**29/85**

## SUPREME COURT OF NEW SOUTH WALES — COURT OF APPEAL

# *WENTWORTH v ROGERS & ANOR*

**Hutley, Glass and Samuels JJ A**

**8 October 1984 — (1984) 2 NSWLR 422; (1984) 15 A Crim R 376**

**PRACTICE AND PROCEDURE – COMMITTAL PROCEEDINGS – SUFFICIENCY OF EVIDENCE –- STRONG OR PROBABLE PRESUMPTION OF GUILT – EFFECT OF DEFENCE EVIDENCE – DUTY OF MAGISTRATE – TESTS TO BE APPLIED: *JUSTICES ACT* 1902 (NSW), S41.**

Section 41 of the *Justices Act* 1902 (NSW) insofar as relevant, provides:

> "(2) After all the evidence for the prosecution has been taken the Justice ... shall—
> (a) if he ... is ... of opinion that such evidence is not sufficient to warrant the defendant being put upon his trial for an indictable offence, forthwith order the defendant, if in custody, to be discharged ... ,
>
> (b) if he ... is ... of opinion that a *prima facie* case has been made out, proceed as hereinafter provided ...
>
> (6) When all the evidence for the prosecution and for the defence has been taken the Justice ... shall—
> (a) if he ... is ... of opinion that on such evidence the defendant ought not to be put upon his trial ... forthwith order the defendant ... to be discharged ... ,
>
> (b) if he ... is ... of opinion that the evidence is sufficient to warrant the defendant being put on his trial for an indictable offence, or if the evidence raises a strong or probable presumption of the guilt of the accused, commit the defendant for trial."

W. laid charges against R. – her former husband – alleging that some 4½ years previously, he had assaulted her occasioning actual bodily harm and that he had committed buggery upon her. At the committal proceedings, W. gave evidence in support of the charges and other corroborative evidence of complaint was given. When the magistrate ruled that there was "a prima facie case", R. called a police officer to rebut the evidence of the complaint. The magistrate then discharged R. on the ground that "no reasonable jury properly instructed would convict in respect of each of the informations". W. appealed, unsuccessfully, to a Judge of the Supreme Court at first instance. On appeal to the New South Wales Court of Appeal—

**HELD: Appeal allowed. Mandamus to issue commanding the Magistrate to deal with the informations according to law.**

**(1) The test of whether "the evidence raises a strong or probable presumption of the guilt of the accused" is whether on the whole of the evidence before him the magistrate, and not a hypothetical jury, thinks it probable that the accused committed the offence.**

***R v Governor of Brixton Prison; ex parte Armah* [1968] AC 192; [1966] 3 All ER 177; [1966] 3 WLR 828, applied.**

**(2) If the Magistrate holds either the opinion expressed above or that "the evidence is sufficient to warrant the defendant being put on his trial", he must commit for trial. If neither of the opinions is held, it is the magistrate's duty to discharge.**

**(3) When a magistrate is required to rule upon the sufficiency of the evidence at the close of the prosecution case, he should ask himself whether a jury could, acting reasonably, be satisfied of the defendant's guilt beyond reasonable doubt. He must disregard any evidence favouring the defence and should not weigh the evidence or assess its acceptability.**

***May v O'Sullivan* [1955] HCA 38; [1955] 92 CLR 654; [1955] ALR 671;**
***R v Rothery* [1925] 25 SR (NSW) 451; 42 WN (NSW) 141; and**
***Jayasena v R* [1969] UKPC 22, [1970] 1 All ER 219, [1970] 2 WLR 448, [1970] AC 618, applied.**

**GLASS JA:** *[After setting out the facts, and the relevant provisions of s41 of the* Justices Act *1902 (NSW), His Honour continued]:* ... **[4]** The powers of the magistrate at the close of evidence for the prosecution are not open to doubt (s41(2)). He is required to rule upon the sufficiency of the evidence. Accordingly he must disregard any evidence favouring the defendant and have regard only to that evidence which favours the prosecution; *R v Rothery* [1925] 25 SR (NSW) 451 at 461; 42 WN (NSW) 141. It is not his function to weigh the evidence or assess its acceptability whether in relation to the character

of the evidence itself or the credibility of the witnesses who gave it. He is required to assume that it is accepted without reservation by a jury; *Jayasena v R* [1969] UKPC 22; [1970] 1 All ER 219, [1970] 2 WLR 448, [1970] AC 618 at 624. Upon that assumption he asks himself whether a jury accepting all the prosecution evidence could lawfully convict the defendant; *May v O'Sullivan* [1955] HCA 38; [1955] 92 CLR 654 at 658; [1955] ALR 671, i.e. could, acting reasonably, be satisfied of the defendant's guilt beyond reasonable doubt. Another formulation of the question is whether the evidence adduced by the prosecution is capable of producing satisfaction beyond reasonable doubt in the minds of a reasonable **[5]** jury. Whether he would be so persuaded by the evidence to that degree or at all is not to the point. If he is of opinion that an inference of guilt may properly be drawn, the evidence is sufficient and a *prima facie* case has been made out. Accordingly, the two limbs of s41(2) describe opinions which are true opposites. The section directs the magistrate to discharge in the event of insufficiency and to proceed further in the event of sufficiency.

The duty of the magistrate under s41(6) at the close of all the evidence is also stated in two limbs which respectively direct him to discharge or to commit. But the limbs which mandate these contradictory courses are expressed in a way which does not immediately suggest true opposites. They contain three separate criteria which predicate three separate opinions on the part of the magistrate. The second test in the second limb (if the evidence raises a strong or probable presumption) is not in point of grammatical structure expressed as an opinion but I think it better so to treat it because the designated conclusion cannot be other than a subjective reaction to the evidence. The first opinion in the second limb (that the evidence is sufficient) is expressed in language identical with the opinion in s41(2) and should be identically construed. The second opinion in the second limb (that the evidence raises a presumption of guilt) raises a wholly different test. The nature of that test and how it comes to be present in the statute are both explained in *R v Governor of Brixton Prison, Ex parte Armah* [1968] AC 192. The opinion in the first limb (that the defendant ought not to be tried) cannot be usefully considered until the second limb has been fully examined.

Under the *Criminal Law* 1826 (UK) if evidence raised "a strong presumption of guilt" the magistrate was directed to commit to prison. If, however, the evidence raised only "sufficient ground for judicial enquiry", the **[6]** magistrate was required to grant hail. The *Indictable Offences Act* 1848 (UK) repealed the 1826 Act but continued to provide for two standards of proof albeit in different language. However, since the magistrate was given power to commit to prison or admit to bail in either event, there was no longer any point in providing for two different standards, *Armah* at 251. The terms of s26 of the 1848 Act show how the error began:

> "When all the Evidence offered upon the Part of the Prosecution against the accused Party shall have been heard, if the Justice or Justices of the Peace then present shall be of opinion that it is not sufficient to put such accused Party upon his Trial for any indictable Offence, such Justice or Justices shall forthwith order such accused Party, if in Custody, to be discharged as to the Information then under Inquiry; but if, in the Opinion of such Justice or Justices, such Evidence is sufficient to put the accused Party upon his Trial for an indictable Offence, or if the Evidence given raise a strong or probable Presumption of the Guilt of such accused Party, then such justice or Justices shall, by his or their Warrant ... , commit him ... to be there safely kept until he shall he thence delivered by due Course of Law, or admit him to Bail as hereinbefore mentioned."

The draftsman of the *Justices Act* (NSW) 1902 took this section as a model both for s41(2) and s41(6) as the side notes demonstrate. He thereby continued the error of stipulating two standards when no difference in judicial power was entailed but, as will later be suggested, he eliminated the fault of imposing contradictory duties in circumstances not defined as truly opposite. *Armah* also determines the elements involved in the formation of the opinion that the evidence raises a strong or probable presumption of guilt. The magistrate is thereby directed to "weigh the whole evidence put before him and decide whether he – not a hypothetical jury – thinks it probable that the accused committed the offence", *Armah* at 229F, and at 253B, 2618; at 184E, 199E, 204D; at 837H, 857H, 864F.

**[7]** The first problem of construction to be tackled concerns the duty of the magistrate under s41(6)(b) to commit if he holds either of two opinions embodying two different tests the nature of which has now been fixed by judicial exegesis. Mr Petty, for the defendant, argued that the first test (sufficiency of evidence) is explained by the second test (strong or probable presumption) and absorbed into it, that there is at that stage only one test (sufficiency having been displaced)

and that there can be no committal unless the magistrate is himself satisfied that the accused is probably guilty as charged. Mr McHugh QC, for the plaintiff, submits that the two standards cannot be merged and that if either is satisfied, it is the magistrate's duty to commit. I agree that the magistrate is directed to commit if he holds either opinion in s41(6)(b). Further, I am satisfied that room exists for the application of both tests having regard to the judicial construction placed upon each of them. For example, a magistrate may consider that the evidence is such that a jury accepting it could properly convict although he, weighing it for himself, does not consider that the evidence is such that a jury accepting it could properly convict although he, weighing it for himself, does not consider that the defendant is probably guilty. Conversely he could form the view the evidence is not capable of generating satisfaction beyond reasonable doubt in the minds of a reasonable jury although he, weighing it for himself, is satisfied of guilt on the probabilities but not beyond reasonable doubt.

The main problem in construing s41(6) is the meaning to be given to the first limb which conditions the duty and power to discharge upon a vague undefined opinion that the defendant ought not to be tried. Neither counsel was able to refer us to any authority bearing upon its interpretation. **[8]** Mr McHugh submits that it is the obverse of the second limb. If either opinion in (b) is held, the magistrate must commit. If neither is held, the defendant ought not to he put on his trial and the magistrate must discharge. Mr Petty submitted, on the other hand, that there would be no point in allowing the defendant to call evidence when the prosecution evidence is sufficient to put him on trial unless the magistrate can say that on the whole of the evidence for both the prosecution and defence the defendant ought not to be tried.

There are a number of questions pertinent for consideration at this point. It is accepted doctrine that the sufficiency of the prosecution evidence to support a conviction cannot be reduced to insufficiency by any amount of contrary evidence for the defence no matter how overwhelming or preponderant it may be: *Hocking v Bell* [1945] HCA 16; [1945] 71 CLR 430 at 433. To this principle one exception only has been recognised. If a *prima facie* case has been made out only if some evidence remains unexplained and the defendant furnishes an explanation by evidence which cannot be treated as genuinely in dispute and which reasonable men could not reject, what appeared to be a *prima facie* case no longer exists in point of law; *De Gioia v Darling Island Stevedoring and Lighterage Co Ltd* (1941) 42 SR (NSW) 1 at 4; 59 WN (NSW) 22. Only in such marginal circumstances can the sufficiency of the prosecution evidence be depressed below the sufficiency level.

If, notwithstanding that evidence has been adduced by the defendant, the prosecution evidence will almost always remain sufficient, upon what could the magistrate base an opinion that the defendant ought not be put on his trial? **[9]** Assuming that he was so empowered, he could form the opinion that the defendant's evidence was so preponderant in weight that a conviction would be perverse; *R v Crooks* 44 SR (NSW) 390 at 393; 61 WN (NSW) 155; *Plomp v R* [1963] HCA 44; [1963] 110 CLR 234 at 250; [1964] ALR 267 or that upon the whole of the evidence and, particularly having regard to the unreliability of some of the prosecution evidence, a conviction would be unsafe; *R v Chamberlain* [1984] HCA 7; (1984) 153 CLR 521; 51 ALR 225 at 236, 295, 298; (1984) 58 ALJR 133. However, the exercise of such powers is confined to Courts of Criminal Appeal. A trial judge sitting with a jury has no power to direct an acquittal because a conviction would be perverse; *Hocking v Bell supra*, or because it would be unsafe: *R v Prasad* [1979] 23 SASR 161; (1979) 2 A Crim R 45; *R v Galbraith* [1981] 2 All ER 1060; 73 Cr App R 124; [1981] 1 WLR 1039; 2 Crim LR 767. I am of opinion that the imprecise formula that in his opinion the defendant ought not to be tried should not be construed so as to give the magistrate a power denied to trial judges to override the sufficiency of the prosecution case. Clear words would in my opinion be required to invest the magistrate with authority to intercept the trial before the tribunal constitutionally charged with the determination of the question whether the evidence which, *ex hypothesi* is sufficient for a conviction, should be accepted as proof beyond reasonable doubt.

The second opinion in s41(6)(b) is also inconsistent but in a different way with any alleged capacity of the magistrate to weigh the evidence in forming the opinion in s41(6)(a). If by weighing the whole of the evidence for himself he concludes that the defendant is probably guilty and should be committed he could not simultaneously form the opinion he ought not to be tried after weighing the same evidence and finding it deficient in some respect. Accordingly the construction

I would adopt of this hitherto unconsidered s41(6)(a) is that it is a true reciprocal of s41(6)(b). If either **[10]** opinion in (b) is held, it is the magistrate's duty to commit. If neither is held, it is his duty to discharge. He has no power to weigh the evidence and discharge because a jury would be acting unreasonably to accept the prosecution evidence in view of its deficiencies thus making its conviction unsafe. Equally he has no power to weigh the evidence and discharge because a jury would be acting unreasonably to reject the preponderant defence case thus making its conviction perverse. *A fortiori*, he has no power to weigh the evidence and decide that a jury should not convict where a conviction would he neither perverse nor unsafe. *A fortissimo*, he has no power to weigh the evidence and discharge because of an opinion that a reasonable jury properly instructed would not convict. This amounts to a forecast of the assessment which a hypothetical jury would make of the credibility and acceptability of the plaintiff and her witnesses. Although this is a construction which has been urged upon and adopted by magistrates in the past, I am unable to find any warrant for it, when the section is construed in the light of accepted standards of criminal proof. The common law strategy for controlling juries has traditionally been expressed in terms of what jurors acting reasonably could lawfully do and not as a prognostication of what, acting reasonably or unreasonably, they were likely to do.

I believe that a consideration of the history of the section leads to a similar result. The law confers upon Crown law authorities the responsibility of determining whether an indictment should be preferred notwithstanding committal. In the exercise of this screening function regard is doubtless paid, *inter alia* to the likelihood of conviction **[11]** and the expense to the public of a trial which terminates in an acquittal. I would not be disposed to hold that a committing magistrate has been endowed with a similar screening function by the manner in which the draftsman has adapted the language of s25 of the 1848 Act to meet the situation where the defendant has called evidence. That section was, as previously mentioned, the draftsman's model for both s41(2) and s41(6). He observed the contradiction it contained between the duty imposed on the justices to discharge if the evidence was insufficient concurrently with a duty to commit if the evidence was sufficient or raised a strong and probable presumption. A mandatory committal for strong and probable presumption was in theoretical conflict with a mandatory discharge of insufficiency, if the former test (as happened) was so construed as to be less demanding.

In s41(2) he has predicated the contradictory powers of discharge and committal on opinions which are true opposites viz. insufficient evidence and *prima facie* case. In s41(6) the purpose of prescribing contradictory duties to be performed in situations truly opposite was achieved by coining the autochthonous phrase "ought not to be tried" which balanced the two opinions "sufficient evidence" or "strong and probable presumption" and denoted the state of the magisterial mind if neither of those opinions was held. If the draftsman had the additional purpose of securing an advantage to the defendant who chose to call evidence, this purpose was not realised (except in the *De Gioia* type of case) because the section failed to specify what that advantage was. As it turned out, an advantage was secured as a result of the judicial construction of strong and probable presumption of guilt although an anticipation of this by the draftsman seems unlikely. A defendant calling evidence had the opportunity of influencing the assessment of his guilt to be made by the justices by depressing it below the level of a probability.

**[12]** Since the magistrate has in my view misdirected himself in point of law, it is unnecessary to consider whether he returned the right answer to the wrong question. Mr Petty argued that the prediction that a jury would not convict was sound since the prosecution case was inconsistent with the findings in the hospital report, the nature of the complaints made by the plaintiff to Dr and Mrs Neische and the evidence of the police officer that no complaint of rape or buggery was made to him. Further, the jury would have her acknowledgment that she felt vengeful and vindictive towards the defendant. On the other hand, the partial corroboration of the Niesches and the evidence by the solicitor of admissions to him by the plaintiff's husband strengthened the plaintiff's proofs. If it were relevant to do so, I would express a personal opinion, for what it is worth, that the plaintiff had made out a strong case which a jury was likely to accept. *[His Honour then considered the supervisory role of the Supreme Court and whether declaratory relief should be granted.]*

**SAMUELS JA:** **[1]** I have had the advantage of reading in draft the judgment prepared by Glass JA and I need not repeat all the facts. The problem which the case presents to me concerns the weight which the examining magistrate ought to attach to any evidence which the defendant calls.

Section 41 of the *Justices Act*, 1902 ("the Act") which deals with proceedings for committal for trial, establishes a two-stage procedure, which is also in force in the other States and Territories of Australia, but not in England: *Magistrates' Courts Act*, 1952, s7 and *Magistrates' Courts Act*, 1980, s6. The first stage is set out in s41(2), by which, after all the evidence for the prosecution has been taken, the magistrate, if of the opinion that such evidence "is not sufficient to warrant the defendant being put upon his trial for an indictable offence", shall discharge the defendant; or, **[2]** if of the opinion that "a *prima facie* case has been made out", shall proceed to the second stage.

The second stage enables the defendant to give evidence and call witnesses, and culminates in the requirements of s41(6) which, when all the evidence for the prosecution and the defence has been taken, directs the magistrate to follow one of two alternative paths. If he is of opinion that "on such evidence" the defendant "ought not to be put upon his trial", he must discharge him: s41(6). If he is of opinion "that the evidence is sufficient to warrant the defendant being put on his trial", or "if the evidence raises a strong or probable presumption of the guilt of the accused", he must commit the defendant for trial.

These provisions condemn the art of legislative drafting, lacking both symmetry and sense. It is scarcely surprising, therefore, that conventions have grown up over the years attributing meaning and scope to s41(2) and (6) which their language does not authorize. The present case offers an example. I can recall from my own experience that it was not uncommon for advocates to submit – often successfully – that a defendant should be discharged on the ground that a jury, properly instructed, *would* not convict. This is the formula which the learned magistrate adopted here, and I agree with Glass JA that it cannot be justified.

A magistrate, by dint of s41(2)(b) of the Act, must proceed to the second stage of the committal proceedings if he is of opinion that a *prima facie* case has been made out. To some the term "*prima facie* case", though often invoked in various regions of the law, is not plainly **[3]** defined. As Lord Reid said in *Armah v Government of Ghana & Anor* (*supra*): "The matter has been further complicated by the frequent use of the phrase 'a *prima facie* case'. That phrase is not self explanatory: what is it that the case shows *prima facie* or at first sight? Is it that on the evidence as it stands at the moment the accused would seem to be guilty, or is it that the evidence contains allegations set out in such a way that further investigation is justified? I would hope that a less ambiguous phrase will be used especially in any future legislation".

However, it seems to me that a *prima facie* case has been made out if, in the opinion of the magistrate, there is evidence which, if believed by a jury, is capable of establishing the ingredients of the charge beyond reasonable doubt. In the first edition [1958] of his book *Evidence*, Mr Rupert Cross, at p54, said: "The test to be applied by the judge in order to determine whether there is sufficient evidence in favour of the proponent of an issue, is for him to enquire whether there is evidence which, if uncontradicted, would justify men of ordinary reason and fairness in affirming the proposition which the proponent is bound to maintain, having regard to the degree of proof demanded by the law with respect to the particular issue". This test is taken from the judgment of Brett J in *Bridges v North London Railway Co* (1874) LR 7 HL 213 at 233, save for the reference to the degree of proof required, which is supplied by the learned author.

I would myself accept the rider (see *May v O'Sullivan* [1955] HCA 38; [1955] 92 CLR 654 at 658; [1955] ALR 671 and *R v Galbraith* [1981] 2 All ER 1060; 73 Cr App R 124; [1981] 1 WLR 1039 at 1046-2; 2 Crim LR 767) but it was dropped from the second [1963] and third [1967] editions (see at pp57 and 61 respectively), **[4]** to be reinstated however in the fourth [1974] edition at p66, and retained in the fifth [1979], out of deference to a paper by Professor Eric Edwards in [1970] 9 WALR 169. Curiously, the additional words do not appear in the second Australian edition [1979] whose authors say (at pvii) that they relied heavily upon the fourth English edition. I might add that in withdrawing his gloss upon the words of Brett J, Sir Rupert Cross was influenced by what he took to be the approval by the High Court in *May* of statements made by the Full Court of South Australia in *Wilson v Buttery* [1926] SASR 150. It seems to me that those *dicta*, which suggested that in a criminal matter the evidence sufficient to constitute a case to answer need only be such as would satisfy a reasonable tribunal on the balance of probabilities, were contrary to principle and were not approved (although they were not explicitly repudiated) in *May*. Sir Rupert Cross ultimately accepted that view since in his fifth edition, at p120, *Buttery* is relegated to the status of "an occasional suggestion to the contrary". It is evident that in determining whether a *prima*

*facie* case is made out a magistrate does not consider the extent to which the evidence satisfies his own mind but only the effect which he supposes it could exert upon the corporate mind of a reasonable jury. As Cockburn CJ pointed out in *R v Carden* [1879] 5 QBD 1 at 6 it is no part of a committing magistrate's province "to try the case". Nor has he authority to temper the evidence to a vulnerable defendant by refusing to commit on the ground that "it would be unjust or oppressive to require him to be tried .... that proposition has no support in practice or in principle. In my view once a **[5]** magistrate decides that there is sufficient evidence to justify committal he must commit the accused for trial" : per Lord Reid in *Atkinson v United States of America Government* [1971] AC 197 at 232; [1971] LR AC 197. The tests for assessing the sufficiency of evidence for the purpose stated, or the existence of a *prima facie* case, do not include any predictions by the magistrate about what a jury might do, as opposed to what it could lawfully do. Hence conjecture of this kind is excluded along with apprehension of oppression; and I do not see that it is invoked as a criterion at the close of the second stage of the proceedings.

In s41(6) the words "on such evidence" in par (a), and "the evidence" in pars (b) refer to the opening phrase of sub-s(6) "When all the evidence for the prosecution and for the defence has been taken". Accordingly the magistrate must come to the opinion he is required to form upon all the evidence; so that the material upon which he arrived at his earlier opinion that a *prima facie* case had been made out, has now been augmented by the evidence presented by the defence. And the tests to be applied are differently stated. The notion of sufficiency which, by s41(2)(a), was cast in the negative mode, has now become, in s41(6)(b), one of two positive requirements. The other is represented by the existence of a strong or probable presumption of guilt. As Glass JA has observed, *Armah* explains the draftsman's error which led to the incorporation of this formula in s41, and which, indeed, picked it up bodily including the use of the word "accused" rather than "defendant" itself a solecism calculated to give offence to purists.

I accept the construction of the test which was **[6]** advanced in *Armah*, although with slight misgivings created by the fact that the provision in that case (s5 of the *Fugitive Offenders Act* 1881) contained only the strong or probable presumption phrase, which did not therefore appear in collocation with another test, as it does in s41(6)(b). However, the evident source of the phrase is s25 of the *Indictable Offences Act*, 1848, where it does appear alongside the alternative test of sufficiency; and, of course, their lordships (or the majority) had all this in mind when determining that it was the magistrate himself who must think that the presumption is satisfied. I am not persuaded of the correctness of the construction offered by Lyell J in the Divisional Court in *Armah* (at 207), to the effect that the phrase "strong or probable presumption of guilt" was intended as an exposition of the "sufficiency test" rather than an alternative standard. Such a construction is, to my mind, both grammatically unsound and inconsistent with the genesis and history of the language in question. It seems to me that there are two alternative standards; and, in this respect, I reject the argument advanced by Mr Petty for the respondent. It is clear that satisfaction of the presumption cannot involve any speculation about the likely conduct of a jury.

The first of the two alternatives specified in s41(6)(b) thus stands on its own feet and, in my view, stipulates the same test as that supplied by s41(2)(b); a *prima facie* case is congruent with a sufficient case and neither conclusion depends upon the likely conduct of a jury. On any view – and Mr Petty did not dispute this – s41(6)(a) describes the opinion to which the magistrate must come if neither of the **[7]** tests in s41(6)(b) is satisfied. It is therefore a true reciprocal, and does not provide any overriding discretion which would enable a magistrate to discharge a defendant upon some ground not yielded by par (h).

The argument upon which the respondent relied in point of construction, and which I have already rejected, and which Glass JA rejects for reasons in which I agree, contended that the presumption represented the only test to be satisfied for committal, and that in dealing with it the magistrate was entitled and bound "to make some limited assessment of the credibility of the witnesses and the cogency of the prosecution evidence". I would not disagree with the last point, which may indeed be too narrowly stated. A magistrate may well assess whether evidence is sufficient to persuade a jury, by making certain assumptions without committing his own mind to belief. But he can scarcely decide whether "he – not a hypothetical jury – thinks it probable that the accused committed the offence" without making up his own mind as to which evidence – out of all the evidence called by both sides – he accepts or rejects. However, the question which remains

is the extent to which the magistrate may consider the defendant's evidence when he comes to consider the first of the two tests. As I have said, the standards required by s41(2)(b) and s41(6)(h) are the same. But they may be applied to different materials thus producing different results. If, even at the conclusion of the second stage, the magistrate is to consider only the evidence for the prosecution, the tender of evidence for the defence, which s41 plainly contemplates, would be an entirely **[8]** useless exercise. Since the legislature cannot be taken to have intended an absurdity of these dimensions, it follows that the magistrate must have some regard to the defendant's case. There are general statements in support of this proposition e.g. *R v Horseferry Road Stipendiary Magistrate, Ex parte Adams* [1977] 1 WLR 1197 at 1199; but the difficulty is to define its limits. It appears that *De Gioia v Darling Island Stevedoring & Lighterage Co Ltd* (1941) 42 SR (NSW) 1; 59 WN (NSW) 22 permits limited account to be taken of the defendant's evidence. At 4 Jordan CJ said: "If the trial Judge has properly formed the opinion that the plaintiff can be regarded as having made out a *prima facie* case only if his evidence, or some of it, remains unexplained, then if an explanation is supplied by the defendant it is necessary for him to reconsider the plaintiff's evidence for himself in the light of that explanation, not for the purpose of usurping the jury's functions, but in order to determine whether what bore the appearance of a *prima facie* case in fact amounted to one, and to decide a point which is for him alone, namely whether there is a case fit to go to the jury." His Honour added: "No doubt, the trial Judge can take the case from the jury only if the explanation offered is one which in the circumstances reasonable men could not reject, which does not in any relevant aspect involve evidence that is capable of being treated as genuinely in dispute, and which shows that a *prima facie* case has not been made out".

Two passages are cited in support of the first of these statements, neither of which, if I may respectfully say so, seems to me to sustain the proposition distinctly. The first, **[9]** *Giblin v McMullen* (1868) 5 Moo PC NS 434, [1869] UKPC 12; (1889) LR 14 AC 631, 16 ER 578 [1869] LR 2 PC 317 at 335, is to this effect: "... if, at the close of the plaintiff's case, there was not evidence upon which the jury could reasonably and properly find a verdict for him, the judge ought to have directed a nonsuit". And their Lordships go on to approve the principle in *Ryder v Wombwell* [1868] LR 4 Ex 39 that a judge should not leave a case to the jury where there is a scintilla of evidence in support of the issue but only where there is evidence upon which the jury might reasonably and properly conclude that the fact was established. This is a view which Jordan CJ earlier expressed in *De Gioia*, at 3, and in *Commissioner of Railways v Corben* (1938) 39 SR (NSW) 55 at 59; 56 WN (NSW) 7, and which was adopted by Latham CJ in *Hocking v Bell* [1945] HCA 16; [1945] 71 CLR 430 at 441-2, and approved by the Judicial Committee on appeal: [1947] 75 CLR 125 at 131-2. The second passage, in *Hiddle & Anor v National Fire & Marine Insurance Co of New Zealand* [1896] AC 372 at 375-6, also takes the same point, and in reliance upon *Ryder*, says: "... the non-suit was proper, although there may have been some evidence to go to the jury, if the proof was such that the jury could not reasonably give a verdict for the plaintiffs". In neither of these cases do the facts illustrate Jordan CJ's proposition, and the opinions deal not with matters left unexplained but with the circumstances in which a jury might reasonably and properly find for a plaintiff with the onus of proof.

These principles do not directly affect the present problem; and the case from which they come do not wholly support the illustration which Jordan CJ gave in *De Gioia* (at 4) of the use which may be made of evidence tendered **[10]** by the defendant. I regard that statement in *De Gioia* as no more than an illustration. I do not consider that it should be regarded as establishing that the only resort which may be had to a defendant's evidence is for the purpose of supplying an explanation in amplification of the plaintiff's testimony. That was the purpose relevant in *De Gioia*; and the statement must be read in the light of the facts of that case.

In my view the general rule to be applied in a case such as the present, where evidence led by a defendant in committal proceedings is concerned may be expressed somewhat more widely. In formulating any rule it must be remembered that the magistrate's duty is to assess the effect which reasonable and fair-minded jurors could attribute to the evidence. Evidence is "sufficient" if a reasonable jury could convict upon it: see *Armah* at 252-3 per Lord Pearce. But it is unnecessary to multiply authority in favour of that proposition, which however, legitimately injects an element of control into the question of whether the defendant must be committed. Further, any assessment of the defendant's case must be for the purpose of determining whether a "sufficient" case has been made out, and not for the purpose of rebutting the prosecution's case: *De Gioia* at 4-5. And, no doubt, the characteristics which Jordan CJ mentioned in *De*

*Gioia* at 4 must attach to the defendant's evidence – in short, it must be such as a reasonable jury could not regard as other than substantially indisputable. An example is provided by *In re Roberts* [1967] 1 WLR 474 where, in proceedings for unlawful sexual **[11]** intercourse contrary to the *Sexual Offences Act* 1956 (England) s6(1) the defendant gave evidence admitting the act but giving grounds for his belief that the girl was over sixteen, thereby raising the statutory defence under s6(3) of the Act. The examining justices refused to commit for trial and Havers J refused an application for consent to prefer a bill of indictment on the footing that the justices were right to refuse to commit if "on the whole of the evidence given before them, and bearing in mind the burden of proof which is on the defence, they are satisfied that no reasonable jury could convict on the present state of the evidence. It follows that they could only take this course in a clear case and if the accused chooses to give evidence before them". The same reasoning would apply to a charge under s71 of the *Crimes Act*, 1900, to which the defence of consent under s77 is raised. Equally in cases which do not impose any legal onus upon a defendant, such as where reliance is placed upon provocation or self-defence, a magistrate might conclude that a jury could not reject evidence offered in proof of these elements. In those circumstances it would be open to him to commit the defendant for manslaughter, or discharge him, on the footing that a reasonable jury could not convict of murder.

In my opinion, s41(6)(b) provides two independent and alternative tests. In determining whether the second is satisfied the magistrate must make up his own mind upon his own assessment of the effect of all the evidence. In dealing with the first the magistrate must determine whether there is evidence which, if believed, could satisfy a reasonable **[12]** jury that the charge was proved beyond reasonable doubt. In order to make that determination he may consider evidence tendered by or on behalf of the defendant which "in the circumstances reasonable men could not reject, which does not in any relevant aspect involve evidence that is capable of being treated as genuinely in dispute, and which shows that a *prima facie* case has not been made out". The cases in which all these requirements are satisfied will no doubt be rare. The formula in s41(6)(a) does not confer any separate discretion on the magistrate but merely indicates the absence of any positive determination under s41(6)(b). Nothing in s41 authorizes a committing magistrate's opinion a jury would not convict the defendant. It is no part of a committing magistrate's function to conjecture what a jury would or *might* do or not do. His duty is confined to determining what it could reasonably and properly do. I should add that I am, with respect, doubtful whether the passage in the judgment of Hunt J in *Spautz v Williams* 7 ALR 144; 45 FLR 112; (1983) 2 NSWLR 506 at 537-8; 23 ALT 31 correctly expresses the true construction of s41. In my opinion the magistrate misdirected himself and, in doing so, constructively failed to exercise his jurisdiction, for the reasons expressed by Glass JA.

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