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SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v TORTOMANO

Young CJ, Starke and Gray JJ

30 April 1979 — [1981] VicRp 4; [1981] VR 31

CRIMINAL LAW – ACCUSED CHARGED WITH RAPE – ACCUSED DISCHARGED BY CHILDREN'S COURT – SUBSEQUENTLY PRESENTED FOR TRIAL – APPLICATION TO QUASH PRESENTMENT REFUSED BY TRIAL JUDGE – WHETHER TRIAL JUDGE IN ERROR – WHETHER SECTION COVERS THE FIELD IN RELATION TO RAPE OR ATTEMPTED RAPE OFFENCES: *CRIMES ACT* 1958, S359A.

HELD:
1. There is a distinct difference between discharging a prisoner and ordering that he shall not stand trial. The Magistrate's function in committal proceedings is purely executive and not judicial. This function is to determine whether the accused be held in custody or admitted to bail or go free. He does not determine whether the accused is guilty or innocent or whether he shall stand trial or not. A mere discharge cannot be regarded as an order that a man shall not stand trial.
***Ex parte Cousens re Blacket & Anor* [1946] NSWStRp 36; (1946) 47 SR (NSW) 145; 63 WN (NSW) 228, applied.**

2. When s359A of the *Crimes Act* 1958 was enacted it did not lay down a code and cover the field in relation to the trial of a person for an alleged offence of rape or attempted rape. The legislation cannot be looked at as imposing a prohibition of prosecution for rape except in the circumstances provided for in the section. On the contrary the section merely imposes a prohibition from prosecution in stipulated circumstances. In every other circumstance the law remains unchanged. The crown can present a person for trial when and where it wishes.

YOUNG CJ, STARKE AND GRAY JJ: The first ground of appeal is in these terms:

> "1. At the committal proceedings in respect of the charge of which the accused was eventually convicted a Stipendiary Magistrate on the 11 August 1978 at the Preston Court dismissed the charge. In those circumstances the Learned Trial Judge was in error in allowing the trial against the accused man to take place."

It appears that the applicant was presented on information charged with rape in the Children's Court at Preston on 11th August 1978. After a hearing the applicant was discharged, Subsequently a notice of trial for rape was served on the applicant and he was duly presented before His Honour Judge Franich as set out above. An application was made to the learned Judge to quash the presentment. This application was overruled by the learned Judge.

The ground is based on s359A the *Crimes Act*. This section in so far as it is relevant is in these terms:

> "359A(1) 1. Notwithstanding anything in this or any other Act or any rule of law to the contrary the trial of a person for an alleged offence of rape attempted rape or assault with intent to rape shall not be commenced—
> (a) where a Stipendiary Magistrate has ordered that that person shall not stand trial for the offence;
>
> (b) where an information for the offence has not been laid before a justice and the prescribed period has elapsed; or
>
> (c) in any other case after the prescribed period has elapsed."

Mr O'Brien first of all submitted that when the applicant was discharged on 11th August 1978, it amounted to an order that he should not stand trial and that accordingly s359A(1)(a) forbade the commencement of the trial. There are we think various answers to this argument. Firstly it seems to us that there is a distinct difference as a matter of language between discharging

a prisoner and ordering that he shall not stand trial. It is to be noted that the Magistrate's function in committal proceedings is purely executive and not judicial. This function is to determine whether the accused be held in custody or admitted to bail or go free. He does not determine whether the accused is guilty or innocent or whether he shall stand trial or not. *Ex parte Cousens re Blacket & Anor* [1946] NSWStRp 36; (1946) 47 SR (NSW) 145; 63 WN (NSW) 228. A mere discharge cannot be regarded as an order that a man shall not stand trial. The matter becomes even clearer when one has regard to a recent amendment in s47A(10) of the *Magistrates (Summary Proceedings) Act* 1975 which empowers a Magistrate in the case of rape and associated offences in the circumstances therein set forth to order that an accused shall not stand trial for the offence. It is of significance that both s47A of the *Magistrates (Summary Proceedings) Act* and s359A of the *Crimes Act* were introduced into their respective Acts by the same amending Statute, viz. the *Rape Offences (Proceedings) Act* 1976 (Act 8950). It follows that in our opinion there is no substance in this submission.

Mr O'Brien next submitted that it was evident that the legislature in enacting this section intended to lay down a code and cover the field. Whatever the intention was we are clearly of opinion that it did not do so. Section 359A deals with three situations. Under sub-s(1)(a) a trial shall not be commenced where the Magistrate so orders. We have already held that the Magistrate did not so order. Sub-section (1)(b) deals with the situation where an information has not been laid. That is not this case. The words "in any other case" in sub-s(1)(c) may seem at first blush to cover this situation but when one looks in sub-s(2)(b) at the definition of the expression "the prescribed period" in sub-s(1)(c) it becomes apparent that sub-s(1)(c) deals only with the situation where the accused has been committed for trial. Accordingly in our judgment whatever the intention of the Parliament the situation that arose here, i.e. where the Magistrate discharged the applicant at the committal proceedings, is simply not dealt with. Whether this is a *casus omissus* or not does not matter. The legislation cannot be looked at as imposing a prohibition of prosecution for rape except in the circumstances provided for in the section. On the contrary the section merely imposes a prohibition from prosecution in stipulated circumstances. In every other circumstance the law in our opinion remains unchanged. The Crown can present a man for trial when and where it wishes. Accordingly in our opinion this ground fails.

Ground 3 is in these terms:

> "The Learned Trial judge erred in refusing the application made by Counsel for the Appellant to call as a witness for the Appellant a person who was referred to in the transcript as Bruno."

The relevant legislation is s37A of the *Evidence Act*. Sub-section (2) in that section provides:

> "(2) Without the leave of the Court—
> (a) the complainant shall not be cross-examined as to her sexual activities other than with the accused; and
> (b) no evidence shall be admitted as to the sexual activities of the complainant other than with the accused."

During his cross-examination of the prosecutrix counsel for the applicant sought in the absence of the jury for leave to cross-examine her in respect of alleged activity of a sexual character about a week before the offence and in respect of her conduct with Bruno on the mattress on the night before the offence when she and Bruno both had their jeans off. The learned Judge allowed cross-examination as to the latter incident, not as to the first. No complaint is made of either of these rulings. The evidence in respect of the latter incident was admitted on the basis that the applicant observed the two of them on the mattress and the learned Judge held that what he saw may have affected his belief at the time on the next day when he had intercourse with her as to whether she was consenting or not. In the event the prosecutrix denied having intercourse with Bruno.

However, after the applicant had given evidence counsel for him sought leave to call Bruno to give evidence. A perusal of the transcript from pp658-660 does not give a very clear picture of exactly what it was suggested Bruno would say. However the learned Judge certainly took it, with the tacit approval of counsel, that Bruno would say that he had had sexual relations with Miss Franze. His Honour rejected this evidence on the basis that the evidence went to the general reputation for promiscuity of the prosecutrix and so offended against the principle underlying

the section. He pointed out that what was alleged took place at a different time and place with a different person sixteen or seventeen hours before the alleged offence. It must be remembered that it was common ground that Bruno and the prosecutrix were on the mattress on the night in question with their jeans off. There was an issue as to whether Franze had her underpants off or not. It was also common ground that the applicant was coming in and out of the room. Whether her underpants were on or off added little to the scene presenting itself to the applicant. It seems to us that the fact of whether intercourse in fact took place or not is beside the point. No one suggested that the applicant saw it if it actually occurred. What was important was what the applicant saw and heard.

In those circumstances we think that the learned Judge did not err in the exercise of his discretion to exclude the evidence. There was evidence that no doubt Bruno could have given in respect of conversations between himself, the applicant and the prosecutrix, and perhaps other evidence which did not relate to sexual activity of the prosecutrix. All that need be said in respect of this evidence is that leave did not have to be sought in order to adduce it, that the learned Judge did not rule on it and that no attempt was made by counsel for the defence to lead it.

Ground 4 was in these terms:

> "The Learned Trial Judge erred in failing to warn the jury to disregard the comments by the learned prosecutor in his address when he used these words or words to the effect of 'You might think she had a pretty nasty experience in the house the night before.'"

The defence in cross-examination of the prosecutrix clearly suggested that she had been a willing party to sexual promiscuity on the night before and that she had made no effort to get away from the applicant and his friends when she had the opportunity. The Crown prosecutor could reasonably anticipate an attack upon her along these lines in defence counsel's final address and indeed (as we are informed, in the learned Judge's report to this Court) such an attack eventuated. In our judgment it was clearly open to the learned prosecutor to put forward an alternative picture in rebuttal. The criminal jurisdiction cultivates robust advocacy where thrust and counter thrust are to be expected. It is no part of the trial Judge's role to descend into the arena. In our judgment what the learned prosecutor said in this instance fell well within what is permissible and no correction by the judge was called for. Accordingly this ground fails.
