfully introduced in Parliament in 1987 and 1992: Fox, op. cit., s.4.5.1.2.

6 The Court of Appeal has jurisdiction by virtue of s.30 of the *Constitution (Court of Appeal) Act* 1994.

> part of the Queen shall then and there be commanded of them, and such men shall be taken from the jury book of the jury district in which such place is situate and at the time and place aforesaid the said sheriff shall bring into court the said order with the name place of abode and addition of every grand juror written on a panel signed by him and sealed with his seal of office and shall deliver the said panel to the proper officer of the said court, who shall in open court call aloud the names of the grand jurors on the said panel one after another, and the twenty-three men so first drawn and appearing or if twenty-three men shall not appear such of them as do appear not being less than twelve men shall be the grand jury and shall be sworn and act as such accordingly: Provided always that every such order shall be delivered to the sheriff ten days before the day on which the indictment is intended to be preferred."

2 A court of five has heard this application because it is desirable to consider the correctness of the decision of a Full Bench – all six members of the Court - which has stood for many years and which established two highly important and related propositions about the effect of a forerunner of the present s.354. That decision was in *Byrne v. Armstrong*[7], where the Court divided, Madden, C.J., Williams, Holroyd and a'Beckett, JJ. constituting the majority and Hodges and Hood, JJ. dissenting. The two propositions are, first, that once the requirements of the section are satisfied the Court has no discretion but must summon a grand jury and, secondly, that the application is to be made *ex parte*. As regards the second proposition the dissenting judgments were described by the Full Court in 1991 as most persuasively argued.[8] We have heard the Solicitor-General as *amicus curiae* on the proper construction of the section. He has submitted that both propositions are unsound.

3 Having regard to the approach to statutory interpretation a hundred years ago, it is not surprising that in *Byrne v. Armstrong* no reference was made to the Parliamentary Debates in 1874, when the original provision was enacted. They make interesting reading in more ways than one. They show a deep division of opinion and what must be regarded, by the more urbane standards of the day, as a heated discussion. The principal proponent of the legislative change was the Attorney-General, Mr G. B. Kerferd, who made the Second Reading Speech. The

---

7 (1899) 25 V.L.R. 126.

8 Application by Douglas Frederick Robinson, unreported, 15 March 1991, at p.2.

debates are to be found in Volumes 19 and 20 of Hansard and the references we give will be to Volume 20. The main speakers against the provision, clause 22 of the Bill[9], were Mr Higinbotham and Dr Madden, who were to become Chief Justice of Victoria in 1886 and 1893 respectively. Kerferd was to hold office as a judge of the Court from 1886 until 1889.

4 The Parliamentary Debates are notable for the widely differing views expressed in them about the desirability of the new provision. They are of interest in other ways too. Section 21 of the Act of 1874, as clause 22 became, enabled application to be made by any person, supported by an affidavit showing certain things, or by a law officer. In the case of a law officer no affidavit was required. Modern commentators have suggested that it is difficult to conceive of a situation in which application might be made by the Director of Public Prosecutions, who has replaced a law officer in the section.[10] The explanation put forward by the Attorney-General in his Second Reading Speech[11] was that there might be instances in which a law officer would prefer to relieve himself of the responsibility of filing an *ex officio* information by remitting the case to a grand jury.

5 Another question on which the debates bear is the reason for the special provision made with regard to offences committed by a body corporate, in which case it was made necessary for the affidavit only to disclose an indictable offence committed by it. One asks at once why it was thought necessary to distinguish between cases of offences by a body corporate (where only the commission of an indictable offence by it had to be disclosed by the affidavit) and cases where the offence disclosed was committed by a natural person, where it was necessary also to show by affidavit either that a justice had declined to commit for trial[12] or that, the defendant having been committed for trial, he had not been presented. The

---

9 Hansard, p.2280 gives the text of the clause.

10 *Bourke's Criminal Law Victoria*, s.354.1; Freckelton, *Criminal Law Investigation and Procedure Victoria*, Vol. 2, s.2.12.840.

11 Hansard, p.2257.

12 In the ordinary sense of "commit" now current, that is, as including cases where, although the defendant is "committed" for trial, he is granted bail.

explanation lies in two common law procedural rules relating to proceedings against corporations for an indictable offence. The first was that a corporation could not be committed for trial, since it could not be committed to prison or granted bail.[13] The second rule was that on a trial at a court of assizes or general sessions the accused had to be present in person, so that a corporation could not be tried, a situation dealt with in England by using certiorari to remove the indictment into the King's Bench, where appearance could be by attorney.[14] These procedural difficulties have been dealt with by legislation in more recent times. No doubt it was these procedural problems which led the Attorney-General to observe in his Second Reading Speech[15] that under the present law there was no means of proceeding against a corporation for an indictable offence except by the filing by a law officer of an *ex officio* information. Mr Higinbotham pointed out[16] that any person might institute criminal proceedings against any other person, or against a corporation, as a result of a successful application to the Supreme Court for leave to file a criminal information, a procedure very rarely resorted to. Next day he cited from the section enabling such an application to be made.[17] That was s.13 of the Act which created the Supreme Court of Victoria, the *Supreme Court Act* 1852[18]. Section 12 of that Act provided for the prosecution of offences by information in the name of the attorney or solicitor-general or such other person as the Lieutenant Governor might appoint, and by s.13 it was enacted:

> "XIII. That it shall be lawful for any person by leave of the said Court to exhibit a Criminal information against any other person for any crime or misdemeanour not punishable by death, alleged to have been by such person committed, and it shall not be necessary for any person applying to the Court for leave to exhibit such Criminal information to file any exculpatory Affidavits unless required by

---

13 *R. v. Daily Mirror Newspapers Ltd.* [1922] 2 K.B. 530; *Re Kennelly* (1974) 7 S.A.S.R. 44 at 45-46; Glanville Williams, *Criminal Law, The General Part*, p.853; Gowans, J., "*Some Experiences in Criminal Trials in Relation to Company Offences*", (1966) 39 A.L.J. 328 at 330.

14 *R. v. Kennelly* at 45-46; Glanville Williams, op. cit.; Gowans, loc. cit.

15 Hansard, p.2257.

16 Hansard, p.2258.

17 Hansard, p.2281.

18 15 Vict., No. 10.

> order of the Court so to do: And every Criminal information exhibited by leave of the Court shall be in the name of Her Majesty the Queen, and upon the information of the person to whom such leave has been granted; and the prosecutor shall file such information in the said Court; and the same shall be heard, tried, and determined in the same manner as any other information hereinbefore required to be heard, tried, and determined in the said Court."

An example of an application under s.13 is *R. v. McMeikan*[19], where on its return an order nisi was, as a matter of discretion, discharged. This is the case of the Flemington Bone Mills mentioned in the Parliamentary Debates[20]. Sections 12 and 13 of the *Supreme Court Act* 1852 were repealed by s.1 of the *Judicature Act* 1874, and s.20 of the Act of 1874 introduced the procedure by way of presentment.[21]

6 There is some discussion in the Parliamentary Debates of 1874 of the question whether, once what the proposed section required to be shown was shown, there would be any discretion to refuse to make an order summoning a grand jury, and the related question whether the application was to be made *ex parte*. Both the Bill and the section as enacted referred to "the Supreme Court or any judge thereof". The *Judicature Act* 1883[22] substituted the Full Court for the Supreme Court or any judge thereof, and the provision considered in *Byrne v. Armstrong*, s.389 of the *Crimes Act* 1890, also referred to the Full Court. The change from the Supreme Court or a judge to the Full Court is discussed in that case by Madden, C.J. at 130-1 and by Hood, J. at 136-7. The relevant change to the law made by the *Judicature Act* 1883 is contained in one of the sections dealing with the distribution of business, s.10, which sets out all matters which the Full Court is to hear and determine. These include "(6) All applications under section twenty-one of the Act No. 502". The

---

19 (1869) 6 WW & a'B(L) 68.

20 Hansard, pp.2258-60.

21 This did not destroy the prerogative right to issue an information, which was expressly preserved by s.22 of the Act of 1874. Section 355 of the *Crimes Act* 1958, preserving the common law power of the Attorney-General to file an information by virtue of his office, was repealed as obsolete by s.2(d) of the *Imperial Law Re-Enactment Act* 1980. By s.9 of the *Crimes (Classification of Offences) Act* 1981, any power to bring proceedings for an indictable offence by criminal information in the Supreme Court or County Court was abolished.

22 The *Judicature Act* 1883 (47 Vict., No. 761), and not the *Judicature Act* 1874, is of course that which is ordinarily spoken of as the *Judicature Act* in the sense of the Act providing for the concurrent administration of law and equity.

Parliamentary Debates contain nothing to show why this particular provision was thought desirable.[23]

7 In speaking against clause 22 of the 1874 Bill, Mr Higinbotham began by referring to the discretion exercised by the Court on an application under s.13 of the *Supreme Court Act* 1852 and observed that it was to be hoped that, if clause 22 became law, the Court would act upon the same principle. What he said was this:[24]

> "He (Mr. Higinbotham) had shown that the applications under the Bill would be at least as expensive, and would necessarily be more tedious. He could only hope that, if the Bill passed, the Supreme Court would act on the same principle upon which it had acted under the existing law – that it would not grant such an application except in extreme cases, because it should be borne in mind that applications, whether under the existing law or under the proposed Bill, were applications by which private persons sought to set in motion the criminal law of the country for the purpose of redressing private wrongs, supposed or real. If a man suffered wrong the civil courts were always open to him, but in the animosities which arose between individuals damages were not a sufficient redress, and it became sometimes an object with persons not influenced by any but purely personal and vindictive feelings to try and injure the character of another by setting the criminal law in motion. Surely in a case of that kind, the Court ought to lay down and act on the principle, whatever the law might be, that such applications should be granted only in extreme cases. It was not desirable, under ordinary circumstances, that men should be enabled to set the criminal law in motion against one another; but provisions of this kind were calculated not only to give undue encouragement to the indulgence of personal animosity, but also to be productive of very grave and serious political consequences. Most of the applications which had been made to the Court under the existing law had been applications in cases of libel, and applications in cases of libel were applications which the Court granted reluctantly, and which, he had no doubt, the Court would, as it ought to, grant reluctantly under the proposed change of the law."

8 Mr Wrixon, speaking in support of the clause, seems – it is by no means clear – to have taken the view that the Court would have a discretion.[25] In view of the fact that as Chief Justice Madden was to write the leading judgment 25 years

---

[23] Hansard, vols. 43 and 44.

[24] Hansard, pp.2281-2.

[25] Hansard, p.2283.

later in *Byrne v. Armstrong*, in favour of the view that applications must be *ex parte*, it is of particular interest to see what he said in his speech against the enactment of clause 22:

> "He presumed that the application referred to in the clause, supported by affidavit, to 'the Supreme Court or any judge thereof', would be in the nature of an ordinary application to a judge in chambers. Well it was not to be supposed that a judge in chambers would make such an order as was provided for by the clause *ex parte*. Both parties would have to be represented, and that would involve an expense which, when superadded to the necessary expense of a jury, would make the cost of the whole proceeding in excess, in most instances, of the costs attending an application to the Supreme Court under present circumstances."[26]

Consistently with this view, Dr Madden later put forward in support of his argument a suggested bill of costs showing how expensive the new procedure would be.[27] Mr F.L. Smyth, speaking against the clause, like Dr Madden, entertained no doubt that if the provision was enacted an order would not be made on an *ex parte* application:

> "If honorable members supposed that the Supreme Court would make an order for the summoning of a grand jury on a mere affidavit, without hearing what could be said on the other side, they were greatly mistaken."[28]

9 In his judgment in *Byrne v. Armstrong* Madden, C.J. does not seem to take the view that applications under the original provision – s.21 of the Act of 1874 – were not to be made *ex parte*.

10 If "must" has in recent years become one of the vogue words of those who draft Victorian legislation, "it shall be lawful" was one of the vogue phrases in the nineteenth century. Many sections of the *Supreme Court Act* 1852, including s.13 itself, begin with the words "That it shall be lawful". "It shall be lawful" appears time and again in the *Judicature Act* 1874 itself, while in at least one case – s.37 – the words used are "It shall not be lawful".

---

[26] Hansard, p.2284.

[27] Hansard, p.2289.

[28] Hansard, p.2285.

11 In *Byrne v. Armstrong* the view which prevailed was that "it shall be lawful" conferred no discretion and that applications were to be made without notice. Like the Full Court which dealt in 1991 with the application by Robinson, we find the judgments of the dissentients in *Byrne v. Armstrong* very persuasive[29]. We would adopt the reasoning in those two judgments in holding, as we do, first, that there is a discretion to refuse to summon a grand jury notwithstanding that the requirements of the section are met, and, secondly, that applications under the section should not be made *ex parte*. We overrule *Byrne v. Armstrong*.[30]

12 Parliament has twice, in recent years, declined to repeal s.354 of the *Crimes Act* 1958. As recently as 1998, s.22(1)(b)(ii) of the *Director of Public Prosecutions Act* 1994 was amended to exclude from the Director's power to take over proceedings those which are consequent on a finding of a grand jury. We make no suggestion that s.354 should be repealed. As we have interpreted it, s.354 confers, and its predecessors have always conferred, a discretion to refuse to summon a jury notwithstanding that the requirements of the section are met. Notice of the application should be given to the alleged offender. (We need not consider the case in which the giving of notice is impossible.)

13 The section providing for grand juries has always spoken of the summoning of men. That word continued to be used long after women became eligible for jury service. In its wider sense "man" means "person". It might be argued that if the

---

29 So did Smith, A.C.J. in *R. v. Judge Martin; Ex parte Attorney-General* [1973] VR 339 at 342.

30 Numerous authorities recognise that prima facie "it shall be lawful" is a permissive or facultative expression and that it is for those who assert that there is a duty to exercise the power conferred to point to the necessary indication of an intention in the words used by Parliament or the context or subject matter. It is sufficient to give, in chronological order, a number of examples: *Julius v. Bishop of Oxford* (1880) 5 App. Cas. 214; *Hereford Railway Co. v. R.* (1894) 24 SCR 1; *Metropolitan Coal Co. of Sydney Ltd v. Australian Coal and Shale Employees' Federation* (1917) 24 CLR 85 at 96-97 per Isaacs and Rich, J.J.; *Newmarch v. Atkinson* (1918) 25 CLR 381 at 387-8 per curiam; *Ward v. Williams (*1955) 92 CLR 496 at 505-8 per curiam; *Monaghan v. Glasgow Corporation* [1955] S.C. 80; *Braybrook v. Hall* [1956] VLR 75 at 79 per Sholl, J.; *Bernstein v. Bernstein* [1960] Ch 128; *R. v. Judge Martin; Ex parte Attorney-General* [1973] VR 339; *Duffy v. Corporation of Dublin* [1974] IR 33 at 37-40 per Henchy, J.; *Commissioner of State Revenue (Victoria) v. Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 88 per Brennan, J.; *Horsburgh v. Russell* (1994) SLT *942; Commonwealth v. SCI Operations Pty Ltd* (1998) 192 CLR 285 at 346-7 per Brennan C.J.; *Samad v. District Court of New South Wales* (2000) 50 NSWLR 270.

word "man" imports a male person it is to be taken to include a female by reason of s.37 of the *Interpretation of Legislation Act* 1984. Compare Pearce & Geddes, *Statutory Interpretation in Australia*, 4th ed., para.6.26 and see Scutt, "*Sexism in Legal Language*", (1985) 59 A.L.J. 163. The Solicitor-General submits that, one way or another, "men" includes women, and this is very likely so.[31] But it is undesirable that there should be the slightest doubt on this point. The summoning of women might conceivably be the subject of objection, as their deliberate exclusion might well be. Unless there is some statutory provision making the position absolutely clear (and we have not been referred to any), s.354 should be amended by substituting "persons" for "men". But any such amendment should not, we earnestly suggest, be treated as the occasion (unless the greatest care is exercised) for a general "modernisation" of the section, lest this have the result that other doubts are created. The section depends so much upon pre-existing practices and judicial accretions that any attempt at wholesale "modernisation" would be fraught with danger.

14 The present application, having been made *ex parte*, cannot on any view be granted. But there are other reasons why it must fail. So far we have said nothing about the highly unusual facts of the case. The applicants, Mr Shaw and Ms Walter, do not have solicitors or counsel. They have prepared the papers themselves and they have appeared in person. They are concerned about what they see as the unlawful activities of Freemasons. Specifically, they say that Freemasons take and administer unlawful oaths, contrary to s.316 of the *Crimes Act*, and that they enter into conspiracies for the taking and administration of these oaths, contrary to s.321 of that Act. Broadly speaking, s.316 makes it an offence to administer or take an oath: to commit treason or murder; to engage in any mutinous or seditious enterprise; to commit any indictable offence other than treason or murder; to disturb the public peace; to be of any association formed for the purpose of doing any of those acts; to obey the commands of any body of men not lawfully constituted or of any leader not having authority by law; not to inform or give evidence against any

---

[31] The grand jury summoned on the application of Lorne Campbell comprised 17 women and six men, according to *The Age* of 7 November 1986.

other person; not to reveal any unlawful association or any illegal act or any illegal oath.

15 This is not the first occasion on which Mr Shaw has come before the courts complaining of the activities of Freemasons. From material placed before us, it seems that he has unsuccessfully sought to file a writ naming three bodies as defendants and complaining of the infiltration by Freemasonry of the law-making and law-enforcement arms of this State. The proposed action sought among many other things an injunction against "all masonic workings and rituals". Mr Shaw wishes to obtain in these other proposed proceedings an order that all members of Parliament and all judges, masters and magistrates in this State make an affidavit disclosing whether they are Freemasons. He and Ms Walter do not reveal their addresses in the affidavits made in support of this application. In another affidavit Mr Shaw explains that he has concealed his address because every Freemason has taken an oath to maim or kill. Although his Honour is not named as one of the alleged offenders for the purposes of the present application, the material alleges that one judge of the Supreme Court and his associate have committed a criminal offence by attempting to pervert the course of justice.

16 The exhibits to the affidavits in support of the application are numerous and most varied. Sometimes they are themselves copies of affidavits. At times they consist of extracts from an Act of Parliament. Sometimes they contain long passages from the Scriptures. It is perhaps not surprising to find that both applicants have been before the courts on other occasions, and are associated with other persons who have been before the courts. Ms Walter is one of the plaintiffs in an action challenging the appointment by a bank of a receiver under a debenture. The papers also refer to an alleged default under a mortgage and the lodging by Ms Walter of a caveat which was ordered by the court to be removed. She complains that she has been denied justice on numerous occasions – some fifteen in all – this year by six judges of the Trial Division, two members of the Court of Appeal and five masters. She says that she has been denied justice by those who are or may be

Freemasons and that the symbol of Freemasonry is displayed on numerous parts of the court houses. Tarot cards have been placed before us with a view to showing that the statue of Justice which looks down on these courts shows baneful occult influences. In one of the exhibits, Mr Shaw, dealing with the legal proceedings brought by Ms Walter which we have very briefly mentioned, asserts that two issues have been paramount in the hearings, the first being Magna Carta and the second the involvement of Freemasonry.

17 The exhibits include such things as reproductions of the front page of *Freemasonry Victoria*, bearing a photograph of past grand masters, who are not identified in the material. Attention is drawn to a pentagram floor said to be discernible in a different photograph from the same publication. Another example is a page taken from a work entitled "The Deadly Deception", dealing with the drinking of wine from a human skull and someone dressing up as a skeleton (said to have looked most convincing). Copies of the entire magazine *Freemasonry Victoria* are put in evidence. One exhibit consists of a photograph of Her Majesty Queen Elizabeth in the robes of Sovereign Head of the Most Venerable Order of the Hospital of St. John of Jerusalem. Another is a photograph of Pope John Paul II giving an audience to men in colourful uniforms, evidently put forward in support of a contention elsewhere in the material that Freemasonry has "infiltrated into the very heart of the Vatican". There are numerous photographs in evidence, including one of a portrait of Prince Albert. Another exhibit is a newspaper account of an address given by a judge – not of this Court – to Masons at Darwin in 1985. This is immediately followed by a cutting from the Melbourne *Herald-Sun* – distinctly satirical in tone – dealing not with oaths but with a marble monument. The immediately following exhibit is a provision of the Victorian Constitution of 1855. Other exhibits show that Mr Shaw has concerned himself with the question of the existence of Royal Assent to the Act containing that Constitution. In another exhibit Her Majesty the Queen is petitioned to withhold the Royal Assent from any Bill seeking to ratify the Treaty of Nice. We find copious quotations from the Reverend Charles Finney, an American publicist of the early nineteenth century. (We draw

examples at random from the material to give some idea of its nature.) One affidavit of Mr Shaw, comprising, with exhibits, some 50 pages, deals with the prosecution of a woman named Diann McKinnon in the Sunshine Magistrates' Court last May on a charge of speeding. At this Mr Shaw tried to appear as a McKenzie friend. Matters which he attempted to debate included whether the 1855 Constitution was lawful and who owned the copy of it which was "purportedly" submitted to the Sovereign; whether the statutes of this State were invalid by reason of the invalidity of that Constitution; the existence of a conspiracy to pervert the course of justice in Victoria, which conspiracy began with that Constitution; and the role of Freemasons in relation to unlawful oaths. With the assistance no doubt of Mr Shaw, Ms McKinnon unsuccessfully tried to appeal to the Supreme Court against her conviction and fine, basing herself either on the Constitution of 1855 or – it is not clear – the supposed invalidity of that Constitution. The next affidavit, by Mr Shaw, deals with his having interested himself in the conviction of one Brian Fyffe of a traffic offence in December 2000. Civil proceedings are mentioned again: Mr Fyffe is said to have had "legal battles over his property in Gippsland". Mr Shaw had himself, last August, sought to appeal against Fyffe's traffic conviction. The basis of the contemplated appeal was that International Freemasonry was a Foreign Power operating unlawfully and contrary to the Constitution of 1855, the Commonwealth Constitution and the Victorian *Crimes Act*. His affidavit complained of the disregard by the magistrate of evidence that two Acts had left the State of Victoria in 1854 for London. Further reference was made to Magna Carta and to the petition to Her Majesty to withhold the Royal Assent from any Bill seeking to ratify the Treaty of Nice. Elsewhere the writ of habeas corpus is invoked.

18 After this brief survey of the voluminous material, we turn to the question of the identity of the alleged offenders for the purposes of s.354. The notice of application recites that the applicants have disclosed an indictable offence "committed by a body corporate, namely", and then goes on to name Grand Lodge Holding Ltd., Freemason's Custodian Company Ltd., Victoria Eades Pty. Ltd.,

Freemason's Victoria Pty. Ltd. and Square One Publications Ltd. If these companies – assuming them to exist, as we suppose they do – are the bodies corporate by whom the applicants claim to have shown an indictable offence to have been committed, then they are the alleged offenders for the purposes of the section. But the application goes on to complain that "the Court has declined or refused to commit the alleged offender, namely –

| | | |
|---|---|---|
| A. | First Defendant: | Supreme Council of the Ancient and Accepted Rite for Australia. Regional Recorder, Region 3, Mr. E. Gibbs, 59 Herbert Street, Parkdale 3195 Region 3 (Riverina/Victoria/Tasmania) |
| B. | Second Defendant: | United Grand Lodge of Victoria, Masonic Centre Victoria, Dallas Brooks Hall, 300 Albert Street East Melbourne (all named living members, re. Portrait 1995 – 1996 Masonic Team as exhibited) |
| C. | Third Defendant | The Masonic Lodge Werribee, Watton Street, Werribee 3030, Mr. Michael Hulks." |

19 It may be doubted whether any of the three bodies named in this part of the notice of application is a body corporate, but their legal status is not dealt with in the material, nor is it clear from the application whether the persons E. Gibbs and Michael Hulks are to be regarded as additional alleged offenders or simply as part of the address of the body named. As regards the "second defendant", the reference to the United Grand Lodge of Victoria is followed by words in parenthesis which may be intended to convey that the "second defendant" is not the body named but certain members of it. Exhibit FC10 is a large colour photograph of a number of Masons who are named and also described as "Grand Lodge Team 1995-1996". Perhaps the intention is that such of those as are still living should be among the persons whom the grand jury will be invited to indict. But this is by no means clear.

20 With the exception of the link provided by that photograph, one searches in vain for anything of real use in the material to link the supposed companies, the

bodies and the natural persons mentioned in the notice of application with specific Masonic activities and in particular with the taking or administration of oaths. The material is so voluminous and so disordered that it is difficult to make confident assertions, but there appear to be only two links in addition to the photograph. The first is that Square One Publications Ltd. is named in *Freemasonry Victoria* as its publisher. The second is that the body named as the third defendant is the Masonic Lodge Werribee, and Exhibit FC22 is a newspaper cutting dealing with the Centenary of the Werribee Masonic Lodge and the impending installation of Mike Hulks as its master. The article is of interest for its photograph of a bluestone building where the Lodge first met in 1901. (That Lodge and Mr Hulks are mentioned in the notice of application.)

21 The applicants told us that, although as Christians they did not really wish to prosecute anybody, they should be taken as alleging offences by the five alleged bodies corporate lettered "A" to "E", both the body and the individual named as first defendant (although they did not know which persons formed the Supreme Council), all persons in the portrait mentioned under "Second Defendant" who were still living (they could not identify these) and, for the time being, not the Masonic Lodge Werribee but only Mr Hulks. They said they had been given the names of the five bodies corporate by someone at Dallas Brooks Hall, and that one of them was a publisher and another ran an old people's home.

22 The material contains a large collection of what are in some sense said to be Masonic oaths. It is a question whether any of them is shown to be a current oath administered and taken by Masons in this State. Most of the oaths are notable for the imprecation with which they conclude. The taker of the oath asks that if he should violate it his tongue be torn out by the root and buried in the sand of the sea at low water mark or a cable's length from the shore; or that he "incur the fearful penalty of having my eyeballs pierced to the centre with a three-edged blade"; or that his left breast be laid open and his heart torn therefrom and given to the ravenous birds of the air or devouring beasts of the field as a prey; or that the wine

he now drinks become a deadly poison to him, as the hemlock juice drunk by Socrates, and that the cold arms of the skeleton – a role played "convincingly" by a costumed colleague – should forever encircle him. These are all very colourful, but it is, if we may say so, childish to imagine that a man who takes an oath of this kind – if indeed men do so nowadays – is, by reason of the colourful images in the imprecation, to be regarded as a potential murderer or a potential victim of murder.

23 The material fails to show that Freemasons administer or take oaths proscribed by s.316 of the *Crimes Act*.

24 There are several reasons why this application must fail. One or two of the defects are, or may be, capable of being cured, but we should make it clear that in our view there is no reason for supposing that the papers ever would or ever could be put into a state which would warrant the summoning of a grand jury. There is a wide range of deficiencies. Most of the affidavits fail to state the deponent's place of residence. The Court has power to dispense with this requirement, and a general power to dispense with irregularities in affidavits, but we would not exercise it in this case, taking as we do the view that this is pre-eminently the kind of application in which the applicants should be properly identified. In addition, the affidavits are objectionable by reason of the way in which they put before the Court a hotch-potch of documents and assertions, inadequately identified and sourced. No-one would wish to see an applicant in person suffer as a result of inability to assemble and verify material as a lawyer would, but benevolent indulgence cannot be stretched to the point of accepting what has been put forward in this case. Quite apart from questions of proper form and admissibility, even applicants in person cannot expect a court to wade through material of the present kind in the hope that there may be found "a grain or two of truth among the chaff". What, for example, are we expected to make of the vicissitudes of Mr Fyffe, said to be currently lodged in Port Phillip prison for threatening to kill, or those which have beset Ms McKinnon in her attempts to defeat her prosecution for a traffic offence?

25 Then there is the problem, mentioned earlier, of the identity of the alleged offenders. Are they the five supposed companies first mentioned in the notice of application, or the persons or bodies next described there as the alleged offenders? We have listened to the attempted explanation here. We have already mentioned the failure of the material to deal with the status in law, identity and role of those named in the notice of application. Again – and so far we have not mentioned this difficulty – the material suggests on the one hand that reliance is placed on the "body corporate" branch of s.354 but on the other hand seems intended to show that a court has declined to commit alleged offenders, not in the sense that committal proceedings have been unsuccessful, but in the sense that the applicants have not been permitted to file a writ. No committal proceedings have in fact been taken. In addition, the material fails to show that Freemasons in Victoria take or administer oaths contrary to s.316 of the *Crimes Act*.

26 We gave the applicants great latitude in arguing their application – more than we should have. They have made it plain that they regard every part of the legal system as infested – that is the kind of word they would use – with Freemasons and that they are convinced that the courts in general and we in particular will never give them the justice to which they are entitled. Many of the expressions were offensive. ("You break the law by the week." "The courts cannot be trusted. You bend the statute law at the whim of whatever decision you want to make. But God's law will win." These are only examples of repeated imputations of bad faith.) The applicants have said to us that, each time their application is dismissed, "We will be back tomorrow." We realise that nothing we say will deflect them from their course. We have, however, during the argument, tried to convey to them a little about abuse of process.

27 The application is hopeless and it must be, and is, dismissed.

---