**02/05; [2004] VSC 544**

**SUPREME COURT OF VICTORIA**

# *HENDERSON v THE MAGISTRATES' COURT of VICTORIA & ANOR*

**Habersberger J**

**8, 10 December 2004 — (2004) 151 A Crim R 366**

**CRIMINAL LAW – COMMITTAL PROCEEDINGS – HAND UP BRIEF – NOTICE BY ACCUSED OF INTENTION TO SEEK LEAVE TO CROSS-EXAMINE WITNESS AT COMMITTAL – LEAVE REFUSED BY MAGISTRATE IN RESPECT OF SOME WITNESSES – WHETHER MAGISTRATE IN ERROR – WHETHER APPLICATION IN THE NATURE OF MANDAMUS SHOULD BE GRANTED: *MAGISTRATES' COURT ACT* 1989, Sch 5, cll 12 and 13.**

H. had been charged with a number of offences in relation to possession/trafficking in cannabis. After service of the hand up brief, H. served a notice on the prosecution that he wished to cross-examine at the committal proceeding a number of police witnesses. The magistrate granted leave in respect of some witnesses but refused leave in respect of 18 police officers and two other witnesses. Among other reasons, the magistrate stated that issues with respect to whether cash had been stolen by police at the scene and their spending habits were not matters relevant to the prosecutions not to the credit of the witnesses. H.then sought orders in the nature of mandamus and other orders.

**HELD: Application for an order in the nature of mandamus refused.**
**1. A precondition of the existence of any authority to make an order simply means in the current context that the court has no authority to grant leave to cross-examine a witness unless satisfied of the matters set out in the *Magistrates' Court Act* 1989 clause 13(5)(a) and (b), namely, identification of an issue, relevance of a witness' evidence to that issue and justification of cross-examination of that witness on that issue. An incorrect decision by the Magistrates' Court on those matters does not necessarily mean that there has been jurisdictional error.**

**2. The submission that the magistrate erred in deciding that the issues with respect to the cash or the provenance of the items found did not amount to a constructive refusal by the magistrate to exercise jurisdiction. The question was whether the magistrate failed to exercise the jurisdiction conferred on him or so misconceived the nature and extent of the jurisdiction that his purported exercise of the jurisdiction was in truth no exercise at all.**

## HABERSBERGER J:

1. By an originating motion filed on 10 August 2004 the plaintiff John William Henderson sought prerogative relief in respect of the refusal by a magistrate to grant leave to Mr Henderson to cross-examine 18 witnesses at a committal proceeding. Although orders in the nature of *certiorari*, declarations and an order in the nature of mandamus were sought in the originating motion, Mr Gillespie-Jones of counsel who appeared on behalf of the plaintiff before me, informed me that the only relief sought by him was an order in the nature of mandamus requiring the first defendant, the Magistrates' Court of Victoria, to hear and determine the matter according to law.

2. Mr Henderson has been charged with a number of offences including having been in possession of and trafficking cannabis L, heroin and amphetamines; being in possession of firearms, ammunition and explosives; receiving and being in possession of proceeds of crime. The charges followed the execution of a search warrant at a house at 7 Burton Crescent, Maribyrnong. Mr Henderson was one of a number of people present in that house at the time of the search. It is alleged that drugs were found at the house in different locations. Many of the goods were found at two storage premises allegedly linked to Mr Henderson.

3. Mr Henderson was served with a hand-up brief and the committal proceeding involving Mr Henderson and two other defendants is due to commence next Monday, 13 December 2004. Pursuant to s56 of the *Magistrates' Court Act* 1989 "a committal proceeding must be conducted in accordance with Schedule 5" of that Act. Schedule 5 relevantly provides that a witness who has made a statement, a copy of which was served in the hand-up brief, cannot be cross-examined without leave (clause 13(2)). A defendant who wishes to seek leave to cross-examine at the committal proceeding a specified person or persons must give notice of that fact no later than 14 days before

the committal mention date (clause 12(1)(a)). Because of their importance clause 13(5) and (5A) of Schedule 5 should be quoted in full:

> "(5) The Court must not grant leave to cross-examine a witness to whom this clause applies unless satisfied that—
> (a) the defendant has identified an issue to which the proposed questioning relates and has provided a reason why the evidence of the witness is relevant to that issue; and
> (b) cross-examination of the witness on that issue is justified.
>
> (5A) In determining whether cross-examination is justified the Court must have regard to the need to ensure that—
> (a) the prosecution case is adequately disclosed; and
> (b) the issues are adequately defined; and
> (c) the evidence is of sufficient weight to support a conviction for the offence with which the defendant is charged; and
> (d) a fair trial will take place if the matter proceeds to trial, including that the defendant is able adequately to prepare and present a defence; and
> (e) matters relevant to a potential plea of guilty are clarified; and
> (f) matters relevant to a potential *nolle prosequi* are clarified; and
> (g) trivial, vexatious or oppressive cross-examination is not permitted; and
> (h) the interests of justice are otherwise served."

4. By a form 8A dated 29 June 2004 Mr Henderson gave notice that he intended to seek leave to cross-examine a large number of witnesses. In respect of 18 named police officers, the notice stated as follows:

> "The issue that the above witnesses have in common is that they executed a search warrant at 7 Burton Crescent, Maribyrnong and are said to have found items including firearms and drugs during the search. A very large amount of cash was taken during the search and has not been reported as being found and it is proposed to cross-examine the above in relation to any change in spending habits after the execution of the search warrant to ascertain which police have taken the money and not reported it. The premises were the subject of telephone intercept and surveillance and it will be necessary to explore these matters with particularity in order to establish the police knowledge of cash on the premises. It is sought to examine the provenance of the items found. Credit as to previous complaints against the above members will also be a matter in issue. In situations were items have been found or planted credit is a major issue. The telephone intercepts and logs have been the subject subpoena [sic] served upon the Chief Commissioner months ago but no documents have been produced. It is sought to examine the police members as to access to the storage facilities videos [sic] thereof, and any similar facts alleged arising from the burglaries. Access to the storage facilities and the contents of them at various times is also an issue. It is difficult to identify which policeman touches any particular issue as the logs and recordings have not been produced pursuant to subpoena or otherwise".

Other issues were raised in respect of 20 other witnesses.

5. By a form 9A dated 8 July 2004 the Director of Public Prosecutions gave notice that the informant opposed leave being granted to Mr Henderson to cross-examine 21 of the 38 witnesses, including all 18 of the police officers. The reasons for opposing leave were stated to be as follows:

> "George Xydias - this witness's evidence does not relate to an indictable offence, to which the committal proceedings apply. Raymond Vincent and Alan Pringle - the issue is said to be the provenance of the weapons or items - these witnesses are not the appropriate witnesses with respect to this issue".

Then in respect of the 18 police officers it was said:

> "The issue of the alleged missing money is (a) not relevant to a fact in issue; (b) is merely a collateral issue and does not bear any weight or have any relevance to the charges as filed; (c) does not relate to the credit of the police officers given that the evidence relating to the charges is corroborated by electronic evidence".

6. On 9 July 2004 the parties came before the Magistrates' Court on a committal mention. All three accused were represented, as was the informant and the Chief Commissioner of Police. The Chief Commissioner had been subpoenaed to produce certain documents. A folder of documents was provided to Mr Henderson's counsel on that day and arrangements made for other documents to be made available for inspection.

7. All three accused had given notices of intention to seek leave to cross-examine. There was no objection to orders being made granting leave to the other two accused to cross-examine the witnesses named in each of their notices, in respect of the issues identified in each notice. Counsel for Mr Henderson informed the learned magistrate that as a result, leave had been given to cross-examine 11 of the 18 police officers named by Mr Henderson. Of course, that leave only related to the issues identified by each of the other accused persons.

8. Submissions were then made by counsel on behalf of Mr Henderson and on behalf of the informant. Counsel for Mr Henderson referred to the allegation that a large amount of cash had been taken during the search and disputed the reasons given for the lack of relevance of the alleged missing money. He also submitted that the notice of opposition did not give any reasons for opposing the calling of the 18 police officers in respect of a number of other relevant matters. Submissions were also made about the other three witnesses in respect of whom the granting of leave was opposed.

9. In response, submissions were made on behalf of the informant including that the poor drafting of the notice given by Mr Henderson meant that the requirements of clause 13(5) of Schedule 5 had not been addressed.

10. Counsel for Mr Henderson declined the suggestion by the learned magistrate to adjourn the application for leave to cross-examine until after there had been an opportunity to read through all of the new material obtained through the subpoena process.

11. After considering the matter over the luncheon adjournment, the learned magistrate gave his reasons for refusing leave to cross-examine in respect of the 18 police officers and two of the other witnesses, and for granting leave to cross-examine in respect of the remaining witness. The relevant part of his reasons read as follows:

> "In determining whether to grant leave to cross-examine I must have regard to the matters set out in clause 13(5)(a) of Schedule 5. With respect to the first group of witnesses set out in the form 8A, that is some 18 witnesses, the reference to the reason to cross-examine relating to telephone intercepts and logs and the following lines set out in that particular paragraph have been the subject of a subpoena to the Chief Commissioner of Police. Significant documents have this day been produced under subpoena and others are to be produced on behalf of the Chief [Commissioner] to counsel for Mr Henderson. Accordingly, the subpoena on the Chief Commissioner is and will be adjourned to a date to be fixed with a right of reinstatement. Consequently, those issues at this stage, in my view, do not warrant leave for any cross-examination to be granted. The other grounds on which leave is being sought to cross-examine these initially named 18 witnesses, in my view, do not fall within the requirement of clause 5(a). The issues with respect to the cash, spending habits of the police, the provenance of the items found and the police knowledge of such are not matters relevant to these prosecutions, nor do they go to the credit of the witnesses, having regard to the electronic devices and other evidence which is contained in the brief. With respect to the first 18 witnesses named, the reasons and issues set out in the form 8A do not, in my view, meet the necessary criteria of clause 5(a) and accordingly, the application to cross-examine those witnesses is refused."

12. Following the commencement of this proceeding on 10 August 2004 the Office of Public Prosecutions wrote to Mr Henderson's solicitors on 30 August 2004. Part of that letter stated as follows:

> "I advise that it is our view that these proceedings are misconceived. We submit that pursuant to the Court of Appeal's decision in *Potter v Tural* [2000] VSCA 227; (2000) 2 VR 612; (2000) 121 A Crim R 318, the Magistrates [sic] decision is not reviewable. I advise that the Co-defendants, Warwick and McMahon were granted Leave to cross-examine most of the witnesses concerned. This was because they provided valid reasons in their respective Forms 8A. Copies of those forms are attached.
>
> We submit that the appropriate course for you to follow is to re-submit an amended Form 8A containing valid reasons and make a fresh Application at a further Committal Mention. We would not oppose having the matter listed for a further mention for this purpose."

13. In late September, Mr Henderson's solicitors apparently sent to the Office of Public Prosecutions an undated and unsigned Amended Notice to Cross-Examine. Each of the 18 police officers was now listed separately together with a statement of the issue or issues in respect of which leave to cross-examine was sought and a statement of the relevance of that evidence. The

issue of the "very large amount of cash" allegedly taken during the search is said to be relevant to the cross-examination of all bar two of the police officers. A typical example of the way in which the new notice is drafted is that relating to Craig Smith which reads as follows:

> "Issue: The location and positioning of exhibits at the 7 Burton Crescent Maribyrnong [sic]. The bias of police members involved in the search. The attendance at Public Self Storage on 25th March 2004. Relevance: This witness attended at 7 Burton Crescent Maribyrnong on the execution of a search warrant. He unlocked a safe in the house. He was in company with Allan Birch and Paul Hendricks. A very large amount of cash was taken during the search and has not been reported as being found, and it is proposed to cross-examine the above in relation to any change in spending habits after the execution of the search warrant to ascertain which police have taken the money and not reported it. It is sought to examine the provenance of the items found. The bias of any investigation is relevant. The connection of items at Public Self-Storage to the defendant."

14. In addition, the Amended Notice to Cross-Examine included the name of a nineteenth police officer, Brett Williamson, in it.

15. By a letter dated 28 September 2004 the Office of Public Prosecutions acknowledge receipt of the Amended Notice. That letter went on to say as follows:

> "An Amended Form 8A, which is undated, was delivered by hand to this office on the 27th September 2004 for Mr Adrian Castle. There was no covering letter by way of explanation. With reference to the request for the police members, I note that the Amended Form 8A again makes reference to the issue of the alleged missing money. This is an issue which has already been canvassed and opposed by this Office and then the Court when considering the first Form 8A on the 9th July 2004. Whilst this remains an issue as well as reference to bias of any investigation drafted in the Form 8A, there is no need for a Special Mention to be listed in the Magistrates' Court. The proceedings issued in the Supreme Court can be persued [sic] to resolve the issue ..."

16. No attempt was made to obtain a committal mention by Mr Henderson's legal representatives. Mr Gillespie-Jones explained that this was because the Office of Public Prosecutions had indicated that it still opposed any attempt to cross-examine on the issue of the alleged missing money.

17. I turn then to consider the principles governing the granting of an order in the nature of mandamus in circumstances such as this. First, mandamus may go where there has been an error which amounts to a refusal, whether actual or constructive, to exercise jurisdiction at all. [1]

18. Secondly, the meaning of a constructive refusal to exercise jurisdiction has been authoritatively explained in the following passages. In *The King v War Pensions Entitlement Appeal Tribunal & Anor, Ex parte Bott*[2] Rich, Dixon and McTiernan JJ said:

> "A writ of mandamus does not issue except to command the fulfillment of some duty of a public nature which remains unperformed. If the person under the duty professes to perform it, but what he actually does amounts in law to no performance because he has misconceived his duty or, in the course of attempting to discharge it, has failed to comply with some requirement essential to its valid or effectual performance, he may be commanded by the writ to execute his function according to law de novo, at any rate if a sufficient demand or request to do so has been made upon him. In the case of a tribunal, whether of a judicial or an administrative nature, charged by law with the duty of ascertaining or determining facts upon which rights depend, if it has undertaken the inquiry and announced a conclusion, the prosecutor who seeks a writ of mandamus must show that the ostensible determination is not a real performance of the duty imposed by law upon the tribunal. It may be shown that the members of the tribunal have not applied themselves to the question which the law prescribes, or that in purporting to decide it they have in truth been actuated by extraneous considerations, or that in some other respect they have so proceeded that the determination is nugatory and void."

In *Ex parte Hebburn Limited, re Kearsley Shire Council*[3], Jordan CJ said:

> "It was contended, however, that even if this be so, at the worst all that the magistrate had done was to make a mistake of law in construing the section, and the fact that a tribunal has made such a mistake in exercising its jurisdiction, does not amount in law to a constructive failure to exercise it. I quite agree that the mere fact that a tribunal has made a mistake of law, even as to the proper construction of a statute, does not necessarily constitute a constructive failure to exercise jurisdiction,

> *R v Minister of Health*. But there are mistakes and mistakes; and if a mistake of law as to the proper construction of a statute investing a tribunal with jurisdiction leads it to misunderstand the nature of the jurisdiction which it is to exercise, and to apply 'a wrong and inadmissible test': *Estate and Trust Agencies (1927) Ltd v Singapore Improvement Trust*, or to 'misconceive its duty', or 'not to apply itself to the question which the law prescribes': *R v War Pensions Entitlement Appeal Tribunal*, or to misunderstand 'the nature of the opinion which it is to form': *R v Connell*, in giving a decision in exercise of its jurisdiction or authority, a decision so given would be regarded as given in a purported and not a real exercise of jurisdiction, leaving the jurisdiction in law constructively unexercised, and the tribunal liable to the issue of a prerogative writ of mandamus to hear and determine the matter according to law: *R v Board of Education*." [References omitted]

19. Thirdly, the correctness or otherwise of the magistrate's refusal of the application for leave to cross-examine is not the question to be considered in determining whether or an order in the nature of mandamus is called for. Thus, immediately after the passage from *Bott's* case just quoted, Rich, Dixon and McTiernan JJ continued:

> "... the prosecutor who undertakes to establish that a tribunal has so acted ought not to be permitted under colour of doing so to enter upon an examination of the correctness of the tribunal's decision, or of the sufficiency of the evidence supporting it, or of the weight of the evidence against it, or of the regularity or irregularity of the manner in which the tribunal has proceeded. The correctness or incorrectness of the conclusion reached by the tribunal is entirely beside the question whether a writ of mandamus lies".

See also *Potter v Tural*[4] and *Tez v Longley*[5].

20. Fourthly, the granting of this type of relief remains discretionary.[6]

21. Mr Gillespie-Jones submitted that in attempting to discharge his duty the magistrate failed to comply with a "requirement essential to its valid or effective performance" and failed in "the duty of ascertaining or determining facts upon which rights depend", thus the "ostensible determination is not a real performance of the duty imposed by law upon the tribunal." He submitted that there had been a constructive failure to exercise jurisdiction.

22. In support of his argument that there had been a jurisdictional error in this case, Mr Gillespie-Jones placed great reliance on a passage from the judgment of Batt JA in *Potter v Tural*[7]. I quote from His Honour's judgment:

> "To determine whether either of the magistrates constructively failed or refused to exercise jurisdiction it is necessary to ascertain the task which was confided to them by the relevant legislation. This question of statutory interpretation is that which is determinative of Ground 1A. In my opinion, the task confided was simply to determine, (1) whether the magistrate was satisfied that the evidence sought to be adduced had substantial relevance to the facts in issue and also, where a witness was under the age of 18 years, whether the interests of justice could not be adequately served except by granting leave; and, if the magistrate was so satisfied, (2) whether leave should be granted to cross-examine as proposed in the notice of intention, that is, whether such cross-examination should be allowed. This follows in my view from cll 4(1)(c), 12(1)(a), 13(2) and (4) and 16(a) and (b). Clause 4(1)(c) appears to be an express grant of jurisdiction to entertain and decide an application for leave. When sub cl (5) mandatorily requires the court to 'have regard to' the matters enumerated there, it requires the court to take those matters into account and give weight to them as a fundamental element in making its determination. But the subclause does not go to jurisdiction by serving to delimit it with certain tests. Rather, it states criteria or considerations that are obligatory in making the determination confided to the court. If a magistrate granted leave without having had regard even tacitly, to consideration (a) for instance, he would not, in my opinion, have failed to exercise jurisdiction (or acted without jurisdiction), but would have made an error within jurisdiction. Unlike the satisfaction required by sub cl (4), the Act does not require the considerations enumerated in cl 13(5) to be taken into account 'as a pre-condition of the existence of any authority to make an order or decision in the circumstances of the particular case'. Nor in my opinion, if the Magistrates' Court misconstrues cl 13(5) can it be said that it 'thereby misconceives the nature of the function which it is performing or the extent of its powers in the circumstances of the particular case'. Rather, I consider the following passage from the judgment of the High Court in *Craig* is applicable, namely: - "In contrast [to a tribunal], the ordinary jurisdiction of a court of law, encompasses authority to decide questions of law, as well as questions of fact, involved in matters which it has jurisdiction to determine. The identification of relevant issues, the formulation of relevant questions and the determination of what is and what is not relevant evidence are all routine steps in the discharge of that ordinary jurisdiction. Demonstrable mistake in the identification of such issues or the formulation

> of such questions will commonly involve error of law which may, if an appeal is available and is pursued, be corrected .... Such a mistake on the part of an inferior court entrusted with authority to identify, formulate and determine such issues and questions will not however, ordinarily constitute jurisdictional error. Similarly, a failure by an inferior court to take into account some matter which it was, as a matter of law, required to take into account in determining a question within jurisdiction or reliance by such a court upon some irrelevant matter upon which it was, as a matter of law, not entitled to rely in determining such a question will not ordinarily involve jurisdictional error". That was said in relation to *certiorari*. The position must be no less clear in relation to mandamus for failure to exercise jurisdiction".

Mr Gillespie-Jones argued that this statement by Batt JA meant that any error in applying clause 13(4), the predecessor of what is now clause 13(5) in Schedule 5, was a jurisdictional error. I do not agree. A precondition of the existence of any authority to make an order simply means in the current context that the court has no authority to grant leave to cross-examine a witness unless satisfied of the matters set out in clause 13(5)(a) and (b), namely, identification of an issue; relevance of a witness' evidence to that issue and justification of cross-examination of that witness on that issue. An incorrect decision by the Magistrates' Court on those matters does not necessarily mean that there has been a jurisdictional error. Like Batt JA, I respectfully rely on what was said by the High Court of Australia in *Craig v South Australia*[8] in the passage quoted by His Honour.

23. I therefore consider that it is not enough for Mr Gillespie-Jones to submit that the learned magistrate erred in deciding that, "the issues with respect to the cash" or "the provenance of the items found" were not matters relevant to these prosecutions. What has to be shown is that there was a constructive refusal to exercise jurisdiction. As Howie J put it in *McKirdy v McCosker*[9]:

> "The question for this Court is not whether the Magistrate was wrong in refusing to give the directions sought, even if this error involved a misconstruction of the section, but whether he failed to exercise the jurisdiction conferred upon him by the section or so misconceived the nature and extent of the jurisdiction or the manner in which it was to be exercised that his purported exercise of the jurisdiction was in truth no exercise at all ..."

24. Having said all of that, I am not disposed to embark on a final determination of that question, and, for the following reasons, I decline to do so. As I have said, Mr Henderson's notice seeking leave to cross-examine was not well drafted. Indeed, as Mrs Weinberg of counsel, who appeared on behalf of the second defendant, submitted, it may be doubted whether the notice complied with the requirements of clause 13(5) of Schedule 5. Mr Henderson's legal representatives implicitly recognised this when they served the Amended Notice to Cross-Examine. It seems to me that that step having been taken, it would have been far better to have sought a further committal mention to allow Mr Henderson to make an application for leave to cross-examine based on the Amended Notice. I do not agree with Mr Gillespie-Jones' explanation of why that was not done. I see no reason why the fact that the informant had indicated that he would still oppose leave being granted in respect of the issue of the missing money, meant that a further application could not have been made based on the Amended Notice. While the Magistrates' Court may have regard to the informant's attitude to the application in determining whether to grant the application, (clause 13(4) of Schedule 5), it goes without saying that it would be a constructive refusal by a magistrate to refuse the application simply because the informant had opposed it.

25. In the circumstances, it seems to me to be preferable for Mr Henderson to make an application based on the Amended Notice than for me to decide what could be seen as a hypothetical question given the existence of the Amended Notice. It should be remembered that the question of what cross-examination is allowed at a committal proceeding is one for the Magistrates' Court. The learned magistrate will be fully aware of all of the relevant considerations. This court can only intervene when there has been a jurisdictional error or an actual or constructive refusal to exercise jurisdiction at all. It is not sufficient that I might have reached different conclusions from those of the learned magistrate on some or all of the issues. I do not consider that what can sometimes be a fine line between an error going to jurisdiction and one not doing so, should be determined in the context of this poorly drafted notice.

26. Before concluding these reasons, I offer the following observations. The advantage of a fresh application based on the amended notice is that an attempt has been made in respect of each

individual witness to identify the issue or issues to which the proposed questioning relates and to provide a reason why the evidence of that witness is relevant to that issue. No doubt further argument could be addressed by way of submission to the court in support of the proposition that cross-examination of that particular witness on that particular issue is justified.

27. Obviously the reasons for granting or refusing leave to cross-examine will differ. In some cases, it may be that it is decided that an issue is not relevant or that the matters set out in clause 13(5A) do not require it to be investigated by cross-examination. In other cases, it may be decided that although the identified issue is relevant, the particular witness' evidence in respect of that issue is not. Thus, leave may be given to cross-examine a particular witness in respect of one of more issues, but refused in respect of other issue or issues.

28. During the course of argument I was assured by Mrs Weinberg that the Office of Public Prosecutions would not raise any objections to a fresh application being made by Mr Henderson at the commencement of the committal proceeding next Monday. There is power in the Magistrates' Court to hear such an application despite a failure to comply with the time limits (clause 12(5) of Schedule 5). I was told that there would be no problem with the availability of witnesses. As I have said 11 of the 18, or perhaps now 19, police officers are already giving evidence, and it was not anticipated that there would be any difficulty in making the others available for cross-examination if required.

29. Therefore, for all of the above reasons, in the exercise of my discretion, I have decided to refuse the application on behalf of Mr Henderson for an order in the nature of mandamus.

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[1] See *Brygel v Stewart-Thornton* [1992] VicRp 70; [1992] 2 VR 387; (1992) 67 A Crim R 243 per JD Phillips J; *Potter v Tural* [2000] VSCA 227; (2000) 2 VR 612 at [26]; (2000) 121 A Crim R 318 per Batt JA, with whom Tadgell JA agreed; and at VR [6] per Callaway JA.
[2] [1933] HCA 30; (1933) 50 CLR 228 at 242-243; 39 ALR 533; (1933) 7 ALJR 169.
[3] (1947) 47 SR (NSW) 416 at 420; (1947) 64 WN (NSW) 107; 16 LGR (NSW) 82.
[4] per Batt JA at [26].
[5] (2004) NSWSC 74 at [27] per Shaw J; 142 A Crim R 122.
[6] See *Potter v Tural* per Batt JA at [26] and [51].
[7] at [45].
[8] [1995] HCA 58; (1995) 184 CLR 163; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359.
[9] (2002) NSWSC 197 at [4]; (2002) 127 A Crim R 217.

**APPEARANCES:** For the Plaintiff Henderson: Mr S Gillespie-Jones, counsel. Ferraro, Pruscino & Co, solicitors. For the second Defendant: Mrs R Weinberg, counsel. Ms K Robertson, Solicitor for Public Prosecutions.

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