SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCR 2018 0025

THE QUEEN

V

LINTON PETERS (a pseudonym)[1]

JUDGES:	OSBORN, KAYE and NIALL JJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	12 April 2018
DATE OF JUDGMENT:	9 May 2018
MEDIUM NEUTRAL CITATION:	[2018] VSCA 115
JUDGMENT APPEALED FROM:	Case stated by order of the Honourable Justice Beale dated 15 February 2018 and amended on 1 May 2018

CASE STATED – Public interest immunity – Form of questions – Amendment of questions reserved – Whether findings of fact open to trial judge – Whether conclusion relating to evidence capable of raising a public interest in the accused's fair trial – Matter remitted to trial judge for further consideration having regard to answers to the questions reserved.

APPEARANCES:	Counsel	Solicitors
For the Crown	Mr M J Rochford QC with Ms N Warda	Mr John Cain, Solicitor for Public Prosecutions
For the Accused	Mr P J Morrisey SC with Ms G Morgan	Stephen Andrianakis & Associates
For the Commonwealth	Mr T Howe QC with Ms I Sekler	Australian Government Solicitor
For the Chief Commissioner of Victoria Police	Mr E M Nekvapil	Victorian Government Solicitor

[1] To ensure that there is no possibility of identification, this judgment has been anonymised by the adoption of a pseudonym in place of the name of the respondent.

OSBORN JA
KAYE JA
NIALL JA:

1 Linton Peters (a pseudonym) is charged with the murder of AB.

2 The murder charge is proceeding through pre-trial steps in the Trial Division of this Court.

3 It is not disputed that Peters shot AB causing his death. The defence seeks to put in issue self-defence.

4 The Crown does not concede that the evidence currently available discharges the evidential burden upon the defence of raising the issue of self-defence by presenting or pointing to evidence that suggests a reasonable possibility of the existence of facts that if they existed, would establish self-defence.[2]

5 The defence relies upon a body of information, principally derived from Victoria Police ('Vic Pol') documentation which demonstrates a background of dispute which would provide a motive for hostility on the part of AB towards Peters at the time of the fatal confrontation which culminated in the shooting.

6 The defence has sought production of documentation from the Commonwealth with respect to information bearing on the background of dispute.

7 In turn, the Commonwealth has claimed public interest immunity ('PII') with respect to certain information held by it.

8 That claim fell to be decided in accordance with s 130 of the *Evidence Act 2008*, which applied by reason of the extended operation given to it by s 131A.

9 Section 130 provides:

130 Exclusion of evidence of matters of state

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2 *Crimes Act 1958*, s 322I(1).

(1) If 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.

(2) The court may give such a direction either on its own initiative or on the application of any person (whether or not the person is a party).

(3) In deciding whether to give such a direction, the court may inform itself in any way it thinks fit.

(4) Without limiting the circumstances in which information or a document may be taken for the purposes of subsection (1) to relate to matters of state, the information or document is taken for the purposes of that subsection to relate to matters of state if adducing it as evidence would—

(a) prejudice the security, defence or international relations of Australia; or

(b) damage relations between the Commonwealth and a State or between 2 or more States; or

(c) prejudice the prevention, investigation or prosecution of an offence; or

(d) prejudice the prevention or investigation of, or the conduct of proceedings for recovery of civil penalties brought with respect to, other contraventions of the law; or

(e) 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; or

(f) prejudice the proper functioning of the government of the Commonwealth or a State.

(5) Without limiting the matters that the court may take into account for the purposes of subsection (1), it is to take into account the following matters—

(a) the importance of the information or the document in the proceeding;

(b) if the proceeding is a criminal proceeding—whether the party seeking to adduce evidence of the information or document is an accused or the prosecutor;

(c) the nature of the offence, cause of action or defence to which the information or document relates, and the nature of the subject matter of the proceeding;

(d) the likely effect of adducing evidence of the information or document, and the means available to limit its publication;

(e) whether the substance of the information or document has already been published;

(f) if the proceeding is a criminal proceeding and the party seeking to adduce evidence of the information or document is an accused—whether the direction is to be made subject to the condition that the prosecution be stayed.

(6) A reference in this section to a State includes a reference to a Territory.

10 The balancing of public interests contemplated by s 130(1) reflects the common law principles stated by Gibbs ACJ in *Sankey v Whitlam*:[3]

> The general rule is that the court will not order the production of a document, although relevant and otherwise admissible, if it would be injurious to the public interest to disclose it. However, the public interest has two aspects which may conflict. These were described by Lord Reid in *Conway v Rimmer*, as follows:
>
> > There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done.
>
> It is in all cases the duty of the court, and not the privilege of the executive government, to decide whether a document will be produced or may be withheld. The court must decide which aspect of the public interest predominates, or in other words whether the public interest which requires that the document should not be produced outweighs the public interest that a court of justice in performing its functions should not be denied access to relevant evidence. In some cases, therefore, the court must weigh the one competing aspect of the public interest against the other, and decide where the balance lies. In other cases, however, as Lord Reid said in *Conway v Rimmer*, 'the nature of the injury which would or might be done to the nation or the public service is of so grave a character that no other interest, public or private, can be allowed to prevail over it'. In such cases once the court has decided that 'to order production of the document in evidence would put the interest of the state in jeopardy', it must decline to order production.

11 In *State of Victoria v Seal Rocks Victoria (Australia) Pty Ltd*, Ormiston JA (with whom Phillips and Buchanan JJA agreed) expressed the underlying principles this way:

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3 (1978) 142 CLR 1, 38–9 (citations omitted).

> In my opinion, therefore, public interest immunity in a document or other communication is a right by way of an immunity or a privilege which enures in the body politic and indeed in the nation (or relevant polity) as a whole, and not merely in the executive, being designed to protect the operation of the instruments of government at the highest level and for the benefit of the public in general, subject only to a court's reaching a conclusion to the contrary on sound grounds that no other public interest, especially in the administration of justice, should prevail in the particular circumstances.[4]

12 In Ruling No 2, the trial judge accepted the Commonwealth's claim to PII with respect to certain documents but rejected the Commonwealth's claim of PII with respect to three paragraphs contained in a draft intelligence bulletin entitled 'Fatal shooting of (AB) on (the relevant day)' ('the Information').

13 Three fundamental conclusions underpinned this decision. First, his Honour accepted on the one hand that the information related to a matter of state in terms of the matters included in s 130(4) of the *Evidence Act*. Secondly, his Honour concluded on the other hand that the information could be of significant assistance to the defence. Thirdly, his Honour concluded that the disclosure of the Information was not likely to significantly undermine the competing interest in a matter of state for which the Commonwealth contends.[5]

14 The trial judge ordered the Commonwealth to disclose the Information to the defence in the murder trial.

15 The Commonwealth sought and obtained a stay of this order and then requested the trial judge to state a case reserving a question of law under s 302 of the *Criminal Procedure Act 2009* as to the correctness of the decision which he had made with respect to PII.

16 It is apparent that this course was taken because on the face of it the Commonwealth had no standing to bring an interlocutory appeal pursuant to the relevant provision of the *Criminal Procedure Act*.[6]

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4 (2001) 3 VR 1, 6–7 [17].

5 Ruling No 2 [4]; Ruling No 3 [5] and [7].

6 *Criminal Procedure Act*, s 295.

17 The defence opposed the reservation of a question of law but ultimately his Honour, acting on his own motion, reserved a question on the following terms:

> (a) On 'the material filed before the Court' was the Court correct to find … that the public interest in non-disclosure of 'the Information' did not outweigh the public interest in disclosure of 'the Information'?
>
> (b) '[T]he Information' means the last 3 paragraphs (including footnotes 5 and 6) on page 3 of a draft Intelligence Bulletin titled 'Fatal Shooting of (AB)' and [the relevant day].
>
> (c) '[T]he material filed before the Court' means:
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> (i) The Depositions;
>
> (ii) The Prosecution Summary of Opening dated 13 September 2017;
>
> (iii) The Defence Response dated 27 September 2017;
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> (iv) The Commonwealth's written submissions (confidential and non-confidential) dated 4 December 2017, 29 January 2018, 8 February 2018 and 13 February 2018;
>
> (v) The Commonwealth's confidential affidavits dated 28 November 2017, 8 February 2018 and 13 February 2018;
>
> (vi) The Defence's written submissions dated 6 December 2017, 9 December 2017 and 12 February 2018; and
>
> The material filed by the Chief Commissioner of Victoria Police in response to the Defence subpoena dated 12 September 2017.

18 For reasons we shall explain below, this Court has directed that the question of law reserved by the trial judge be amended to read as follows:

> (a) On 'the material filed before the Court', was it open to the trial judge to find … that the disclosure of 'the Information':
>
> (i) is not likely to significantly undermine the public interest for which the Commonwealth contends;
>
> (ii) could be of significant assistance to the defence;
>
> (iii) could be regarded as raising an issue of the public interest in a fair trial;
>
> (iv) was not prohibited by public interest immunity.

19 'The Information' and 'the material filed before the Court' remain as

originally defined by the trial judge. The trial judge has amended the question in accordance with out directions.

20 For the reasons we set out below, we would answer these questions as follows:

(i) No.

(ii) and (iii) Yes.

(iv) Inappropriate to answer.

21 Because we have reached the view that the trial judge erred in respect of the evaluation of the impact of publication upon the public interest asserted by the Commonwealth, it will be necessary for his Honour to undertake the balancing exercise required by s 130 again and to again address the appropriate procedure for the resolution of the PII issue.

22 We will first explain our reasons with respect to the form of the relevant questions of law and then explain our reasons for our answers to them

The preliminary procedural issue

23 Sections 302, 305 and 306 of the *Criminal Procedure Act* provide:

> **302 Reservation of question of law**
>
> (1) This section applies to a proceeding in the County Court or the Trial Division of the Supreme Court for the prosecution of an indictable offence.
>
> (2) In a proceeding referred to in subsection (1), if a question of law arises before or during the trial, the court may reserve the question for determination by the Court of Appeal if the court is satisfied that it is in the interests of justice to do so, having regard to—
>
> (a) the extent of any disruption or delay to the trial process that may arise if the question of law is reserved; and
>
> (b) whether the determination of the question of law may—
>
> (i) render the trial unnecessary; or

(ii) substantially reduce the time required for the trial; or

(iii) resolve a novel question of law that is necessary for the proper conduct of the trial; or

(iv) reduce the likelihood of a successful appeal against conviction in the event that the accused is convicted at trial.

(3) The court must not reserve a question of law after the trial has commenced, unless the reasons for doing so clearly outweigh any disruption to the trial.

…

305 Case to be stated if question of law reserved

(1) If a court reserves a question of law under section 302, 302A or 304, it must state a case, setting out the question and the circumstances in which the question has arisen.

(2) The court must sign the case stated and transmit it within a reasonable time to the Court of Appeal.

(3) The Court of Appeal may return a case stated transmitted to it under subsection (2) for amendment and the court that stated the case must amend it as required.

306 General powers of Court of Appeal on case stated

(1) The Court of Appeal may hear and finally determine a question of law set out in a case stated.

(2) In the case of a question of law reserved under section 302, 302A or 304, the Court of Appeal may remit the question and the determination of the Court of Appeal back to the court which reserved the question.

(3) The applicant is not required to attend the hearing under subsection (1).

24 When this matter came on for hearing the Court expressed the strong preliminary view that the initial form of the question reserved was unsatisfactory. After indicating our preliminary concerns no party sought to dissuade us from that view. Nevertheless it is appropriate to record our reasons for this conclusion and for our conclusion that the case should be amended pursuant to s 305(3) of the *Criminal Procedure Act*.

25 The question reserved by the trial judge involved the application of s 130 of

the *Evidence Act*. But it was not expressed so as to identify a specific question of statutory construction. No question was identified of the type which arose in *Galloway (a pseudonym)*[7] as to the effect of a particular provision of the *Evidence Act*; or in *DPP (Cth) v JM*[8] as to the meaning of the words 'artificial price' under the relevant provision of the *Corporations Act 2001* (Cth).

26 Indeed, when reserving the question of law, the trial judge considered s 302(2)(b)(iii) of the *Criminal Procedure Act* and concluded:

> Next will the Court of Appeal be resolving a novel question of law? No, the Court of Appeal will be applying settled principles of law in relation to PII.[9]

27 As this Court observed in *Furze v Nixon*[10] there is considerable learning on the stating of a case albeit in a number of different legislative contexts.

28 There are a number of authoritative statements supporting the view that a case cannot be satisfactorily stated by asking 'was I correct to reach an ultimate conclusion' in cases involving disputed questions of both fact and law.[11]

29 As we apprehend it this is because:

(a) Such a question does not raise a specific question of law; and

(b) Such a question is apt to conceal what is in truth an attack on findings of fact.[12]

30 In *Connor v Pittaway*,[13] Pape J accepted the correctness of the observations of the Chief Justice of New South Wales in *Re Van Der Lubbe*:[14]

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7 [2014] VSCA 272.

8 (2013) 250 CLR 135.

9 Ruling No 4 [15].

10 (2000) 2 VR 503, 506 [5] (Phillips, Batt and Buchanan JJA).

11 Eg *Connor v Pittaway* [1969] VR 335; *Furze v Nixon* (2000) 2 VR 503.

12 See *R v Rigby* (1956) 100 CLR 146, 149–152.

13 (1969) VR 335, 337.

14 (1949) 49 SR(NSW) 309, 312; also applied in *R v Madden* (1995) 85 A Crim R 367, 370 (Hunt CJ at CL).

> It is not proper to ask whether, as a matter of law the chairman on the facts found by him was entitled to find the appellant guilty of the offence charged, leaving the Court of Criminal Appeal to grope through the case stated and try to discover for itself what are the specific questions of law involved.

31 Nonetheless by reading the case stated as a whole in that instance Pape J was able to discern a specific question as to the meaning of the statutory phrase 'loiter with intent'.

32 In *Furze v Nixon*,[15] the Court of Appeal was confronted with questions relating to the evidentiary effect of a certificate served under provisions of the *Road Safety Act 1986* and made the following observation in the course of their reasons:[16]

> We doubt if asking whether 'the Decision of the Court to convict the Appellant [was] correct in law' could be justified on a full appeal; it is certainly inapt in a case stated.

33 In the present case, it is apparent from the submissions filed on behalf of the Commonwealth that a central thrust of its case is that the trial judge erred in the findings he made as to the extent of the impact of publication upon respective public interests in a matter of state on the one hand, and the capacity of the accused to mount his defence on the other. Conversely, the defendant submitted in his written case that having regard to the intermediate conclusions of fact that the trial judge reached with respect to these issues, the only answer open to the question of law originally stated for this Court was that the trial judge was correct.

34 In these circumstances we formed the view that it was necessary to consider whether the question reserved pursuant to s 302 could be satisfactorily amended to raise a specific question or specific questions of law, which addressed the underlying issues raised by the findings of the trial judge with respect to the competing claims of the public interest identified by him.

35 Moreover, because it was in the public interest to address and resolve the underlying issues we took the view that we should facilitate the statement of an

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15 (2000) 2 VR 503.

16 Ibid 508 [8] (Phillips, Batt and Buchanan JJA).

amended case if that could be satisfactorily done.

36 Ordinarily a case stated will proceed on the basis of findings which set out the ultimate facts upon which the relevant question of law arises. As *DPP (Cth) v JM*[17] makes clear, it may also be appropriate in some circumstances to assume facts asserted by the prosecution as part of its case in a criminal proceeding, in order to resolve a threshold issue of law which may materially affect the course and outcome of that proceeding.

37 In *Furze v Nixon*, this Court said:[18]

> Thus, it is important to … set out clearly and with particularity the ultimate facts upon which a 'question of difficulty in point of law has arisen' within the meaning of s 446 of the *Crimes Act*. Ordinarily, there will be no reason to include the evidence. One exception is if the question is of the admissibility of a particular item of evidence; another when the question of law is whether there is evidence to support a particular and critical finding which was made; but otherwise it will be both necessary and sufficient to set out only the ultimate facts.

38 The present case is an exceptional one where the fundamental dispute is concerned with particular and critical findings of fact. The Commonwealth's challenge to those findings gives rise to questions of law as to whether they were open to the trial judge.[19]

39 Accordingly, after hearing the parties as to the appropriate form of questions directed to the resolution of this issue we concluded that the question reserved should be amended to the form we have set out above.

40 Questions (i), (ii) and (iii) go to findings that were made by the trial judge after receiving confidential material from the Commonwealth and hearing the Commonwealth in closed court. That process was replicated in this Court. Neither

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17 (2012) 250 CLR 135.

18 (2000) 2 VR 503, 507–8 [7] (Phillips, Batt and Buchanan JJA).

19 *Australian Broadcasting Commission v Bond* (1990) 170 CLR 321, 355 (Mason CJ); *Kostas v HIA Insurance Services Pty Ltd* (2010) 241 CLR 390, 412 [69] (Hayne, Heydon, Crennan and Kiefel JJ); *S v Crimes Compensation Tribunal* [1998] 1 VR 83, 89–93 (Phillips JA).

the prosecutor nor defence counsel have been provided with the Information. This course was adopted in order to preserve the integrity of the Information and protect the public interest for which the Commonwealth contends.

41 Likewise, questions (i), (ii) and (iii) were the subject of submissions to us by the Commonwealth in closed court. This course was taken on a provisional basis and without objection by the prosecutor or the defence.

42 Prior to hearing the Commonwealth in closed court, we indicated that we would not resolve the second question adversely to the defence (ie the question relating to the significance of the Information to the conduct of the defence) without affording both the defence and the prosecutor a further opportunity to be heard. In the event, that has proved unnecessary.

Was it open to the trial judge to find that the disclosure of the Information was not likely to significantly undermine the public interest for which the Commonwealth contends?

43 The trial judge gave limited and circumspect reasons for the conclusion that the disclosure of the Information is not likely to significantly undermine the competing public interest for which the Commonwealth contends. We must take a similar approach in our open reasons in order to avoid destroying the public interest which is in issue.

44 The question of whether the trial judge's finding of fact was open to him is to be decided on the evidence and inferences most favourable to that conclusion.[20]

45 Nonetheless, after careful consideration and with due respect to the trial judge, we have come to the conclusion that the finding in issue was not open to him.

46 Fundamentally this is because we are satisfied that his Honour's finding is

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20 *Azzopardi v Tasman UEB Industries Limited* (1985) 4 NSWLR 139, 151 (Kirby P); *ISPT Pty Ltd v Melbourne City Council* (2008) 20 VR 447, 464–465 [65]–[69] (Warren CJ, Kellam JA and Osborn AJA).

directly inconsistent with credible evidence as to the extent and nature of the public interest involved.

47 Conversely, we have concluded that the principal reason advanced by his Honour for regarding the probable impact upon that public interest as unlikely to be significant cannot be regarded as materially supporting that conclusion.

48 Further, the gravity of the harm identified in the material filed on behalf of the Commonwealth is such that a real risk of the eventuation of that harm should be regarded as significant.[21] The facts giving rise to the unacceptable risk must themselves be established on the balance of probabilities[22] but not the prospect of the eventuation of the risk itself.

49 In our view, the affidavit material substantiated a real risk of the eventuation of grave harm to the public interest asserted on behalf of the Commonwealth. In turn, it was not open (on the material referred to in the case stated) to find that that interest is unlikely to be significantly undermined by the disclosure of the Information.

Was it open to the trial judge to conclude that the Information could be of significant assistance to the defence?

50 The circumstances in which the issue of self-defence currently falls to be considered are set out by the trial judge in the statement made by him as part of the case stated:[23]

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21 *Conway v Rimmer* [1968] AC 910, 940 referred to with approval by Gibbs ACJ in *Sankey v Whitlam* (1978) 142 CLR 1, 39; *Rogers v Home Secretary* [1973] AC 388, 410–11 (Lord Reid); *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners* (Nox 2) [1973] AC 405, 434; *Burmah Oil Co Ltd v Bank of England* [1980] AC 1090, 1143 (Lord Scarman); *The Australian Statistician v Leighton Contractors Pty Ltd* [2008] 36 WAR 83, 93 [46] (Steytler P, McLure JA and Newnes AJA); *Ryan v State of Victoria* [2015] VSCA 353 [158] (Tate, Santamaria and Ferguson JJA); *Kamasee v Commonwealth of Australia [No 4]* [2016] VSC 492 [11]–[14]; *AS v Minister for Immigration and Border Protection* [2017] VSC 162 [40(b)] (Daly AsJ).

22 *Evidence Act*, s 142.

23 Section 305(1) of the *Criminal Procedure* Act requires the judge to set out the question and the circumstances in which the question has arisen.

The shooting

On 12 July 2016 at about 5.30 in the afternoon two men, [one of whom was the deceased] were driving in the area of [ADDRESS REDACTED]. The deceased had told [the person who was driving the deceased] to go to the vicinity of [REDACTED] address because he wanted to see someone. [The driver] parked his car a few doors to the north and started to walk back together with the deceased towards [particular premises].

As they were approaching the house, the accused drove up in a black Toyota Hilux and stopped in the middle of the road. He then turned right into a driveway adjacent to his own address at [REDACTED].

The accused got out of the Hilux and the three men approached each other, somewhere [adjacent to the deceased's address]. A verbal confrontation occurred with the accused yelling at the other two men.

The accused produced a small .25 calibre hand gun and fired a number of shots. One of the shots struck the deceased in the leg and another in the chest.

The deceased subsequently died from the injuries occasioned by the two gunshots.

The accused left the area in the Toyota Hilux.

Matters relevant to legitimate forensic purpose

At relevant times there was a dispute between another man, [XY], and the accused. This arose from an incident in May 2015 where XY was shot…The shooting was the subject of [a] Victoria police operation.

An Interpose report in relation to [the police operation] that was disclosed to defence pre-committal confirmed that on or about 22 May 2015, the accused was arrested and interviewed at Melbourne airport in relation to this incident. He was released pending further enquiries, his telephone seized, and assistance offered by Victoria Police if the felt threatened. A further entry in the Interpose report on 31 August 2015 states that 'Linton Peters has left the country and headed to Turkey whilst things cool off, he was interviewed and no evidence to charge him at present'.

The defence case is that the accused was not himself the perpetrator of the shooting, but [XY] held him responsible for it. Social media monitoring of [XY]'s associates by police subsequent to the incident identified concerns regarding the potential for violent repercussions towards the accused.

[XY] was known to be a current member or associate of the Comanchero OMCG.

…

[XY] was known to associate with the deceased, otherwise known as [REDACTED], and police had received information suggesting that the deceased was a 'hitman' for [XY].

> 40 individuals including associates of [XY] [went] … looking for Peters to exact revenge for the May 2015 shooting.
>
> [XY] and 5 of his associates were reported in December 2015 to be carrying automatic firearms in order to carry out a revenge attack for [XY]'s shooting.
>
> It will be the defence case at trial that between May 2015 and July 2016, the accused was the subject of repeated, protracted, threatening behaviour by [XY] and persons associated with him, including the deceased. This included demands for money, accompanied by direct threats to assault or kill the accused, made to the accused and persons close to the accused.[24]

51 Having reviewed the material referred to in the case stated we are of the view that it was open to the trial judge to conclude that the Information could be of significant assistance to the defence.

52 In our view, it was open to conclude that the Information adds materially to the information otherwise available to the accused as tending to raise a case of self-defence. We cannot elaborate the basis of this conclusion further in open reasons without revealing the substance of the Information itself.

Was it open to the trial judge to conclude that the disclosure of the Information could be regarded as raising an issue of the public interest in a fair trial?

53 In turn, it is in our view that the Information could be regarded as meeting the test postulated in *Jarvie v Magistrates Court of Victoria at Brunswick*[25] as giving rise to a public interest in the applicant's fair trial. Namely, whether there is good reason to think that the disclosure of the Information may be of substantial assistance to the accused in meeting the case against him.

54 For completeness we should add however that as the Commonwealth submitted, and the accused accepted, the proper application of this test requires more than a mere possibility. As Brooking J himself made clear in *Jarvie*, a mere speculative possibility of assistance is not sufficient.[26]

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24 Redactions made by this Court.

25 [1995] 1 VR 84 ('*Jarvie*'); *R v Roberts* (2004) 9 VR 295, 337 [103].

26 [1995] 1 VR 84, 89–90.

Conclusion

55 It will be necessary for the trial judge to re-evaluate and balance the public interests he has identified as inherent in the Information. The answers that we have given to the questions reserved by the case stated will be relevant to that re-evaluation but the exercise will have to be undertaken anew and may not be able to be finally resolved on an ex parte basis.

56 It will be necessary to weigh the impact of disclosure of the Information upon the public interest in the fair trial of the accused on the one hand, against the impact of disclosure of the Information upon the public interest in non-disclosure of the information asserted by the Commonwealth on the other hand.

57 We should reiterate for completeness that we have not had the benefit of informed submissions from the prosecutor or the defence in respect of the case stated. Neither counsel for the defence nor the prosecutor have at this point seen the Information.

58 We would also wish to emphasise that our answers to the questions reserved should not be taken to indicate any concluded view as to what is necessary for a fair trial in this case.

59 Further, the consequences of the re-evaluation made by the trial judge under s 130 may not be binary in the sense that the information is either disclosed to, or withheld from, the defence for the purposes of the trial. It may require consideration of procedural alternatives to the provision of the Information in its current form or at all. The conduct and outcome of the re-evaluation must be a matter for the trial judge. It will require care to ensure procedural fairness is accorded to any party who may be adversely affected by its outcome.

60 Accordingly, it would be inappropriate for this Court to answer question 1(d).

61 We will remit the questions reserved and our determination back to the trial judge pursuant to s 306(2) of the *Criminal Procedure Act*.

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