

14/12; [2012] VSC 144

## SUPREME COURT OF VICTORIA

**JEFFREY v SCHUBERT & ANOR**

J Forrest J — 16, 27 April 2012

**CRIMINAL PROCEDURE – COMMITTAL PROCEEDING – JURISDICTIONAL ERROR – MAGISTRATE COMMENCING COMMITTAL HEARING – DISCUSSION ABOUT GIVING A SENTENCE INDICATION – WHETHER MAGISTRATE WAS GUILTY OF JURISDICTIONAL ERROR WHEN DECIDING NOT TO GIVE SENTENCE INDICATION – POWER OF MAGISTRATE TO GIVE SENTENCING INDICATION IN CASE OF A COMMITTAL PROCEEDING: *CRIMINAL PROCEDURE ACT 2009 (VIC)*, s60.**

J. was charged with two indictable offences in relation to the trafficking and possession of drugs of dependence. When the committal hearing commenced, the question of whether the Magistrate could give a sentencing indication arose. After discussion, the Magistrate said she was not prepared to give a sentencing indication. Upon application to review—

**HELD: Application dismissed.**

**Notwithstanding the wording of s60 of the *Criminal Procedure Act 2009 (Vic)*, the power to provide a sentence indication is only engaged where the Magistrates' Court is empowered to exercise summary jurisdiction in respect of the relevant offence(s). The Magistrate was, therefore, correct to hold that she did not have the power to give a sentence indication absent the power to deal with the charges.**

**J FORREST J:****Introduction**

1. The plaintiff, Mr Dayle Jeffrey, seeks judicial review of the decision of a magistrate not to give a sentence indication in conformity, so it is argued, with s60 of the *Criminal Procedure Act 2009 (Vic)*.<sup>[1]</sup> Mr Jeffrey also seeks orders in the nature of mandamus to compel the Magistrate to consider the exercise of such power.

2. At the hearing of this application, the dispute between Mr Jeffrey and the informant, Mr Schubert, came down to one issue: whether the Magistrate at the commencement of the hearing of Mr Jeffrey's committal for two indictable offences had the power to give such a sentence indication, absent a decision by the Magistrates' Court that the charges were to be determined summarily.<sup>[2]</sup>

3. It was accepted by senior counsel for Mr Schubert that a fair reading of the Magistrate's reasons demonstrates that her Honour concluded that she did not have the power to give a sentence indication unless the court was seized with summary jurisdiction. It was also accepted by counsel that if her Honour was wrong on this count then such a conclusion amounted to jurisdictional error.<sup>[3]</sup>

4. The resolution of this application is dependent upon the construction of s60 and particularly whether effect is to be given to its apparent meaning or whether such meaning should be qualified by the statutory context of the section within the CPA.

5. Ultimately, I have concluded that notwithstanding the wording of s60, the power to provide a sentence indication is only engaged where the Magistrates' Court is empowered to exercise summary jurisdiction in respect of the relevant offence(s). The Magistrate was, therefore, correct to hold that she did not have the power to give a sentence indication absent the power to deal with the charges.

**The relevant provisions of the *Criminal Procedure Act 2009 (Vic)***

6. It is necessary, initially, to say something of the structure of the CPA and its purpose. The relevant purpose is found in s1(a):

to clarify, simplify and consolidate the laws relating to criminal procedure in the Magistrates' Court, the County Court and the Supreme Court.

7. Chapter 2 deals with "commencing a criminal proceeding".

8. Chapter 3 then deals with “summary procedure”. Part 3.1 of Chapter 3 provides for summary hearings and is headed “when a summary hearing may be held”. Sections 28, 29 and 30 set out the mechanism for the summary determination of indictable offences. Three conditions must be satisfied before a magistrate has the jurisdiction (in the sense of being empowered) to “hear and determine” the charge summarily:

- (a) the relevant indictable offence must fall within those listed in s28 (a number of which are to be found in Schedule 2);
- (b) the court considers the charge appropriate to be determined summarily, having regard to the matters in s 29(2); and
- (c) the accused consents to a summary hearing.<sup>[4]</sup>

9. Section 29(2) sets out the criteria which a magistrate must have regard to in determining whether a case should be determined summarily, including the seriousness of the offence, the adequacy of sentencing orders available to the court, whether a co-accused is charged with the same offence as well as any other matters that the court considers relevant.

10. Section 30 then sets out the process by which an indictable offence may be heard and determined summarily:

**Procedure for indictable offences that may be heard and determined summarily**

- (1) The informant or the accused may apply for a summary hearing under section 29(1).
- (2) Without any application under subsection (1), the Magistrates' Court may offer a summary hearing under section 29(1).
- (3) An application for, or an offer of, a summary hearing may be made at any time before the Magistrates' Court determines whether to commit the accused for trial.
- (4) If an application for a summary hearing is made before the hearing of any evidence, the Magistrates' Court may seek from the prosecutor or, if the informant is appearing in person, the informant and he or she must give—
  - (a) an outline of the evidence which will be presented for the prosecution; and
  - (b) any other information which the court considers relevant—
 for the purpose of enabling the court to determine whether to grant a summary hearing.
- (5) Any statement made by the prosecutor or informant under subsection (4) is not admissible in evidence in any subsequent proceeding in respect of the charge.
- (6) If the Magistrates' Court grants a summary hearing, the hearing and determination of the charge must be conducted in accordance with Part 3.3.
- (7) Subject to subsection (8), if—
  - (a) a committal hearing commences; and
  - (b) the Magistrates' Court subsequently grants a summary hearing—
 the court may, with the consent of the accused, admit as evidence in the summary hearing—
  - (c) the oral evidence of any witness; and
  - (d) the statement of any witness; and
  - (e) any document or exhibit—
 given or tendered during the committal hearing.
- (8) If evidence is admitted under subsection (7)—
  - (a) the Magistrates' Court must, at the request of the informant or the accused, call or recall (as the case requires) any witness for examination or cross-examination; and
  - (b) the hearing must otherwise be conducted in the same manner as a proceeding for a summary offence.

11. Section 60 is located within part 3.3 which is concerned with summary hearings and reads as follows:

**Court may give sentence indication**

At any time during a proceeding for a summary offence or an indictable offence that may be heard and determined summarily, the Magistrates' Court may indicate that, if the accused pleads guilty to the charge for the offence at that time, the court would be likely to impose on the accused—

- (a) a sentence of imprisonment that commences immediately; or
- (b) a sentence of a specified type.

12. Section 61 then provides for the effect of sentence indication:

**Effect of sentence indication**

- (1) If—

- (a) the Magistrates' Court gives a sentence indication under section 60; and
  - (b) the accused pleads guilty to the charge for the offence at the first available opportunity—the court, when sentencing the accused for the offence, must not impose a more severe type of sentence than the type of sentence indicated.
  - (2) If—
    - (a) the Magistrates' Court gives a sentence indication under section 60; and
    - (b) the accused does not plead guilty to the charge for the offence at the first available opportunity—the court that hears and determines the charge must be constituted by a different magistrate, unless all the parties otherwise agree.
  - (3) A sentence indication does not bind the Magistrates' Court on any hearing before the court constituted by a different magistrate.
  - (4) A decision to give or not to give a sentence indication is final and conclusive.
  - (5) An application for a sentence indication and the determination of the application are not admissible in evidence against the accused in any proceeding.
  - (6) This section does not affect any right to appeal against sentence.
13. “Committal proceedings” are dealt with in a separate chapter. Chapter 4 sets out in detail the pre-committal procedure and the procedure to be adopted at a committal hearing.
14. Section 155 provides:

**Nature of committal proceeding**

Nothing in this Act alters the nature of a committal proceeding from that existing immediately before the commencement of this section.

**Background to the application**

15. On 27 November 2009, Mr Jeffrey was charged with two offences:
- Contrary to s71AC of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic), trafficking in a drug of dependence, namely methylamphetamine, between 19 December 2008 and 21 January 2009; and
  - Contrary to s73 of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic), possessing a drug of dependence, methylamphetamine, between 19 December 2008 and 21 January 2009.
16. It is apparent from the discussion before the Magistrate that there were a number of co-offenders associated with Mr Jeffrey; two had been dealt with in the County Court and one in the Magistrates' Court.
17. For reasons that are not relevant, the charges were adjourned on several occasions and ultimately came on for a committal hearing on 5 September 2011 before her Honour Magistrate Bolger.

**The application before the Magistrate**

18. At the commencement of the hearing on 5 September 2011, counsel for Mr Schubert said as follows:
- If her Honour pleases, this matter is currently listed for a sentencing indication hearing to which the Crown consents and depending upon the sentencing indication it may proceed as a plea or it may proceed as a committal which I understand from my learned friend will be quite brief involving the cross-examination of two police witnesses.
19. Her Honour then posed the following question to counsel for the informant:
- HER HONOUR: How do you say I am able to give a sentencing indication at the commencement of a committal?
- COUNSEL: Because the prosecution will consent to the summary jurisdiction of the matter, your Honour.<sup>[5]</sup>
20. During the course of discussion with senior counsel for Mr Jeffrey, her Honour said as follows:

But can I say this? I am not entirely convinced the circumstances permit a sentence indication.<sup>[6]</sup>

Her Honour then referred to the terms of s60 and the fact that this application was being made

in the course of a committal with no consent being given to the matter proceeding summarily.

Senior counsel concluded his submissions as follows:

COUNSEL: Yes. So in this case we would seek a sentence indication. If the sentence indication isn't immediately followed by a plea of guilty, the parties would consent to a committal going on before your Honour.<sup>[7]</sup>

Then there was the following exchange:<sup>[8]</sup>

HER HONOUR: Doesn't that contemplate that the matter then remains within the Magistrates' Court?

COUNSEL: Well, I don't think that is – what I think has got nothing to do with it, what I'd submit is that that's not necessarily the case.

HER HONOUR: But isn't that what the legislation says?

COUNSEL: Well, the - - -

HER HONOUR: "The Court that hears and determines the charge must be constituted by a different magistrate, unless all the parties otherwise agree."

COUNSEL: Well, the charge would be in the context of a committal, the determination of the committal.

HER HONOUR: Well, I'm - - -

COUNSEL: I mean that's the way in which during committal proceedings - - -

HER HONOUR: I'm not prepared to give a sentencing indication.

Senior counsel then announced that he proposed to seek a review of her Honour's decision and the hearing was adjourned.

21. An observation may be made of the approach taken by counsel for Mr Schubert and senior counsel for Mr Jeffrey: it was not suggested to the Magistrate by either counsel that her Honour lacked the power to give a sentence indication notwithstanding that no consent had been given by Mr Jeffrey to summary jurisdiction and, more importantly, no determination had been made by the court to grant summary jurisdiction. It was the Magistrate who perceived that she did not have the power to give a sentence indication notwithstanding the urgings of both counsel. A second observation might be added, the approach taken by counsel (particularly for Mr Schubert) at the hearing has no bearing on the question of the proper construction of s60.

### **The submissions on this application**

22. Counsel for Mr Jeffrey made two substantive points. First, that s60 does, on its face, provide for a sentence indication to be given in the course of a committal proceeding regardless of whether summary jurisdiction has been acquired by the Magistrates' Court. A committal hearing is specifically included within the definition of proceeding contained in s3 of the CPA. Mr Jeffrey's proceeding was a committal for an indictable offence that could be heard and determined summarily as it fell within s28 of the CPA. In other words, it was not necessary, given the plain words of s60, for there to be a determination that the indictable offence be heard summarily. Secondly, he argued that such an approach was consistent with the purpose of s60; namely, to enable an accused charged with either a summary or an indictable offence with the potential to be heard summarily to be given a sentence indication and thus further the underlying intention of the indicative sentence provisions: to encourage a plea of guilty in the Magistrates' Court in appropriate circumstances. He contended there was no mischief in this approach as a magistrate, if concerned about the timing of such an application in the course of a committal, could always decline to give such an indication. In these circumstances, the Magistrate was wrong to conclude that she did not have the power to give a sentence indication.

23. Senior counsel for Mr Schubert took a very different stance to that of his predecessor in the hearing before the Magistrate. He argued that for s60 to be given any sensible meaning and to avoid any potential inconsistencies, it was implicit that a decision must have been made by the Magistrates' Court that the indictable offence be heard and determined summarily. This, he said, was consistent with the provisions of s61 as well as the place of s60 within the structure of the Act. Secondly, he contended that the legislature could not have intended that an accused be given an opportunity to obtain a sentence indication when he or she was merely part of an administrative committal process with the ultimate destination of the charge being the County or Supreme Court (if the accused was committed to stand trial). It would, he argued, be a very strange situation if a sentence indication could be given by a magistrate where the court had at that time no power to determine the charge. He also pointed to the potential for inconsistency between a sentence

indication given in the course of a committal (which could be rejected, properly, by the accused) and a subsequent sentence indication given by a Supreme or County Court judge pursuant to the provisions of the CPA.

### Analysis

24. Three canons of statutory construction are relevant to this application:

- that the primary task is to give effect to the intention of Parliament;<sup>[9]</sup>
- this is to be ascertained by reference, in the first place, to the words used in the relevant piece of legislation or statutory instrument;<sup>[10]</sup> and
- in determining the statutory intention it is also necessary to have regard to the context, (including relevantly in this case the structure of the relevant Act, its purpose, underlying policy and the mischief it is intended to remedy) in which the statutory provision is to be found.<sup>[11]</sup>

25. I accept that, on its face, s60 may permit a sentence indication in the course of a committal hearing where summary jurisdiction has not yet been accepted by the Magistrates' Court. In this case, the proceeding was in relation to indictable offences which were capable of being "heard and determined summarily" as provided by ss28 and 29 of the CPA. Notwithstanding this conclusion, I am of the opinion that s60 was only intended to apply to an indictable offence which could be heard and determined summarily in circumstances where the Magistrates' Court had in fact the power (at the time of the application for a sentence indication) to determine that offence summarily.

26. In other words, the constituent parts necessary for a summary hearing in such a case: (a) the relevant offence falls within s28; (b) a determination by the magistrate to hear the matter summarily; and (c) the consent of the accused, must be present before the sentence indication provisions of s60 and s61 are engaged. My reasoning is as follows.

27. First, the purpose of giving a sentence indication is to enable the person charged to determine whether to plead to the charge knowing the potential consequences of such a plea and then, if he or she is minded, to plead guilty to the charge. In my view, it would be extraordinary, and not consistent with legislative intention, if a magistrate at a committal hearing was empowered to give a sentence indication but, at the same time, had no power to give effect to that indication.

28. This conclusion is supported by the terms of s61 which sets out the process for a "sentence indication". The giving of a sentence indication is contingent upon the accused pleading guilty at the first available opportunity, but it also presupposes that the magistrate has the power to impose the sentence as a result of a sentence indication under s60. Section 61(1), prevents a magistrate from imposing a sentence in excess of the indication: it must assume that the magistrate giving the indication has the power to impose the sentence. Section 61(2) proceeds on the same assumption: it provides that the court providing the sentence indication is precluded from hearing and determining the charge if the accused does not plead guilty at the first available opportunity. The charge, in that circumstance, is determined summarily by another magistrate – just as the original magistrate would have determined it but for the accused's decision not to plead guilty.

29. Second, the context in which s60 and s61 are located (in the sense of where it is placed in the CPA) is of significance. Chapter 3 deals with summary procedure. Section 60 and s61 fall within Part 3.3 – "Summary Hearing". This deals with a wide range of matters, all within the summary jurisdiction of the court and, equally as significantly, in respect of matters in which the court is empowered to make determinations.

30. Third, the procedure for dealing summarily with indictable offences is set out within s30.<sup>[12]</sup> It can be accepted that, by s30, the legislature intended the Magistrates' Court to have the power to determine charges summarily whilst within Part 4 of the CPA – known in the Magistrates' Court as "the committal stream"<sup>[13]</sup> – the other stream being the management of summary offences. The opportunity for the informant, the accused or the magistrate to consider the making of an application for a summary hearing is spelt out in s30. What that section does not do, however, is to provide for an aspect of the summary proceeding process – a sentence indication – to form part of that procedure. That section makes no reference to a sentence indication being given prior to the determination that it be heard and determined summarily.

31. Rather, s30(6) requires a court granting a summary hearing to conduct the hearing and determination in accordance with Part 3.3 where s60 is located: it follows that the legislative



intention was that a sentence indication will only occur where the summary hearing process has been engaged by the court exercising the power to hear the matter summarily and doing so in accordance with Part 3.3.

32. Fourth, I accept that there is a potential both for double dipping and inconsistency if Mr Jeffrey's contention is accepted. For instance, Mr Jeffrey could, on his argument, receive a sentence indication from the Magistrate and then decide, on his analysis of s60 (in accordance with s61(2)) to plead not guilty and continue with the committal hearing. Assuming he is ordered to stand trial in the County Court or the Supreme Court, he would be entitled to apply for a further sentence indication under s207 of the CPA (which is found within Chapter 5 – "Trial on Indictment"). Section 208 would not preclude this outcome as it only has application to a s207 sentence indication. It may well be that the sentence indication given in the Magistrates' Court differs to that given in the higher court. If, on the other hand, a sentence indication is given once the magistrate has assumed summary jurisdiction then the question of sentence indication in the higher court will not arise as the case will be determined in the Magistrates' Court – either by the magistrate who gave the sentence indication or by another magistrate in accordance with s61(2).

33. Fifth, the role being fulfilled by the Magistrates' Court in dealing with a committal of accused, referred to as a "committal proceeding" in the CPA, is quite different to that when it exercises summary jurisdiction. "Chapter 4 – Committal Proceedings" – sets out in considerable detail the manner in which a committal should be conducted. The purposes of a committal are set out in s97 which include "(a) to determine whether a charge for an offence is appropriate to be heard and determined summarily" (in addition to a number of the more familiar directions of the committal process). Whilst it can be accepted that such a decision forms part of the committal function, it is not suggested within Chapter 4 that, as part of that function, a magistrate, in a committal proceeding, may give a sentence indication. Rather, the committal hearing affords the opportunity where the criteria are met to have the offence determined summarily in accordance with Part 3.3 – to which I have already referred.

34. Finally, as I hope has become apparent, I do not accept the argument of Mr Jeffrey that the legislative purpose was so broad as to encompass a sentence indication where the Magistrates' Court had no power to deal with the charge. Whilst I accept that the underlying purpose of s60 and s61 is to encourage a plea of guilty by permitting a sentencing indication, this can only occur where summary jurisdiction has been invoked.

### Orders

35. The application should be dismissed.

[1] "CPA".

[2] Section 29 of the CPA.

[3] See *Kirk v Industrial Court NSW* (2010) 239 CLR 531 [72], *Craig v South Australia* [1995] HCA 58; (1995) 184 CLR 163, 200.

[4] Section 29(1)(b).

[5] T 1.

[6] T 5.

[7] T 7.

[8] T 7-T 8.

[9] *Interpretation of Legislation Act* 1984 (Vic) s35(a) – ascertainment of the purpose or object underlying the statute.

[10] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* [1920] HCA 54; (1920) 28 CLR 129, 161-162.

[11] *Commissioner for Railways (NSW) v Agalianos* [1955] HCA 27; (1955) 92 CLR 390, 397 per Dixon CJ; *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355, 384 per McHugh, Gummow, Kirby and Hayne JJ; *Westport Insurance Corporation & ors v Gordian Runoff Ltd* [2011] HCA 37; (2011) 281 ALR 593, [151] per Kiefel J; *AB v Western Australia & anor* [2011] HCA 42; (2011) 281 ALR 694, [10] per French CJ, Gummow, Hayne, Kiefel and Bell JJ; *Momcilovic v R* [2011] HCA 34; (2011) 280 ALR 221; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; (2009) 239 CLR 27, [47].

[12] See [10] above.

[13] See s97(a) within Chapter 4.

**APPEARANCES:** For the plaintiff Jeffrey: Mr J Hannebery, counsel. Stephen Andrianakis & Associates, solicitors. For the first defendant Schubert: Mr JD McArdle QC, counsel. Office of Public Prosecutions Victoria.