

56/94; [1995] VSC 80

SUPREME COURT OF VICTORIA

KA FU CHEUNG v MORGAN

Beach J

15, 30 March 1995

COMMITTAL PROCEEDINGS – HAND-UP BRIEF SERVED ON ACCUSED – NO NOTICE GIVEN REQUIRING ATTENDANCE OF ANY WITNESS IN HAND-UP BRIEF – ACCUSED COMMITTED FOR TRIAL – APPLICATION SUBSEQUENTLY MADE FOR COURT TO TAKE EVIDENCE OF PERSON NOT EXAMINED AT THE COMMITTAL PROCEEDING – APPLICATION REFUSED – WHETHER MAGISTRATE IN ERROR: MAGISTRATES' COURT ACT 1989, Sch.5 Cl.13.

1. If an accused person does not give notice before committal for trial that persons whose statements are contained in the hand-up brief are required to attend the committal proceeding to give evidence: (a) the accused forfeits the right to have those persons appear and give their evidence orally; and

(b) those persons shall be deemed to have appeared at the committal proceeding and been examined as witnesses.

2. Cl.13(1) of Sched.5 of the *Magistrates' Court Act* 1989 is intended to cover the case of a person whose name does not appear on the list of persons who have made statements which the informant intends to tender at the committal proceeding.

BEACH J: [1] This is the return of a summons filed on an originating motion whereby the plaintiff seeks the following orders:

1. An order in the nature of mandamus directing the Magistrates' Court of Victoria to exercise its jurisdiction pursuant to CL13 Schedule 5 of the *Magistrates' Court Act* 1989 to determine whether the evidence of thirteen specified persons or any of them be taken at a time and place fixed by the court.

2. In the alternative, an order declaring that the plaintiff is entitled to committal proceedings prior to being presented for trial before the County Court on two counts of trafficking in a drug of dependence and an order directing that such committal proceedings be held at a time and place fixed by the Magistrates' Court of Victoria.

The background to the proceeding may be summarised as follows: On 1 December 1993 the plaintiff was arrested by police and charged with one count of cultivating a narcotic plant, two counts of possessing a drug of dependence and two counts of trafficking in a drug of dependence. In due course the plaintiff was served with a hand-up brief pursuant to the provisions of Schedule 5 of the *Magistrates' Court Act* 1989 (the Act). The hand-up brief contained, amongst other things, a list of the persons who had made statements which the informant intended to tender at the committal, and copies of those statements. The hand-up brief specified 24 March 1994 as the committal mention date. The plaintiff did not give any notice to the informant or the Registrar of the Magistrates' Court that he required the attendance of any [2] of the persons who had made the statements included in the hand-up brief at the committal proceeding.

The proceeding ultimately came before the Magistrates' Court on 28 April 1994. The plaintiff was represented by a solicitor other than the solicitor now acting for him. Without demur on the part of the plaintiff's solicitor, the plaintiff was committed for trial. Having regard to events which occurred subsequent to 28 April 1994 and which it is unnecessary to detail in these reasons for judgment, on 31 October 1994 the plaintiff made application to the Magistrates' Court for an order pursuant to Cl13 of Schedule 5 that the evidence of the persons whose statements were contained in the hand-up brief be taken at a time and place fixed by the court. In short, the plaintiff sought what would amount to a fresh committal hearing.

Cl13(1) of Schedule 5 reads:

"13(1) If a defendant has been committed for trial, the Director of Public Prosecutions or the defendant may apply to the Court for an order that the evidence of a person who was not examined as a witness at the committal proceeding be taken at a time and place fixed by the Court."

The magistrate refused the application on the ground that he lacked jurisdiction to make such an order, stating that the witnesses had all been properly examined at the committal hand-up and that at that time their statements would have been looked at by the magistrate.

It was argued by counsel for the plaintiff that the learned magistrate was in error in concluding that he had no jurisdiction to make the order sought. The witnesses whose statements were included in the hand-up brief had [3] never been examined as witnesses at the committal hearing on 28 April 1994 and that in the circumstances it was appropriate that such an examination now take place. I should say at the outset that it was not suggested by counsel for the first-named defendant that the plaintiff's application was other than a *bona fide* one. In the light of events which have occurred since 28 April, he considered that the plaintiff should have an opportunity to cross-examine some of the witnesses in question before his trial. However, he contended that that could no longer be done by way of a committal hearing, that it could only be done in the absence of the jury at the commencement of the plaintiff's trial.

In my opinion the solution to the problem is to be found within Schedule 5 of the Act, the relevant clauses of which read: *[After setting out the provisions of the Act, His Honour continued]...[5] It is clear from the above clauses that when a defendant is served with a hand-up brief, one of the first matters he is required to determine is which, if any of the persons whose statements are contained in the brief he requires to attend the committal proceeding to give evidence. If he does not give that notice, those persons are not required to attend at the committal proceeding and their statements the truthfulness of which has been attested to are admissible as if their contents were a record of evidence given orally. In other words, those persons shall be deemed to have appeared at the committal proceeding and been examined as witnesses. C113 of the schedule is intended to cover the case of a person whose name does not appear on the list of persons who have made statements which the informant intends to tender at the committal proceeding.*

The provision in Schedule 5 requiring a defendant to give notice to the informant that he requires the attendance of a person at the committal hearing is mandatory. If the defendant fails to give such a notice [6] before he has been committed for trial, then he forfeits the right to have those persons whose names are on the list appear at the committal hearing and give their evidence orally.

It was argued by counsel for the plaintiff that a person not called to give evidence at the committal must be a person who was not examined as a witness at the committal proceeding; that a person examined at a committal proceeding can only be a person who has physically attended the committal proceeding, been called as a witness to give evidence and been cross-examined and re-examined. I am unable to accept that proposition. In my opinion it overlooks the provisions of C15(5)(a), namely, that any statement the truthfulness of which has been attested to by a person shall be admissible as if its content was a record of evidence given orally. In other words, such a person shall be deemed to have been examined at the committal proceeding. The originating motion will be dismissed.

APPEARANCES: For the plaintiff Cheung: Mr M Tovey, counsel. Melasecca Zayler, solicitors. For the defendant Morgan: Mr JD McArdle, counsel. Director of Public Prosecutions.