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SUPREME COURT OF SOUTH AUSTRALIA (In Banco)

R v KELLY; ex parte HOANG VAN DUONG

King CJ, Zelling and Jacobs JJ

10, 11 August, 24 September 1981 — (1981) 28 SASR 271; 4 A Crim R 1

COURTS AND JUDGES – COMMITTAL PROCEEDINGS – CROSS-EXAMINATION OF WITNESS BY COUNSEL – IMPOSITION BY MAGISTRATE OF TIME LIMIT ON CROSS-EXAMINATION – CIRCUMSTANCES IN WHICH IMPOSITION OF TIME LIMIT MAY BE JUSTIFIED – CONSIDERATION OF THE CIRCUMSTANCES IN WHICH IT MAY BE PROPER FOR A JUDGE OR MAGISTRATE TO IMPOSE A TIME LIMIT UPON CROSS-EXAMINATION BY COUNSEL WHICH THE COURT CONSIDERS TO BE IRRELEVANT OR TOO PROLIX – NO ERROR BY MAGISTRATE.

1. The Court should not approve the placing of an arbitrary time limit on a cross-examination in a preliminary hearing or in any other proceedings. A judge or magistrate has a wide discretionary power in any proceedings to contain cross-examination within proper limits and to disallow repetitious, prolix or unnecessary questions. The scope for the exercise of this discretion is rather greater in committal proceedings than in other proceedings, because the magistrate or justice in committal proceedings is not required to decide the case, but merely to determine whether there is a *prima facie* case.

2. Although arbitrary time limits cannot be justified one can envisage situations in which it might be reasonable and proper at some stage of a cross-examination to impose a time limit. Situations may arise, for instance, in which the magistrate, being satisfied that counsel has had an ample opportunity to ask all proper questions, imposes the time limit by way of indulgence to enable counsel to wind up his cross-examination in his own way.

3. The restriction placed on the cross-examination in the present case, mistaken though it may have been, was not such a radical deprivation of the applicant's rights as to vitiate the preliminary hearing and render the committal for trial invalid.

KING CJ: This is an application to make absolute an order nisi for *certiorari* in relation to a preliminary hearing which resulted in the committal of the applicant for trial on a charge of assault occasioning actual bodily harm. There is a difficulty about the way in which the order nisi is expressed, but in substance the applicant seeks to have quashed a ruling by the Magistrate who conducted the preliminary hearing, disallowing certain cross-examination and also to have quashed the committal for trial which followed.

The essence of the applicant's case is that the Magistrate who conducted the preliminary hearing was wrong in limiting his counsel's cross-examination of a witness named Prodhoroff, who identified the applicant as the assailant, and that the error has the consequence that the committal for trial was invalid. It appears from the affidavit of the legal practitioner who appeared as counsel for the applicant at the preliminary hearing that after the cross-examination of the witness had proceeded for a time, the Magistrate announced that he would allow five minutes more for the cross-examination of that witness. At the end of that period the Magistrate directed that there be no more cross-examination of that witness. Counsel, as we are told in his affidavit, wished to cross-examine the witness as to a number of matters which were pertinent to the reliability of the identification, and it is claimed that the applicant will suffer prejudice in making his defence at the trial by not knowing the witness' answers to those questions.

I say at once that I think that this Court should not approve the placing of an arbitrary time limit on a cross-examination in a preliminary hearing or in any other proceedings. A judge or magistrate has a wide discretionary power in any proceedings to contain cross-examination within proper limits and to disallow repetitious prolix or unnecessary questions. The scope for the exercise of this discretion is rather greater in committal proceedings than in other proceedings, because the magistrate or justice in committal proceedings is not required to decide the case, but

merely to determine whether there is a *prima facie* case. In most instances he is not required to resolve disputed issues or to assess the credibility of witnesses. Cross-examination which might be reasonable and necessary on a trial might be unreasonable and unnecessary at the preliminary hearing. Nevertheless, any restriction of cross-examination by the magistrate should not take the form of imposing an arbitrary time limit without ascertaining the nature of the questions which counsel desires to ask and their bearing upon the case. A preliminary hearing provides a valuable opportunity for the defence to explore issues and to investigate facts in a way which is not practical at trial. This opportunity ought not to be diminished by an unduly restrictive attitude to exploratory cross-examination.

The significance of committal proceedings in the system of criminal justice has recently been emphasized by the High Court in *Barton v R* [1980] HCA 48; (1980) 147 CLR 75; (1980) 32 ALR 449; 55 ALJR 31. Although, in my view, arbitrary time limits cannot be justified I can envisage situations in which it might be reasonable and proper at some stage of a cross-examination to impose a time limit. Situations may arise, for instance, in which the magistrate, being satisfied that counsel has had an ample opportunity to ask all proper questions, imposes the time limit by way of indulgence to enable counsel to wind up his cross-examination in his own way. One should not be ready to generalize about how the magistrate's discretionary power to control and contain proceedings should be exercised in the varied situations which arise at preliminary hearings. It may be that in the present case there was a failure of communication between counsel and the Magistrate as a result of which the Magistrate did not appreciate that there were further relevant questions. It may well be that, as a result of that failure of communication, the Magistrate erred in the way in which he exercised his powers to contain cross-examination within reasonable limits. It does not follow, however, that the committal for trial was invalid, or that it should be quashed.

Counsel for the applicant in this Court relied upon s106 of the *Justices Act* 1921, as amended, which provides that a witness produced at a preliminary hearing for oral examination may be cross-examined in the usual manner. I comment that cross-examination is conducted "in the usual manner" notwithstanding that it is subject to the magistrate's overriding power to restrict prolix and unnecessary questions. Moreover, not every infringement of a defendant's right to cross-examine witnesses will vitiate the committal for trial. It is true that a committal for trial by virtue of s112(3) must, in order to be valid, follow a preliminary hearing under s106. A situation is conceivable in which the restrictions placed upon a defendant's right to cross-examine might be so severe as to deprive the proceedings of the character of a preliminary examination under the Act.

In such a case, there being no true preliminary hearing, there could be no valid committal for trial. Although I am fully conscious of what was said in *Barton v R* [1980] HCA 48; (1980) 147 CLR 75; (1980) 32 ALR 449; 55 ALJR 31, concerning the place in the criminal justice system of committal proceedings and the opportunity to cross-examine witnesses for the prosecution afforded thereby, I am unable to think that the restriction placed on the cross-examination in this case, mistaken though it may have been, is such a radical deprivation of the applicant's rights as to vitiate the preliminary hearing and render the committal for trial invalid.

I do not wish to leave this case without emphasizing the caution with which this Court should approach any attempt to have it interfere with the course of a preliminary hearing or call into question the validity of a committal for trial. I cite a passage from the judgment of Gibbs ACJ in *Sankey v Whitlam* [1978] HCA 43; (1978) 142 CLR 1, at p22; 21 ALR 505; 53 ALJR 11; 37 ALT 122,

> "As Jordan CJ pointed out in *Ex parte Cousens; Re Blacket* (1946) 47 SR (NSW) 145, 147; 63 WN (NSW) 228 in substance, a committing magistrate determines nothing, except that in his opinion a *prima facie* case has been made out for committing the accused for trial. The Attorney-General, in deciding whether or not to present an indictment, will not be bound by the decision of the magistrate as to whether a *prima facie* case has been made out."

Although, as Gibbs ACJ pointed out, these considerations are irrelevant in determining the powers of the Court, they are most material to the exercise of any discretionary powers which the Court possesses. I add and emphasize a further citation from the same judgment:

> "In any case in which a declaration can be and is sought on a question of evidence or procedure, the

> circumstances must be most exceptional to warrant the grant of relief. The power to make declaratory orders has proved to be a valuable addition to the armoury of the law. The procedure involved is simple and free from technicalities; properly used in an appropriate case the use of the power enables the salient issue to be determined with the least possible delay and expense. But the procedure is open to abuse, particularly in criminal cases, and if wrongly used can cause the very evils it is designed to avoid. Applications for declarations as to the admissibility of evidence may in some cases be made by an accused person for purposes of delay, or by a prosecutor to impose an additional burden on the accused, but even when such an application is made without any improper motive it is likely to be dilatory in effect, to fragment the proceedings and to detract from the efficiency of the criminal process. I am not intending to criticize those concerned with the conduct of *Bourke v Hamilton* (1977) 1 NSWLR 470, or to show any disrespect for the careful judgments delivered in that matter – indeed I have derived much assistance from them – when I say that that case provides an example of the way in which criminal proceedings may be needlessly protracted if they are interrupted by an application for a declaration – in the end the declaration sought was refused by the proceedings had been delayed for the space of almost a year. The present case itself is another regrettable example of the delay that can be caused by departures from the normal course of procedure. For these reasons I would respectfully endorse the observations of Jacobs P. (as he then was) in *Shapowloff v Dunn* (1973) NSWLR 468, at p470, (1978) 142 CLR at p25 that a court will be reluctant to make declarations in a matter which impinges directly upon the course of proceedings in a criminal matters. Once criminal proceedings have begun they should be allowed to follow their ordinary course unless it appears that for some special reason it is necessary in the interests of justice to make a declaratory order. Although these remarks may be no more than more 'administrative cautions' (cf. *Ibeneweka v Egbuna* [1964] 1 WLR 219 at p224; 108 Sol Jo 114) I nevertheless consider that if a judge failed to give proper weight to these matters it could not be said that he had properly exercised his discretion?".

It follows from what I have said that, even on the assumption, as to the correctness of which I express no opinion, that *certiorari* is available in relation to committal proceedings, I am of opinion that in this case the order nisi should not be made absolute but should be discharged.

[ZELLING J and JACOBS J agreed.]
