26/92

FEDERAL COURT OF AUSTRALIA

THORP v ABBOTTO

Lockhart, Gummow and O'Loughlin JJ

18 March 1992

[1992] FCA 112; (1992) 34 FCR 366; (1992) 106 ALR 239; 59 A Crim R 208; (1992) 26 ALD 668

PROCEDURE – COMMITTAL PROCEEDINGS – TEST TO BE APPLIED BY COMMITTING MAGISTRATE – EVIDENCE OF SUFFICIENT WEIGHT TO SUPPORT A CONVICTION – TWO HYPOTHESES OPEN – ONE CONSISTENT WITH GUILT ONE WITH INNOCENCE – WHETHER MAGISTRATE BOUND TO DISCHARGE DEFENDANT: *MAGISTRATES' COURT ACT* 1989, S56 Sched. 5 cl 11(2).

A magistrate conducting committal proceedings having heard the evidence for the prosecution and for the defence and having formed the opinion that there are two hypotheses open on the material one consistent with guilt and the other with innocence, is not necessarily bound to discharge the defendant.

***Forsyth v Rodda* (1988) 37 A Crim R 50; (1989) 87 ALR 699, applied.**

LOCKHART J: [*After referring to the facts, legislative provisions and the Magistrate's reasons for decision, His Honour continued*] …. **[10]** The researches of counsel did not reveal any reported cases directly concerning the test to be applied by Magistrates under s11(2) of the Victorian Act of 1989 which requires that the Magistrate conducting a committal, at the conclusion of the evidence for the prosecution and the evidence for the defence, should not commit the person for trial unless in his opinion the evidence is of sufficient weight to support the conviction.

In *Forsyth v Rodda* (1988) 37 A Crim R 50; (1989) 87 ALR 699 Wilcox J **[11]** considered the equivalent phrase formerly contained in s59(7) and (7A) of the *Magistrates (Summary Proceedings) Act* 1975 (Vic). Section 59 dealt with the procedure to be followed at committal proceedings where the accused person did not plead guilty to the charge before the Magistrate but made a statement in answer to the caution administered to him. Sub-section (7) and (7A) provided:

> "(7) If after hearing all the oral evidence and reading any statements, documents and exhibits admitted in evidence under s46 or s47, the Magistrate is of opinion that the evidence is not of sufficient weight to support a conviction for the offence with which the accused person is charged, the Magistrate must if the accused person is in custody immediately order that the accused person be discharged.
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> (7A) If after hearing all the oral evidence and reading any statements, documents and exhibits admitted in evidence under s46 or 47, the Magistrate is of opinion that the evidence is of sufficient weight to support a conviction, the Magistrate must direct that the accused person be tried for the offence at the next sittings of the Supreme Court or County Court."

His Honour said at ACR 68:

> " ... a set of facts may give rise to competing inferences. Where there are competing versions of the facts or competing inferences, the tribunal of fact has to choose between them. A hypothesis which is open to the jury, as a matter of law, may be rejected by them as a judgment upon the facts. The jury may disbelieve the evidence which gives rise to the hypothesis; or they may be unpersuaded that they ought to draw a particular inference from proved facts. **[12]** Only in a case where the jury are unable ultimately to exclude the version of the facts, or the inference, which is consistent with innocence, does the obligation to acquit arise."

His Honour then proceeded to state what the Full Court of the Supreme Court of Victoria had said in *Re Attorney-General's Reference (No.1 of 1983)* [1983] VicRp 101; (1983) 2 VR 410 at 415-416 in these terms:

> "It is always a question for the jury whether a reasonable doubt exists as to the guilt of the accused

> and ... in a case based on circumstantial evidence, the necessity to exclude reasonable hypotheses consistent with innocence is no more than an application for that class of case of the requirement that the case be proved beyond reasonable doubt."

Wilcox J, having cited this passage, said:

> "I think that the amendments to s59 were addressed to a different problem altogether. As appears from the Attorney-General's speech (Second Reading Speech of the then Attorney-General with respect to the *Magistrates (Summary Proceedings) Bill* 1975 (Vic)), there was a perception that people were sometimes committed for trial upon evidence so weak that the prospects of a conviction was minimal, but with a significant strain on the persons involved in the trial and a cost to the community. The test of "sufficient weight" was designed to allow Magistrates to stop those cases at a preliminary stage. For that purpose the Magistrate was empowered to make some assessment of credibility and to consider the strength of the prosecution case, put at its highest. But I do not think that it was intended, in a case where the prosecution **[13]** case was credible and – upon one view of the facts – demonstrated a strong case against the accused, that Magistrates should decline to commit for trial just because – on another view of the facts – the proper course for the jury would be to acquit."

On appeal from the judgment of Wilcox J to a Full Court of this Court, reported in [1989] FCA 312; (1989) 87 ALR 699; (1989) 42 A Crim R 197, in a judgment of the Court their Honours (Sheppard, Morling and Gummow JJ) said at 721:

> "Counsel also claimed that the Magistrate was bound to discharge the appellant because he found that there were two competing inferences open, one consistent with guilt and the other consistent with innocence. In counsel's submission, that should have led him to discharge the appellant.
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> We think that the submission is answered by part of what the Magistrate said in the passage quoted above from his decision. He said that, on the present state of the evidence, he was satisfied on the one hand that a reasonable jury could be satisfied that there were reasonable hypotheses consistent with the appellant's innocence. But, on the other, that he was satisfied that a jury could be satisfied beyond reasonable doubt that there were no hypotheses reasonably consistent with his innocence."

These passages from the judgments of the Full Court and of Wilcox J in *Forsyth v Rodda* are in my opinion applicable to the question which arises in this case. They are authorities for the proposition, with which I agree, that a Magistrate conducting a committal, having heard the evidence for the prosecution and for the defence, and having formed the opinion that there are two **[14]** hypotheses open on the material before him, one consistent with guilt and the other with innocence, is not necessarily bound to discharge the defendant.

The task of a committing Magistrate is essentially to sift the wheat from the chaff: cases so weak that a jury properly instructed could not possibly convict the defendant and cases where it could. It is not the task of a Magistrate conducting a committal proceeding to assume the role of the jury at a criminal trial. At the conclusion of the evidence adduced on a criminal trial for both the prosecution and the defence a number of inferences may be open to the jury consistent with guilt or innocence. Some may be stronger than others; each is essentially a matter for the jury to consider in the course of its deliberations when assessing whether the defendant is guilty or not guilty of the offence with which he has been charged.

If a Magistrate was obliged to discharge a defendant whenever an hypothesis was reasonably open on the evidence consistent with his innocence, albeit that another hypothesis was consistent with his guilt, it is difficult to imagine a case where there ever would be a committal for trial of a defendant as there are very few sets of facts or circumstances which cannot admit at least in theory of a possible explanation consistent with innocence. An inference from the facts consistent with guilt may be strong or weak in the eyes of the Magistrate and so may an inference consistent with innocence. The conclusion by the Magistrate that there are two competing inferences open, one consistent with **[15]** guilt and the other with innocence, cannot necessarily require that the accused be discharged. This conclusion is not only supported directly by the Full Court in *Forsyth v Rodda*; it is consistent also with the language of s11(2) of the Victorian Act of 1989 itself and in accord historically with the role of a Magistrate conducting committal proceedings.

The argument before the primary Judge confused the duty of a Magistrate in a committal with the function of a judge and jury on the trial of an accused. This appears to have led His

Honour to impose a stricter test upon a Magistrate conducting a committal than applies to the trial of the accused.

In *Re Attorney-General's Reference*, a reference by the Attorney-General of Victoria of certain points of law to the Full Court of the Supreme Court of Victoria, the Full Court said at 414:

> "The second question in substance asks whether if at the close of the Crown case inferences of fact could be properly drawn which were consistent with the innocence of the accused and other inferences of fact could equally properly be drawn which were consistent with the guilt of the accused, the trial Judge is bound or entitled to direct the jury to acquit the accused. Again treating the word 'direct' as including 'advise' we should have thought that the question admitted of only one answer. Although the formulation of the question may be criticised in a sense, it will be difficult to frame an hypothesis that more clearly raised a question for the jury. The question asked should also be answered that as a matter of law the trial **[16]** Judge was neither so bound nor so entitled."

In *Doney v R* [1990] HCA 51; (1990) 171 CLR 207; 96 ALR 539; (1990) 65 ALJR 45; 50 A Crim R 157; [1990] LRC (Crim) 416 the High Court said at CLR 214-5:

> "It follows that, if there is evidence (even if tenuous or inherently weak or vague) which can be taken into account by the jury in its deliberation and that evidence is capable of supporting a verdict of guilty the matter must be left to the jury for its decision. Or, to put the matter in more usual terms, a verdict of not guilty may be directed only if there is a defect in the evidence such that, taken at its highest, will not sustain a verdict of guilty."

These statements with respect to the conduct of the trial of an accused lead *a fortiori* to the conclusion that at a committal a Magistrate must not usurp the function of the jury and determine guilt or innocence; rather his task is to decide whether the evidence is or is not of sufficient weight to support a conviction for the offence with which the defendant has been charged. It is a task which necessarily involves a degree of evaluation of propositions consistent with guilt or innocence to determine whether a jury properly instructed could or could not convict the defendant upon the evidence at the trial if it remains in the form in which it is at the committal stage. The task of the Magistrate is one which he must determine in an objective manner; it is not for him to say whether a particular inference from the facts is more credible than another; that is the function in due course of the jury.

[17] It is useful to bear in mind the oft-cited passage from the judgment of the High court in *May v O'Sullivan* [1955] HCA 38; (1955) 92 CLR 654 at 658; [1955] ALR 671:

> "When, at the close of the case for the prosecution, a submission is made that there is 'no case to answer' the question to be decided is not whether on the evidence as it stands the defendant ought to be convicted, but whether on the evidence as it stands he could lawfully be convicted. This is really a question of law. Unless there is some special statutory provision on the subject, a ruling that there is a 'case to answer' has no effect whatever on the onus of proof, which rests on the prosecution from beginning to end. After the prosecution has adduced evidence sufficient to support proof of the issue, the defendant may or may not call evidence. Whether he does or not, the question to be decided in the end by the Tribunal is whether, on the whole of the evidence before it, it is satisfied beyond reasonable doubt that the defendant is guilty. This is a question of fact."

It is not therefore the task of the Magistrate when conducting a committal proceeding to conclude that the evidence is not of sufficient weight to support the conviction of the defendant simply because he thinks that there is or could be formulated a reasonable hypothesis consistent with the innocence of the accused; or, expressed another way, he should not form the view that if the decision on the facts were his and not that of the jury in due course, he would entertain a reasonable doubt as to the guilt of the accused. [*His Honour dealt with the facts, allowed the appeal and confirmed the Magistrate's decision to commit the defendant for trial*].

GUMMOW J: [*After referring to the facts and relevant cases, His Honour continued*] ... **[14]** Counsel for the appellant submitted, and I accept, that in accordance with the reasoning in *Forsyth v Rodda*, the magistrate need not consider whether the jury should or would be satisfied beyond reasonable doubt, but merely whether a jury could be so satisfied. Further, (and contrary to the tenor of the remarks of the primary Judge) a jury can be satisfied to the necessary degree where there are competing inferences open, depending upon the view they take of the evidence and of

what is or is not probable. It may be, as a matter at this stage (and before the magistrate) of pure speculation, that the respondent would contend at a trial that for two years or more the person depicted in the photograph had been known to him as Vincenzo Marrama. The existence of an hypothesis which is consistent with innocence does not mean that the jury necessarily would entertain a reasonable doubt as to the guilt of the respondent. The jury might not consider the hypothesis reasonable. It might take a different view of the facts so as to exclude that hypothesis.

It may be that in some committal proceedings in Victoria the magistrate should consider hypotheses consistent with the innocence of the accused which are speculative and not grounded in the evidence before him. But if such cases exist, **[15]** the present, given the strength of the prosecution case, was not one of them.

Counsel for the appellant contends that, upon the material I have described earlier in these reasons, it is clear that the respondent certified a matter that was patently false, namely that the photograph was that of the person named in the application; further, the certification by the respondent as to his knowledge for two years of the person applying for the passport and the respondent's attestation of the genuineness of the signature as that of the applicant, suggest, in the absence of some other explanation, that the false certification of the photograph was made with knowledge of that falsity. The appellant submits that on this material, standing alone, a jury would be entitled to convict, and that the magistrate did not fall into error in committing the respondent for trial. It follows from what I have said above that I accept that submission.

[*His Honour dealt with another issue and allowed appeal. O'Loughlin J agreed with the reasons of and orders proposed by Lockhart and Gummow JJ.*]
