27/08; [2008] VSC 172

SUPREME COURT OF VICTORIA

CLAYTON v HALL and ANOR

Kaye J

19, 23 May 2008 — 184 A Crim R 440

CRIMINAL LAW – PRACTICE AND PROCEDURE – DEFENDANT CHARGED WITH A NUMBER OF INDICTABLE OFFENCES TRIABLE SUMMARILY – DEFENDANT CONSENTED TO SUMMARY HEARING AT COMMITTAL MENTION – CHARGES LATER LISTED FOR HEARING – APPLICATION BY DEFENDANT TO WITHDRAW CONSENT TO SUMMARY HEARING – APPLICATION REFERRED TO MAGISTRATE WHO HEARD COMMITTAL HEARING – REQUIREMENT THAT APPLICANT SHOW EXCEPTIONAL CIRCUMSTANCES AS PER CHIEF MAGISTRATE'S PRACTICE DIRECTION – FINDING THAT EXCEPTIONAL CIRCUMSTANCES NOT SHOWN – APPLICATION REFUSED – MATTER REFERRED BACK TO MAGISTRATE FOR HEARING – CHARGES FOUND PROVED – DEFENDANT SENTENCED TO A TERM OF IMPRISONMENT – WHETHER MAGISTRATE IN ERROR IN REFUSING APPLICATION TO WITHDRAW CONSENT TO JURISDICTION – WHETHER MAGISTRATE WOULD HAVE ARRIVED AT THE SAME CONCLUSION IF HE HAD APPLIED THE CORRECT TEST – WHETHER FUTILE TO GRANT RELIEF IN THE NATURE OF *CERTIORARI*: *MAGISTRATES' COURT ACT* 1989, S53(1); Sched 5, cl 4(1)(b).

1. It is necessarily implicit in Cl 4(1)(b) of Schedule 5 to the *Magistrates' Court Act* 1989 ('Act') that, at a committal mention, the Court may receive the consent of a defendant for the Court to hear and determine the charges against that defendant summarily. In this case, it was not in dispute that the plaintiff had given that consent to the Magistrate at the committal mention. Thus, if the defendant had not applied subsequently to withdraw consent to a summary hearing, that consent would have been effective to invest the Court with jurisdiction to hear the matter summarily.

2. The defendant was entitled, by leave, to withdraw her consent to summary jurisdiction. It was also common ground that the Court, in determining whether to grant such leave, was to be guided by the justice of the circumstances.

3. However, the Magistrate in dealing with the application considered himself bound by cl7 of Practice Direction No 9 of 2004, published by the Chief Magistrate, which stated that "... the defendant's election shall in the absence of exceptional circumstances be considered as final". Such a requirement, that a defendant must demonstrate exceptional circumstances, is a significant detraction from, and fetter upon, the broad discretion which a magistrate otherwise has under s53(1)(a) of the Act to determine an application by a defendant to withdraw an earlier consent to summary jurisdiction. Such a requirement that a defendant, in any such case, must prove "exceptional circumstances", imposes a test which would ordinarily be more stringent than the test recognised in the authorities, namely, the justice of the case. The discretion of the Court, implicit in s53(1), to permit withdrawal of a consent to summary jurisdiction, is not capable of being validly fettered or circumscribed by a Practice Note issued under s16A of the Act. It follows that, by imposing a requirement on the plaintiff that she establish exceptional circumstances, the magistrate determined the plaintiff's application to withdraw her consent by applying an erroneous principle of law and accordingly, the defendant has established an error of law by the magistrate on the face of the record.

4. *Obiter*: Cl 4(1)(b) of Schedule 5 to the Act *Magistrates' Court Act* 1989 provides that the plaintiff's consent to summary jurisdiction may be given at a committal mention, and thus to a Court which may be differently constituted than the Court which ultimately conducts the summary hearing of the charges. That being so, there is no warrant to construe the Act so as to require that any subsequent application by an accused person to withdraw his or her consent must be heard before the Court which actually conducts the summary hearing. Accordingly, the magistrate who heard the application to withdraw consent was competent to hear the application by the defendant to withdraw her consent and the magistrate who dealt with the matters finally was bound by the decision of the Magistrate to reject the defendant's application to withdraw her consent.

5. Having regard to all the circumstances of the case, including the fact that serious charges were involved and the denial of a fundamental right to have the charges tried by a jury, it did not follow that if the magistrate had applied the correct test in determining the application to withdraw consent, he would have arrived at the same conclusion. Accordingly, there was no basis the Court should decline to grant relief to the defendant in the nature of *certiorari*.

KAYE J:

1. In September 2006, the plaintiff was charged with three charges of wilfully committing an indecent act with a child under the age of 16 years (contrary to s47(1) of the *Crimes Act* 1958), two charges of assaulting a female in indecent circumstances while being aware that that person was not, or might not be, consenting (contrary to s39(1) of the *Crimes Act*), and two charges of driving a motor vehicle on a highway during a period of disqualification from obtaining an authorisation to drive a motor vehicle (contrary to s30(1) of the *Road Safety Act* 1986). The charges came on for hearing before Magistrate Spooner at the Morwell Magistrates' Court on 24 September 2007. The plaintiff pleaded not guilty to each of the seven charges. After hearing the evidence, the magistrate convicted her on each charge. Her Honour sentenced the plaintiff to six months' imprisonment on each of charges 1 to 5, to be served concurrently, and to one month's imprisonment on charges 6 and 7, to be served cumulatively. Thus, the plaintiff was sentenced to a term of seven months' imprisonment. The magistrate also made an order in respect of the plaintiff under s11 of the *Sex Offenders Registration Act* 2004.

2. The plaintiff brings these proceedings, pursuant to order 56 of the *Rules of the Supreme Court*, seeking an order for *certiorari* to quash the convictions recorded against her, and a declaration that her conviction on each of the charges is invalid. The originating motion contains four substantive grounds for review of the order of the magistrate. Grounds 2 to 4 relate to the first five charges against the plaintiff. Each of those charges were for indictable offences. Under s53(1) of the *Magistrates' Court Act* 1989, the Court was entitled to hear those charges summarily if (*inter alia*) the plaintiff consented. The principal issue, raised by those grounds, is whether the plaintiff had, before 24 September 2007, validly consented to the charges being heard summarily pursuant to s53(1) and, if so, whether the Court erred in refusing her leave to withdraw her earlier consent to that course. The fifth ground of review relates to the validity of the first three charges, but it was expressly abandoned before me.

Background

3. It is necessary to set out, in a little detail, the background circumstances relevant to the remaining three grounds of review.

4. The transcript of the proceedings before the Morwell Court on 24 September 2007 is an exhibit to the affidavit in support of the originating motion. From that transcript it is apparent that there had been a number of previous preliminary hearings of the charges against the plaintiff. The evidence as to what had occurred on those hearings is not particularly satisfactory. However, it seems that the charges were first before the Court, by way of "mention" hearing, on 30 October and 20 November 2006. Subsequently, the Court conducted a "committal mention" hearing on 19 January 2007, and two further committal mention hearings on 17 April 2007 and 29 May 2007.

5. On 24 September 2007 the matter came on before Magistrate Spooner. Counsel who then appeared for the plaintiff, Mr Brewer, commenced by stating to the magistrate that his client "wishes to access her right to trial by jury". The prosecutor, Senior Constable Farmer, then stated to the magistrate that at the committal mention on 17 April 2007, the plaintiff had elected to have the matter dealt with summarily "due to lack of funds". Mr Brewer indicated to the magistrate that he had received his brief on the previous Thursday. When he looked at the documents, he ascertained that the case was for a final hearing, rather than a committal. He arranged to confer with the plaintiff on the Sunday before the hearing, when he told the plaintiff of her rights. On the next day (the Monday), when the plaintiff had arrived at Court, she instructed Mr Brewer that she wished to exercise her right to a trial by jury. Mr Brewer told the magistrate that, at the time of the earlier hearing (17 April), the plaintiff had been denied legal aid and did not have any money. However, she was now in a better position to fund a trial. After some further discussion, the magistrate referred the plaintiff's application, to withdraw her consent to summary jurisdiction, to Magistrate Alsop, who, on 17 April 2007, had directed that the matter be determined summarily.

6. The case thus came before Magistrate Alsop on the same day. Mr Brewer made the application on behalf of the plaintiff to withdraw her earlier consent to summary jurisdiction. He submitted that the case was a serious one. The plaintiff was a deserted mother of two 14 year old children. If she were convicted she might be entered on the sexual offenders' register. He submitted that the case was always going to proceed as a trial. However, the plaintiff's application for legal aid had been refused, and she was unaware of the appeal procedures. The plaintiff then suffered

a psychological illness for which she was treated by a psychologist. She was under stress at the time that she earlier signified her consent to summary jurisdiction. In the meantime she had been subject to substantial family pressures, including the death of her father. The plaintiff occupied a senior position as a learning and development specialist, and she was now in a position to fund her defence. If she were convicted, she would lose her employment.

7. When Mr Brewer completed his submissions, Magistrate Alsop gave his ruling. His Honour noted the history of the matter, and in particular that it had proceeded from the "summary stream to the committal stream back to the summary stream", and that it was now sought to take the matter back to the "committal stream". His Honour noted that a practice direction of the Chief Magistrate in 2004 had stipulated that any application to withdraw a consent to summary jurisdiction "must be supported by exceptional circumstances". His Honour referred, in summary, to each of the matters relied on by Mr Brewer in support of the application. He noted that at the earlier mentions, including the committal mentions, the plaintiff had been represented, and that it was only when the matter had come on that day (24 September) that an application had been made to withdraw the plaintiff's consent, so that the matter might proceed as a committal. Magistrate Alsop concluded:

> "It's been through a contest mention, it's been through committal mentions, it's been through a series of previous mentions and I am not satisfied to any extent that exceptional circumstances have been made out. The application to remove the matter from this jurisdiction is refused."

8. Having reached that conclusion, Magistrate Alsop referred the case back to Magistrate Spooner. Her Honour proceeded to hear evidence from the two complainants, from two witnesses to whom the complainants had made complaint, and from the informant. Each of those witnesses was cross-examined by Mr Brewer. The plaintiff did not give evidence. After a short adjournment, her Honour ruled that she was satisfied beyond reasonable doubt of the guilt of the plaintiff on each of the seven charges. Counsel declined to make a plea on behalf of his client, other than to request the Court not to make a custodial sentence. He submitted that the Court had no jurisdiction to impose a sentence. Her Honour then proceeded to sentence the plaintiff to a total of seven months' imprisonment, including six months' imprisonment on each of charges 1 to 5. She declared that the plaintiff was sentenced to a registrable offence pursuant to the *Sex Offenders Registration Act* 2004.

9. The three grounds, set out in the originating motion, upon which the plaintiff relies, are stated as grounds 2, 3 and 4, as follows:

> "2. The magistrate erred in hearing the indictable offences when the plaintiff did not consent to summary jurisdiction.
>
> 3. The magistrate erred in construing the right to not consent to a summary hearing as
> (a) Contingent upon a finding of exceptional circumstances
>
> (b) Depending upon whether there had been a previous application for summary jurisdiction
>
> (c) Relying on a practice note
> (i) that purported to fetter the right not to consent to summary jurisdiction extant in section 53(1)(a) of the *Magistrates' Court Act* 1989
> (ii) being inconsistent with section 53(1)(a) of the *Magistrates' Court Act* 1989 was void by operation of section 16A of *Magistrates' Court Act* 1989
>
> (4) In the alternative to paragraphs one and two the magistrate erred in proceeding to assume jurisdiction to hear the charge when she was not the same magistrate who refused an application to the committal stream of the Court."

Submissions

10. Mr M Simon, who appeared for the plaintiff, made two main submissions in support of the application for prerogative relief. His principal submission was based on ground 3. Mr Simon submitted that, in determining the plaintiff's application to withdraw her consent to summary jurisdiction, the magistrate erred by applying a test which required the plaintiff to demonstrate exceptional circumstances. Mr Simon submitted that, on such an application, the magistrate had a discretion, which was to be exercised according to the justice of the situation. By applying the

wrong test, the magistrate made an error of law on the face of the record. Accordingly, Mr Simon submitted that I should grant relief in the nature of *certiorari* quashing the convictions.

11. Mr Simon also made an alternative submission, based on grounds 2 and 4 of the originating motion. He submitted that, by hearing the plaintiff's application to withdraw her consent to summary jurisdiction, Magistrate Alsop was part heard in the proceeding. When the matter was referred to Magistrate Spooner, her Honour was hearing the matter "de novo". Accordingly, Magistrate Spooner was required to hear, anew, the application by the plaintiff to withdraw her consent. By proceeding to hear the charges without first entertaining that application, Magistrate Spooner had acted without jurisdiction.

12. In reply, Mr M Gamble SC, who appeared for the first defendant, submitted that the plaintiff did not have an automatic right to withdraw her earlier consent to summary jurisdiction. He submitted that the magistrate had a discretion to reject the application of the plaintiff to withdraw her consent, and that the plaintiff bore the onus of persuasion on that application. Mr Gamble accepted that there was no authority which supported the requirement by the magistrate that the plaintiff must demonstrate exceptional circumstances. He agreed that the discretion of the magistrate was not circumscribed by any such requirement. However, Mr Gamble submitted that, in the circumstances of this case, and particularly given the late nature of the application, the plaintiff was required to establish cogent reasons why she should be permitted to withdraw her earlier consent to jurisdiction. Mr Gamble submitted that in those circumstances, if the magistrate had applied the correct test, "he could not but have made the same decision". Accordingly, Mr Gamble submitted that, in the exercise of the Court's discretion, I should refuse the application for *certiorari*.

13. Mr Gamble also addressed the alternative submission made by Mr Simon. He argued that there was no basis for the proposition that the magistrate, who heard the application to withdraw the earlier consent to jurisdiction, must be the magistrate who, ultimately, heard the charges against the plaintiff. Mr Gamble referred to the decision of the Court of Queen's Bench Division in *R v Newham Juvenile Court, Ex parte F (A Minor)*[1] in support of the proposition that, in hearing the charges against the plaintiff, Magistrate Spooner was bound by the decision of Magistrate Alsop to refuse the plaintiff's application to withdraw her consent to summary jurisdiction.

14. In his submissions in reply, Mr Simon argued that it cannot be concluded that the magistrate would have made the same decision, if his Honour had applied the correct test, namely, whether it was in the interests of justice that the plaintiff be permitted to withdraw her consent. Mr Simon submitted that the right of an accused person to trial before jury on an indictable offence is a long-standing and basic right. He submitted that the plaintiff had provided an appropriate explanation as to why she wished to withdraw her earlier consent to summary jurisdiction. Accordingly, I should not conclude that, if the magistrate had decided the plaintiff's application to withdraw her consent according to law, he would have reached the same conclusion. Therefore, in the exercise of my discretion, I should not refuse the plaintiff's application for *certiorari*.

The issues

15. The submissions of counsel effectively narrowed the issues which are in contest before me. It is useful to commence by identifying what is not in dispute. First, Mr Simon accepted that, on 17 April 2007, the plaintiff had consented to summary jurisdiction pursuant to s53(1)(b) of the *Magistrates' Court Act* 1989. Further, he accepted that, if the plaintiff had not made an application to withdraw that consent on 24 September 2007, then her earlier consent would have given the Court jurisdiction to try the charges summarily.

16. Mr Simon also accepted that the plaintiff did not have an automatic right to withdraw her earlier consent to summary jurisdiction. It was common ground that the plaintiff was only entitled to withdraw her consent by leave of the Court. Further, it was common ground that the Court was required to determine that application in accordance with the justice of the case. Thus, ultimately, it was common ground that the discretion of the magistrate was not fettered by any requirement that the plaintiff demonstrate exceptional circumstances, in order to be granted leave to withdraw her earlier consent to summary jurisdiction. Accordingly, it was not in dispute that the magistrate had made an error of law by requiring the plaintiff to establish exceptional circumstances. The critical issue is whether, in the exercise of the Court's discretion, I should grant *certiorari*. The

competing arguments in respect of that issue focussed on the question whether, if the magistrate had applied the appropriate test, he would have reached the same conclusion, and would have rejected the plaintiff's application to withdraw her consent to summary jurisdiction.

Principles and findings

17. Section 53(1) of the *Magistrates' Court Act* 1989 provides:

> "If a defendant is charged before the Court with any offence referred to in Schedule 4 or with any other indictable offence to which this subsection applies, the Court may hear and determine the charge summarily if—
> (a) The Court is of the opinion that the charge is appropriate to be determined summarily; and
>
> (b) The defendant consents to a summary hearing."

18. Section 53(1A) extends the category of cases which the Court might hear and determine summarily under s53(1). Pursuant to that provision, the first five charges against the plaintiff were charges which the Court might hear summarily with the consent of the plaintiff.

19. Standing alone, s53(1)(b) leaves open the question whether the consent of a defendant must be given to the same magistrate who, ultimately, proceeds to hear and determine the charges summarily. The predecessor to s53(1) was s70 of the *Magistrates' Court Act* 1971, which was in a different form to s53. In *McKay v Tankard*[2], Southwell J held that that section required that the defendant give his consent to the Court before whom the defendant was formally charged. His Honour's decision was based on the well established proposition that provisions, relating to an accused person's consent to summary jurisdiction, must be strictly complied with[3]. However, the issue is, I consider, now concluded by cl 4(1)(b) of Schedule 5 to the *Magistrates' Court Act* 1989, which applied to the proceeding pursuant to s56(2) of the Act. Clause 4(1)(b) provides:

> "(1) At a committal mention the Court may …
> (b) determine any application for a summary hearing under section 53(1) or offer a summary hearing under that section."

20. Clearly, it is necessarily implicit in that provision that, at a committal mention, the Court may receive the consent of a defendant for the Court to hear and determine the charges against that defendant summarily. In this case, it was not in dispute that the plaintiff had given that consent to Magistrate Alsop at the committal mention of 17 April 2007. Thus, Mr Simon was correct in conceding that, if his client had not applied to withdraw her consent on 24 September, that consent would have been effective to invest the Court with jurisdiction to hear the matter summarily.

21. The *Magistrates' Court Act* does not contain any express provision entitling a defendant to withdraw a consent to summary jurisdiction. However, there are a number of English decisions, to which counsel referred in argument, which recognise the right of a defendant to apply to the Court for leave to withdraw a consent previously given by the defendant to summary jurisdiction in respect of an indictable offence. In *R v Craske, Ex Parte Metropolitan Police Commissioner*[4], the Court of Queen's Bench Division held that a magistrate had the power to permit an accused to withdraw his earlier consent to summary trial.[5] That decision was followed by the Court of Queen's Bench Division in *R v Southampton Justices Ex Parte Briggs*[6]. In that case, Lord Widgery CJ, with whom Ashworth and Griffiths JJ agreed, stated that, in determining a request by a defendant to withdraw consent to summary jurisdiction, the justices should exercise their jurisdiction " … on how they see the broad justice of the whole situation".[7]

22. The only relevant Australian decision on this issue is that of the Supreme Court of Western Australia in *Macri v Ryan*[8]. In that case, the appeal to the Supreme Court was argued on the basis that the accused was bound by his election, unless and until the magistrate, as an exercise of discretion, permitted him to withdraw his consent.[9] However, Franklyn J, in reviewing the authorities to which I have referred, expressed general agreement with them. His Honour considered that there seemed to be no reason why an election might not be withdrawn, by leave if necessary, before the commencement of the trial.[10] Thus, his Honour favoured the view that the provisions of the Western Australian *Criminal Code* were amenable to the propositions stated by the Court of Queen's Bench in *Craske*[11].

23. As I have stated, it is common ground that the plaintiff was entitled, by leave, to withdraw her consent to summary jurisdiction. It was also common ground that the Court, in determining whether to grant such leave, was to be guided by the justice of the circumstances. The authorities to which I have referred support the approach taken by counsel in this case. As I have observed, in *Ex parte Briggs*[12] the Court considered that the discretion should be exercised by reference to the "broad justice of the whole situation". Similarly, in *Craske's case*[13], Lord Devlin considered that the appropriate consideration was whether it was in the "interests of justice" that the defendant, having ill-advisedly given his consent to abandon his right to trial by jury, should be given the opportunity to reconsider the matter.

24. In this case, Magistrate Alsop considered himself bound by cl 7 of Practice Direction No 9 of 2004, published by the Chief Magistrate, which stated that "... the defendant's election shall in the absence of exceptional circumstances be considered as final". Such a requirement, that a defendant must demonstrate exceptional circumstances, is a significant detraction from, and fetter upon, the broad discretion which a magistrate otherwise has under s53(1)(a) to determine an application by a defendant to withdraw an earlier consent to summary jurisdiction. As pointed out by Mr Simon, a requirement that a defendant, in any such case, must prove "exceptional circumstances", imposes a test which would ordinarily be more stringent than the test recognised in the authorities, namely, the justice of the case.[14] The discretion of the Court, implicit in s53(1), to permit withdrawal of a consent to summary jurisdiction, is not capable of being validly fettered or circumscribed by a Practice Note issued under s16A of the Act.[15] Indeed, Mr Gamble did not argue to the contrary. It follows that, by imposing a requirement on the plaintiff that she establish exceptional circumstances, the magistrate determined the plaintiff's application to withdraw her consent by applying an erroneous principle of law. Under s10 of the *Administrative Law Act* 1978, the reasons of the magistrate formed part of the record of the Court. Accordingly, the plaintiff has established an error of law by the magistrate on the face of the record.

25. In light of the conclusions which I have so far reached, it is not necessary for me to consider Mr Simon's alternative submission. Nevertheless, I should indicate that, if it were necessary to do so, I would not have accepted that submission. Clause 4(1)(b) of Schedule 5 to the *Magistrates' Court Act* 1989 provides that the plaintiff's consent to summary jurisdiction may be given at a committal mention, and thus to a Court which may be differently constituted than the Court which ultimately conducts the summary hearing of the charges. That being so, there is, in my view, no warrant to construe the Act so as to require that any subsequent application by an accused person to withdraw his or her consent must be heard before the Court which actually conducts the summary hearing. I agree with the submission made by Mr Gamble that Magistrate Alsop, on 24 September 2007, was competent to hear the application by the plaintiff to withdraw her consent. I also accept Mr Gamble's submission that Magistrate Spooner was bound by the decision of Magistrate Alsop to reject the plaintiff's application to withdraw her consent.[16]

Discretion

26. The grant or refusal of prerogative relief, such as *certiorari*, lies in the discretion of the Court.[17] A Court may decline to grant *certiorari* where it would be futile to do so. Accordingly, the Court might refuse relief if it is satisfied that, if the decision were quashed and remitted for rehearing, the decision maker would reach the same conclusion.

27. There is no precise test which is to be applied in determining the question of the utility of the prerogative relief sought by an applicant. There are, however, a number of authorities which provide some guidance on such a question. In *Mann v Medical Practitioners Board of Victoria & Anor*[18], Nettle JA quoted, with approval, the following passage from the judgment of Ryan J of the Federal Court in *Shell's Self Service Pty Ltd v Deputy Federal Commissioner of Taxation*[19]:

> "Those authorities which include *Ex Parte Frankel* [1914] VicLawRp 92; [1914] VLR 635; 20 ALR 326; 36 ALT 72 and *R v Aston University Senate* [1969] 2 QB 538; [1969] 2 All ER 964 serve as a useful reminder that this Court should not automatically quash or set aside a decision upon finding that it has been vitiated by error of law. It is also necessary to have regard to the conduct of the applicant for review including any delay in bringing the proceedings or acquiescence in the decision maker's error. As well it may be appropriate to examine whether, on further consideration, the decision maker could reasonably come to some other decision more favourable to the applicant for review."

28. In *Mann's case*, Nettle JA[20] also referred to the judgment of Donaldson J (with whom Lord

Parker CJ and Blain J agreed) in *R v Aston University Senate, Ex Parte Roffey & Anor*[21]:

> "This by no means concludes the matter in Mr Pantridge's (the applicant's) favour, because it is not in all circumstances that a breach of the requirements of natural justice will give rise to prerogative redress. The remedies are discretionary and a very important factor is the likelihood that the ultimate decision would have been any different, if a right of audience had been extended to Mr Pantridge. It is in this context that the history of the affair after the initial decision is of relevance, but it is difficult to evaluate … In my judgment it is impossible to project subsequent attitudes backwards in point of time and to determine what the examiners would have done if they had heard the student's allegations, before making a decision. In this situation I regard the time factor as decisive. The prerogative remedies are exceptional in their nature and should not be made available to those who sleep on their rights."[22]

29. Mr Gamble submitted that, if the magistrate had applied the correct test, nevertheless, on the matters put to him by counsel, the magistrate "could not but have come to the decision" not to allow the plaintiff to withdraw her consent to summary jurisdiction. Mr Gamble, in particular, relied on the following matters: the long history of the matter; the delay by the plaintiff in applying for leave to withdraw her earlier consent to summary jurisdiction; the fact that the plaintiff had been represented on previous mention hearings, including the hearing of 17 April 2007 at which she had stated her consent to summary jurisdiction; the policy, evident in the *Crimes Act*, that cases involving charges of sexual offending should be heard with a minimum of delay; the fact that the Court had made arrangements for the case to proceed by way of summary application, including organising facilities for the two complainants to give their evidence by video link; the interests of the prosecution and the community; and the interests of the Court and other litigants in the expeditious and efficient disposition of cases before the court.

30. Each of the matters to which Mr Gamble referred is of some weight. They were, I consider, all relevant to a consideration by the magistrate whether, in the exercise of his discretion, it was in the interests of justice that the plaintiff ought to be allowed to withdraw her consent to summary jurisdiction. However, the relevant circumstances which were before the magistrate did not all point in the same direction. On the other side of the ledger, counsel for the plaintiff, appearing before Magistrate Alsop, identified a number of circumstances which were of significant weight, and which supported the plaintiff's application to withdraw her consent.

31. As a preliminary observation I note that, in the course of his submissions, Mr Gamble argued that the plaintiff had failed to establish any circumstances justifying the exercise of the magistrate's discretion in her favour, because the plaintiff had not adduced any evidence before the magistrate in support of the matters put on her behalf by her counsel. However, no point was taken by the magistrate or by the prosecutor that the matters upon which the plaintiff had sought to rely, through the mouth of her counsel, had not been the subject of appropriate evidence. It is therefore appropriate to proceed, on this application, on the basis that the matters put to the magistrate from the bar table were all matters to which the magistrate ought to have adverted in reaching his decision. In saying that, I do not sanction the method by which the matters were put to the magistrate. In my view, on such an application, in general it is preferable that some evidence should be placed before the magistrate, upon which a proper assessment may be made for the purposes of the exercise of the discretion. However, as I have pointed out, the application before the magistrate proceeded on the basis that the plaintiff was entitled to rely on the matters put on her behalf by her counsel from the bar table.

32. There were, I consider, a number of important matters which the magistrate was required to take into account in determining whether, in the exercise of his discretion, it was in the interests of justice to permit the plaintiff to withdraw her earlier consent to summary jurisdiction. First and foremost of those circumstances was the nature of the five charges of indictable offences against the plaintiff. The charges, of themselves, were particularly serious. The allegations of the complainants, as particularised in them, were odious. In addition, it had been put on behalf of the plaintiff that a conviction on those charges might have grave consequences for her ability to obtain and retain employment for a substantial time in the future.

33. Secondly, and allied to that point, is the consideration that in determining the application, the magistrate was concerned with a well established and basic right of an accused person charged with an indictable offence to have those charges tried by a jury. It is true that s53(1)(a)

provides for an accused to consent for such charges to be heard summarily. However, the right of an accused person to have a charge for an indictable offence brought against him or her tried by a jury, drawn from members of the community, is fundamental and significant. That right has endured for centuries. It is a cornerstone of our criminal justice system. Although, over the last 150 years or so, various statutes have provided that, in specified cases, an accused might consent to an indictable charge being heard summarily, those provisions have been strictly construed by the Courts.[23] That approach is based on the recognition of the paramount importance of the individual's right to have indictable charges tried by jury.

34. Although the history of the case before the Morwell Court was chequered and unfortunate, there was no suggestion that the application by the plaintiff, to withdraw her consent, was capricious or mischievous. The explanation given by her counsel to the magistrate was not put in issue. The original decision was made when the plaintiff was under some stress, and when she did not have the financial resources to fund a defence of a trial. Counsel explained to the magistrate how he came to be involved in the matter, and how, after he had given the plaintiff appropriate advice, she had instructed him that she wished to withdraw her consent to the case proceeding by way of summary hearing. Those matters were all relevant, and provided, at least in part, an explanation as to why the plaintiff had not made an appropriate application to withdraw her consent to jurisdiction until a late stage.

35. The matters to which I have just referred would all be relevant to a determination by the magistrate whether, in the interests of justice, the plaintiff ought to be permitted to withdraw her consent to summary jurisdiction. Those matters are, on their face, material and of some weight. I agree with Mr Simon's submission that, in light of those factors, it could not be concluded that it is inevitable, or probable, that if the magistrate had applied the relevant test of the interests of justice, he would have rejected the plaintiff's application to withdraw her consent to summary jurisdiction.

36. In support of his submissions, Mr Gamble contended that it was relevant for the Court to take into account the interests of the community, and of other litigants, in the efficient disposition of the plaintiff's case. That factor is, I consider, material. However, as appellate Courts have pointed out in other contexts, while that consideration may be relevant, it must not be permitted to supplant the rights of the parties to a fair trial.[24]

37. Accordingly, I am not persuaded that, if the magistrate had applied the correct test, namely whether it was in the interests of justice that the plaintiff be permitted to withdraw her consent, his Honour would have reached the same conclusion. There is therefore no basis upon which I should reject the plaintiff's application for *certiorari*. Indeed, I would be reluctant to exercise my discretion to refuse the plaintiff relief in a case such as this, where the impugned decision was made in a criminal case involving serious charges, and where the decision related to such a fundamental right as that of the plaintiff to have the charges against her tried by a jury. In any event, I am not satisfied that the magistrate, if he had applied the correct test, would have reached the same conclusion. Accordingly I do not consider that I should refuse to grant the plaintiff relief in the form of *certiorari*.

38. Finally, I note that the two charges of driving while disqualified, on which the plaintiff was also convicted, were summary charges. Strictly, the matters relied upon by the plaintiff in this application do not vitiate her conviction on either of those two charges. However, as Mr Gamble quite properly acknowledged, it is not clear, from the transcript, that those matters would have been disposed of in the same way, had they been dealt with separately to the indictable charges. In those circumstances, Mr Gamble correctly accepted that, if I were to conclude that the plaintiff's convictions on the indictable offences should be quashed, an order should be made quashing her convictions also on those summary charges.

Conclusion

39. In conclusion, I am satisfied that Magistrate Alsop erred in law in deciding to reject the application by the plaintiff to withdraw her consent to summary jurisdiction. That error was an error on the face of the record of the Court. On the basis of that decision, Magistrate Spooner heard and determined the charges against the plaintiff summarily. The error of law made by Magistrate Alsop thus vitiated the orders by Magistrate Spooner, by which her Honour convicted the plaintiff

on the seven charges, and sentenced her to a term of imprisonment. I am not persuaded that, if Magistrate Alsop had applied the correct test in determining the application by the plaintiff to withdraw her consent to summary jurisdiction, he would have arrived at the same conclusion. Accordingly, there is no basis why, in the exercise of my discretion, I should decline to grant the plaintiff relief in the nature of *certiorari*. In addition, I shall make a declaration that the plaintiff's conviction on the seven charges was invalid.

Orders

40. Subject to hearing any submission from counsel, I therefore propose to make the following orders in this matter:

> 1. Declare that the orders of the Magistrates' Court of Victoria at Latrobe Valley in case number U02206928, whereby the plaintiff was convicted of charges 1 to 7 and sentenced to a total of seven months' imprisonment, and whereby it was ordered that her name be entered on the Register of Sex Offenders and remain there for 15 years, were invalid and contrary to law.
>
> 2. Order in the nature of *certiorari* that the orders and decision of the Magistrates' Court at Latrobe Valley, in case number U02206928, whereby the plaintiff was convicted of charges 1 to 7 and sentenced to seven months' imprisonment, and that her name be entered on the Register of Sex Offenders and remain there for 15 years, be brought into this Court, and that the said orders and convictions be quashed.

41. I shall hear counsel on the question of costs.

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[1] [1986] 3 All ER 17; [1986] 1 WLR 939; [1986] Crim LR 557; (1986) 84 Cr App R 81.
[2] [1987] VicRp 32; [1987] VR 381, 384.
[3] *Dodemaide v Tucker* [1927] VicLawRp 78; [1927] VLR 539, 540; 33 ALR 385; 49 ALT 48, (Mann J); *Hacking v Keath* [1966] VicRp 50; [1966] VR 364, 369 (Adam J).
[4] [1957] 2 QB 591.
[5] Ibid, See especially at 597 to 598, Lord Goddard CJ.
[6] (1972) 1 All ER 573; [1972] 1 WLR 277.
[7] Ibid, 280.
[8] (1993) 74 A Crim R 504.
[9] Ibid, 511.
[10] Ibid, 510.
[11] Ibid, 511.
[12] *R v Southampton Justices Ex Parte Briggs* (1972) 1 All ER 573; [1972] 1 WLR 277, 280.
[13] *R v Craske* [1957] 2 QB 591, 600.
[14] Compare *Kent v Wilson* [2000] VSC 98, [24, 25] (Hedigan J).
[15] Compare *Baulderstone Horne Brook Pty Ltd v HBO-DC Pty Ltd* [2001] NSWSC 821, [14]; *Herald and Weekly Times Limited v Magistrates' Court of Victoria & Ors* [2000] VSCA 242; (2000) 2 VR 346, [41]; (2000) 117 A Crim R 122.
[16] Compare *R v Newham Juvenile Court, Ex parte (A Minor)* [1986] 3 All ER 17; [1986] 1 WLR 939, 946; [1986] Crim LR 557; (1986) 84 Cr App R 81, (Stephen Brown LJ).
[17] See for example *Waterside Workers Federation of Australia v Gilchrist Watt & Sanderson Limited* [1924] HCA 61; (1924) 34 CLR 482, 518 to 519; 30 ALR 402, (Isaacs, Rich JJ).
[18] [2004] VSCA 148, [17]; (2004) 21 VAR 429.
[19] 89 ATC 4233, 4245.
[20] [2004] VSCA 148, [19]; (2004) 21 VAR 429.
[21] [1969] 2 QB 538, 554; [1969] 2 All ER 964.
[22] See also *Ex Parte Savage v Savage* [1989] WAR 46, 53 to 54 (Nicholson J).
[23] See for example *Dodemaide v Tucker* [1927] VicLawRp 78; [1927] VLR 539; 33 ALR 385; 49 ALT 48; *Karoly v Brown & Anor* (1988) 91 FLR 15; *McKay v Tankard* [1987] 3 VR 381; *Tassell v Hayes* [1987] HCA 21; (1987) 163 CLR 34, 41; 71 ALR 480; 30 A Crim R 27; 61 ALJR 296, (Mason, Wilson and Dawson JJ).
[24] Compare *Howarth v Adey* [1996] VICSC 4; [1996] VicRp 85; [1996] 2 VR 535, 544 (Winneke P); *State of Queensland v J.L. Holdings Pty Ltd* [1997] HCA 1; (1997) 189 CLR 146, 154; (1997) 141 ALR 353; 71 ALJR 294 (Dawson, Gaudron, McHugh JJ).

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