20/93

SUPREME COURT OF VICTORIA

PAVEN v DPP and ANOR

Beach J

16 November 1992

PROCEDURE – COMMITTAL PROCEEDING HELD – ACCUSED COMMITTED FOR TRIAL – APPLICATION TO EXAMINE ADDITIONAL WITNESS – APPLICATION NOT DEALT WITH IN OPEN COURT – APPLICATION REFUSED – WHETHER ERROR IN LAW – NATURAL JUSTICE – APPLICANT DEPRIVED OF OPPORTUNITY TO APPEAR ON HEARING OF APPLICATION – WHETHER DENIAL OF NATURAL JUSTICE: *MAGISTRATES' COURT ACT* 1989, S125(1).

Section 125(1) of the *Magistrates' Court Act* 1989 provides;

"All proceedings in the Court are to be conducted in open court, except where otherwise provided by this or any other Act or the Rules."

1. Upon an application for an order for the examination of a witness who was not examined at the committal proceedings, a magistrate was in error in dealing with the application otherwise than in open court.

2. Depriving the applicant of an opportunity to be present at the hearing of the application, to call relevant evidence and make submissions amounted to a denial of natural justice.

BEACH J: [1] This is an appeal from the order of the Magistrates' Court made at Wodonga, on 7 January 1992, whereby the Magistrate dismissed the appellant's application brought pursuant to the provisions of Clause 13 of Schedule 5 of the *Magistrates' Court Act* 1989. There is also before the Court an originating motion between the same parties seeking relief in the nature of mandamus and/or prohibition. For the moment, that proceeding can be put to one side.

The relevant sub-clauses of Clause 13 read:

> "(1) If a defendant has been committed for trial, the Director of Public Prosecutions or the defendant may apply to the Court for an order that the evidence of a person who was not examined as a witness at the committal proceeding be taken at a time and place fixed by the Court.
>
> (2) The Court must not make an order under sub-clause (1) unless it is satisfied that—
>
> (a) the person who was not examined at the committal proceeding is able to give material evidence; and
> (b) it is in the interests of justice that the evidence of the witness be taken."

The order for review made by the Master on 6 February 1992, raises the following questions of law for determination by the Court:-

> "3. The questions of law shown by the appellant to be raised by the appeal are:
> A. did the learned Magistrate err in law and deny the appellant natural justice by —
> (i) failing or refusing to hear the Appellant's application in open court;
> (ii) denying the Appellant an opportunity to adduce evidence and present argument in Court in support of the application; **[2]**
> (iii) deciding the application without first affording the Appellant the opportunity to adduce further evidence and present argument in support of the application;
> (iv) not making the order in open court.
>
> B. No reasonable Magistrate could have concluded that - he could not be satisfied that -
> (i) the evidence of the person sought to be examined by the Appellant was not material;
> (ii) It was not in the interests of justice that the evidence of those persons be taken."

The background to the appeal may be summarised as follows: On 12 March 1988, the Appellant was charged with being in possession of and trafficking in heroin. On 1 July 1989, the Appellant was committed for trial to the July 1989 sittings of the County Court at Wangaratta. The committal was by way of hand-up-brief. By a presentment and notice served on the Appellant on 4 December 1991, the Appellant was advised by the Director of Public Prosecutions that three additional witnesses, named Henderson, George, and Weidner, would be called by the Director of Public Prosecutions at the Appellant's trial. The Appellant was served with a copy of a statement made by the witness, Henderson, but was not served with copy statements made by the witnesses George and Weidner. On 20 December 1991, the Appellant's solicitor forwarded an application to the Magistrates' Court at Wodonga, requesting an order in respect of the three proposed witnesses and the original informant, Ian Musgrove, pursuant to the provisions of Clause 13.

[3] The application was supported by an affidavit sworn by the appellant's solicitor that same day which reads:

> "1. That I have the care and conduct of this matter on behalf of the applicant.
>
> 2. That on the 9th December 1991, the applicant received depositional material which indicated that a minimum of three further witnesses would be called at the hearing of his trial. He was only given statements in respect of one of those witnesses.
>
> 3. That the matter was adjourned and is now listed for pre-trial conference on Friday the 17th January, 1992, with the Criminal Trial Listing Directorate. On that day it will be requested that the trial be postponed until all witnesses are examined by way of committal hearing, including the Informant, in the light of the further statements".

What occurred thereafter is set out in para.13 and following, of the affidavit of the Appellant's solicitor, sworn 5 February 1992 which read:

> "13. That on 7th January, 1992 my office was contacted by the Clerk/Registrar of the Wodonga Magistrates' Court who indicated that the decision to have a committal had been refused by His Worship.
>
> 14. That the Clerk was advised that it was not appropriate that the decision be refused in the absence of a hearing, as what had been requested was an opportunity to argue the matter.
>
> 15. That the Clerk advised that His Worship had considered the Affidavits in private and had refused the application, and entered it upon his register.
>
> 16. That permission was requested to address the Magistrate on the point but this was refused. Accordingly, a copy of the Court register was requested. Annexed hereto and marked with the letter "E" is a copy of the facsimile decision sheet for the Court Register forwarded to our office which forms the foundation of this application for an Appeal as it is a final order of the Court in the proceeding."

The decision sheet for the court register reads:

> "Upon reading a Notice of Examination of Witnesses by Way of Committal dated 20.12.91, and the affidavit of Robert Melasecca sworn 20.12.91, and not being satisfied that the persons sought to be examined are able to give material evidence or that it is in the interests of justice that the evidence **[4]** of the witnesses be taken, the order sought under Schedule 5 of the *Magistrates' Court Act* 1989, is refused."

It is from that decision that the Appellant appeals to this Court and seeks relief in the nature of mandamus and/or prohibition. The first question of law for determination is whether, in acting as he did, the magistrate denied the Appellant natural justice. The short answer to the question posed is 'Yes'. Section 125(1) of the *Magistrates' Court Act* provides:

> "1. All proceedings in the Court are to be conducted in open court, except where otherwise provided by this or any other Act or the Rules."

The only exception provided by the Act appears in Schedule 3 to the Act, which relates to an alternative procedure which may be adopted by the Magistrates' Court in respect of certain summary offences. It gives the Magistrate a restricted right to deal with such matters otherwise than in open court, but has no relevance to the present dispute. In my opinion, the Magistrate

was in error in dealing with the Appellant's application, otherwise than in open court and on that ground alone the appeal should succeed. But that is by no means the end of the matter.

In my opinion, the principles of natural justice require that an applicant who is making an application pursuant to Clause 13 for an order for the examination of a person who was not examined as a witness at the committal proceeding, be present before the Magistrate dealing with the application, and be given the opportunity **[5]** to present his case in support of the application and, where necessary, to call *viva voce* evidence. Clause 13 of Schedule 5 is an important aspect of the committal procedure, designed by the legislature to ensure that persons charged with criminal offences are fully aware of the nature of the evidence to be called by the Director of Public Prosecutions at trial. The application is one of substance which may require full debate before an informed decision can be made in the matter.

The result which may follow if an accused person is not given an opportunity to cross-examine material Crown witnesses who were not called at the committal, is well demonstrated by the case of *R v Ngalkin* (1984) 71 FLR 264; (1984) 12 A Crim R 29. In that case, Ngalkin was committed for trial on a charge of causing grievous bodily harm and an indictment was subsequently presented. Prior to the commencement of the trial, however, an application was made on behalf of Ngalkin for a stay of proceedings on the ground that it would be an abuse of the process of the court to allow the trial to proceed. In support of the application it was submitted that whereas only one eyewitness had been called at the committal proceedings the Crown proposed to call a further four eyewitnesses at the trial and the accused had thereby suffered serious detriment in three particular respects. He had been deprived of full knowledge of what the Crown witnesses would say on oath, he had been deprived of the opportunity of cross-examining them and he had lost a distinct possibility that the magistrate would hold that no *prima facie* case had been made out against him. **[6]** The trial judge, O'Leary J, held that the proceedings on the indictment should be stayed since by reason of the failure of the prosecution to call the witnesses at the committal proceedings, the accused had suffered substantial detriment. The Court has power to stay proceedings on the indictment if that course be considered necessary to ensure a fair trial of the accused. At p34, His Honour said:

> "The importance and significance of committal proceedings in the criminal process have been highlighted and stressed in a number of cases over recent years, mostly in cases where *ex officio* indictments have been filed and where, therefore, there have been no committal proceedings at all. The principles laid down in those cases, however, are of general application, and are relevant to a case such as the present.

In *Barton* (1980) 147 CLR 75, Gibbs ACJ, and Mason J (with whom Aickin J agreed) said at 99 that "committal proceedings constitute an important element in the protection which the criminal process gives to an accused person". In depriving an accused of the benefit of any committal proceedings at all, as was the case they were there considering, they said an accused:

> "is denied:
> (1) knowledge of what the Crown witnesses say on oath;
> (2) the opportunity of cross-examining them;
> (3) the opportunity of call evidence in rebuttal; and
> (4) the possibility that the magistrate will hold that there is no *prima facie* case or that the evidence is insufficient to put him on trial or that there is no strong or probable presumption of guilt."

To deprive an accused of those advantages is, they said, "a serious departure from the ordinary course of criminal justice" at 100, and "is to deprive him of a valuable protection uniformly available to other accused persons, which is of great advantage to him, whether in terminating the proceedings before trial or at the trial" at 100, 101. They concluded that committal proceedings "constitute such an important element in the protection of the accused that a trial held without antecedent committal proceedings, unless justified on strong **[7]** and powerful grounds, must necessarily be considered unfair" at 100. Stephen J, in the same case, whilst not agreeing that the fair trial of an accused required as an essential prerequisite that it should be preceded by committal proceedings, nevertheless did not deny to committal proceedings their fundamental importance. At 105 he said:

> "Their absence will, however, always call for careful evaluation by the trial court of all the circumstances, lest the consequent prejudice to the accused should be such as to have deprived him

> of a fair trial. Committal proceedings are an important part of the protection ordinarily afforded to an accused in the criminal process and for the accused to be deprived of them necessarily puts a court upon enquiry. To assess what weight a court, in making its evaluation, should give to the absence of committal proceedings requires some analysis of the detriments which their absence occasions to an accused. The most obvious detriment is the loss of the opportunity of being discharged by the committing magistrate. ...
>
> An accused also loses the opportunity of gaining relatively precise knowledge of the case against him and, as well, of hearing the Crown witnesses give evidence on oath and of testing that evidence by cross-examination. A court, in exercise of its power to ensure a fair trial, can do much to reduce the deleterious effect of the first two of these losses by ensuring that the accused is furnished with particulars of the charge and proofs of evidence. But the loss of the opportunity to cross-examine Crown witnesses before the trial will be irremediable. How serious this will be to the accused will depend upon the nature of the offence charged and the Crown's evidence. It is likely to be the most serious detriment which absence of prior committal proceedings imposes upon the accused."

There is no doubt, therefore, that committal proceedings constitute an important element in the protection which the criminal process gives to an accused person, and to deny to an accused person the benefit of committal proceedings is "to deprive him of a valuable protection available to other accused persons, which is of great advantage to them, whether in terminating the proceedings before trial or at the trial". Furthermore, it is also clear, I think, that if, by reason of the absence of **[8]** committal proceedings, an accused person suffers such prejudice as to deprive him of the right of a fair trial, so that to allow the trial to proceed would amount to an abuse of process, there is power in the court to stay the proceedings on the indictment, either until committal proceedings have been held, or at the very least until "the accused has been given discovery of proper particulars and notice of the evidence to be tendered against him" (per Murphy J at 107) or until "the disclosure prior to the trial of the proofs of evidence of those persons whom the Crown proposes to call" (per Wilson J at 115)."

In my opinion it is essential that an applicant for an order under Clause 13, either be given the opportunity to be present in person at the hearing of the application, or be represented by his legal adviser, and be afforded the opportunity to debate the matter with the presiding Magistrate, and to call such relevant evidence as is appropriate. It will only be in this way that an applicant has an opportunity to answer any queries the Magistrate may have concerning the application, and to address submissions to the Magistrate in relation to any matters viewed by the Magistrate as justifying the dismissal of the application. The Appellant was denied such opportunities and in my opinion that denial amounted to a denial of natural justice. The answers to questions 3A, (i) to (iv) inclusive, therefore, must be 'Yes'.

Although those findings are sufficient to dispose of the appeal, in the circumstances of this case it is incumbent upon me to deal with the questions of law raised in para.3B of the Master's Order. At the time the Magistrate dismissed the application he did not have before him statements of the evidence of the three witnesses in question. In that situation there was simply no basis upon which he could state that he was **[9]** not satisfied that the persons sought to be examined were able to give material evidence. The following are the answers to the questions posed:
A(i) Yes; A(ii) Yes; A(iii) Yes; A(iv) Yes.

"B. No reasonable Magistrate could have concluded that he could not be satisfied that –
(i) the evidence of the persons sought to be examined by the Appellant was not material;
(ii) It was not in the interests of justice that the evidence of those persons be taken."

The appeal will be allowed with costs to be taxed, including reserve costs and paid by the Respondent. The order of the Magistrates' Court made at Wodonga on 7 January 1992, will be set aside. The Appellant's application will be remitted to the Magistrates' Court at Wodonga for re-hearing by a Magistrate other than the Magistrate who dismissed the application on a date to be fixed by the Registrar of the Wodonga Magistrates' Court. In the circumstances, the originating motion in proceeding No. 4895 of 1992 will be struck out, with costs to be taxed and paid by the Respondent.

APPEARANCES: For the appellant Paven: Mr L Webb, counsel. Melasecca Zayler, solicitors. For the first defendant Mr McGrane, Magistrate: Mr D Martin, counsel. Victorian Government Solicitor. For the second defendant DPP: Mr J Saunders, counsel. Solicitor to the DPP.