**26/83**

**SUPREME COURT OF VICTORIA**

# *R v JUDGE DIXON: ex parte GLANVILLE*

**Southwell J**

**12 May 1983**

**CRIMINAL LAW – RAPE – COMMITTAL FOR TRIAL – WHETHER WITHIN PRESCRIBED PERIOD OF THREE MONTHS AFTER ACCUSED "CHARGED" – MEANING OF "CHARGED": *MAGISTRATES (SUMMARY PROCEEDINGS) ACT* 1975, S47A.**

On 26 March 1982, R. complained to Police that G. had raped her on that day. Two days later, police interviewed G. and on 5 May 1982 an information was laid and a summons issued by a JP, returnable before a Magistrates' Court on 13 August 1982. The summons was served on G. on 12 May 1982. When the information came on for hearing on the return date, no objection was taken that the committal proceeding had not been commenced before the expiration of the prescribed period within the meaning of s47A of the *Magistrates (Summary Proceedings) Act* 1975. G. was committed for trial at the County Court, and when the trial was called on for hearing, it was submitted that the County Court had no jurisdiction in the matter. Judge Dixon ruled that jurisdiction existed but adjourned the matter to permit a challenge to that ruling. Upon order nisi for a writ of prohibition—

**HELD: Order nisi discharged.**
**(I) The accused was "charged" within the meaning of Rule 9 of s47A of the Act, at least by the time he was served with the summons.**
***Campagnolo v Attrill* [1982] VicRp 90; (1982) VR 893, not followed.**

**(2) As the prescribed period had elapsed, the Magistrate should have considered whether special circumstances existed to justify the fixing of a longer period.**

**(3) In the circumstances, the appropriate proceeding is by way of mandamus directed to the Magistrate, commanding him to consider the making of an order extending the period or that the accused be discharged.**

**SOUTHWELL J:** *[After setting out the facts and Rules 8-11 of s47A of* Magistrates (Summary Proceedings) Act *1975 continued]:* … **[4]** For the applicant Mr Murdoch in the course of comprehensive and most helpful submissions contended that within the meaning of Rule 9 the applicant was "charged" with an offence at the time the information was laid and the summons duly issued, or alternatively, at the latest, when the information and summons was served, that is on 12th May 1982: accordingly, it was said, when the preliminary examination commenced on the 13th August 1982, the prescribed period had elapsed within the meaning of Rule 8, and that the Stipendiary Magistrate was bound by Rule 10 to order that the applicant shall not stand trial. That order, Mr Murdoch argued, would deprive the County Court of jurisdiction by reason of the provisions in s47A(2) (inserted by s9 of Act No. 9509) which reads:

> "Where a stipendiary magistrate orders pursuant to Rule 10 that an accused person shall not stand trial for an offence the order shall have effect according to its tenor."

Mr Murdoch submitted that the case of *Campagnolo v Attrill* [1982] VicRp 90; [1982] VR 893 was wrongly cited and that the authorities relied upon by O'Bryan J did not support the conclusion reached. For the respondent, Mr Horgan submitted that the applicant was not charged within the meaning of Rule 9 of s47A until the charge was read to him at the commencement of the preliminary examination on the 13 August 1982; that the reasoning and conclusion of O'Bryan J was correct and that support was found in the authorities referred to. Further, Mr Horgan submitted, even if the Stipendiary Magistrate was wrong in not ordering that the applicant not stand trial, the jurisdiction of the County Court **[5]** nevertheless remained unaffected. In the light of the competing submissions concerning *Campagnolo's* case and the authorities therein relied upon, it becomes necessary to examine those authorities.

*[His Honour then considered the various authorities considered by O'Bryan J, in* Campagnolo's

case*, and continued]:* ... **[12]** O'Bryan J then considered part of the 1975 report of the Law Reform Commissioner into Rape Prosecutions. Assuming without deciding that course to be permissible, I do not read the portions quoted by O'Bryan J as lending support to the conclusion he reached. I cannot, with respect, accept the statement (1982) VR at page 899) that: "the Commissioner was only concerned with court procedures."

I believe, as the earlier quotation of the report suggests (page 898) that the Commissioner was concerned not merely with the anxiety of the rape victim facing court hearings but the protraction for a lengthy period of that anxiety. Where the report refers to the delays which "often occur between the laying of the charge and the committal hearing" I am driven to the view that the Commissioner was not intending to be referring only to a charge before a court but rather to the laying by whatever means of a charge. Were it not so, and the laying of an information and the issue and service of a summons thereon was not to be regarded as "laying a charge", or in Rule 9 **[13]** s47A, the "charging" of an offence, then the investigating policeman could with immunity lay an information with the accompanying summons bearing a hearing date say, nine months later. That would surely defeat the obvious purpose of the enactment, and accordingly, such an interpretation should not be placed upon the section unless the language plainly demands that interpretation.

I am far from persuaded that the language so commands. Furthermore, the language of Rule 11 tends, in my opinion, to support the proposition of counsel for the applicant that the applicant was charged when the information was laid and sworn and the summons issued. The reference in Rule 11(b) to the laying of a charge seems to indicate that that had occurred in the absence of, and perhaps with the knowledge of, the accused. Even the use of the words "accused person" seems to import the idea that he has been charged notwithstanding that he is yet to be brought to court. Mr Horgan felt bound to concede that the time at which the accused was charged with an offence within the meaning of Rule 9 cannot be a different time to the laying of a charge within the meaning of Rule 11. He further acknowledged "that O'Bryan J's interpretation of Rule 9 involves certain difficulties when that is put alongside Rule 11".

**[14]** I would refer to one further authority: in *R v Norfolk Quarter Sessions; ex parte Brunson* (1953) 2 WLR 294 Pearson J said at p300; (1953) 37 Cr App R 6:

> "A prisoner may be, in a sense, charged at the moment when the policeman arrests him without warrant on suspicion of felony, and there is some obligation to inform the arrested person what he is being arrested for. That might be in some sense described as putting him on charge. Then there may be further action taken by the police at the police station in accordance with the ordinary usages of the police. But it does not in the least follow that what happens at those earlier stages makes the man charged in the most relevant and material sense – namely, in the sense that an information has been laid against him so that the proceedings against him in court or in connection with the court have at that stage been started. I am not satisfied that he can be said to be charged, for the purposes of this case, until an information has been laid."

That *dictum* as it seems to me provides authority supporting the proposition for which Mr Murdoch contended. The issue before me is not identical to that which was before O'Bryan J in *Campagnolo's case*. There His Honour was dealing with the question whether occurrences in the police station might properly he held to constitute a "charging" of the accused. His Honour was not called upon to decide whether the laying and swearing of an information before a Justice of the Peace and the due issue of a summons involved a finding that the accused was thereby charged. However, having said that, it seems to me that His honour held (on p900) in a passage I have already read, that nothing less than an appearance before a competent court by the accused to answer the charge would suffice to constitute a charging within the meaning of Rule 9.

With respect, I am unable to agree that the expression "charged with any offence" in s47A means "appearing before a competent court to answer an accusation made on summons or information", or that "it operates when a person is formally charged before a court" – **[15]** by which I take His Honour to mean that "it operates when and only when". It is unnecessary for me to consider whether occurrences in a police station may amount to "charging". Whether one applies the common usage of the English language or the text of "technical legal sense", I am of opinion that the applicant was charged within the meaning of Rule 9 of s47A of the Act, at least by the time he was served with the summons.

It follows that when the preliminary examination commenced, the prescribed period had elapsed, and the magistrate was bound to apply his mind to the question whether special circumstances existed to justify the fixing of a longer period pursuant to Rule 9. It should at once be said that no point on this issue had been taken before the magistrate and that, in any event, the magistrate may have been aware of the decision of O'Bryan J in *Campagnolo's case* (delivered on the 16th April 1982 but not reported until November) and would in all probability have felt bound to hold that the prescribed period had not elapsed.

There is no material before me to suggest the absence or existence of special circumstances within the meaning of Rule 9 and it is accordingly impossible to know whether, if this matter had been properly raised before the magistrate, he would have made an order pursuant to Rule 10. Such an order, if made, would "have effect according to its tenor" – to use the words of s47A(2) to which I have earlier referred.

What I have said in the last paragraph is, I believe, important to the decision whether the prerogative writ should go. Mr Horgan submitted that, even if s47A had not been complied with, the failure of the magistrate to order that **[16]** the accused not to stand trial has not resulted in the trial judge lacking jurisdiction.

In reply, Mr Murdoch contended that at least by implication s359A of the *Crimes Act* (especially when read in the light of ss353 and 359) provided that there were only two methods by which the County Court could be vested with jurisdiction to try the applicant: either a lawful committal for trial, or the giving of notice of trial. Mr Murdoch found some difficulty in meeting the proposition that irrespective of the means by which the applicant was brought to court (and in the absence of any evidence of *mala fides* on the part of the informant or the prosecutor) the act of filing a presentment valid on its face and in respect of an offence within the jurisdiction of the County Court (see *County Court Act* s36) conferred jurisdiction on the court. See again *The Queen v Hughes* (*supra*).

I then raised with Mr Murdoch the question whether the applicant had sought the wrong relief; that there should have been an application for the issue of a writ of mandamus directed to the magistrate, commanding him to consider the making of an order under Rule 10, rather than proceeding by way of prohibition against the learned trial Judge. With commendable frankness Mr Murdoch acknowledged that he had shortly after acquiring the brief found difficulty in framing a response to such a suggestion. Discussion then ensued as to the practicability of the speedy initiation of proceedings for mandamus but in the result no application was made to me.

I must accordingly decide whether prohibition should go. In the end, I have concluded that it should not. There can be no doubt that the magistrate accepted jurisdiction on the basis that the prescribed period had not expired – and while **[17]** it is true that I have held that basis to be wrong, I am unable to say that there was no basis for the order in fact made, for this reason that had the matter been raised it is possible that special circumstances may have been found to exist. Furthermore, the question whether jurisdiction is conferred by the filing of the presentment, irrespective of the means by which the applicant was brought to court, was not fully argued, and I refrain from expressing a view upon that question.

In my opinion, the appropriate proceeding is by way of mandamus directed to the magistrate. Mr Horgan informed me that upon such proceedings (and presumably, assuming there is no successful appeal from this decision) the Crown would not oppose the granting of a writ calling upon the magistrate to consider whether an order should be made by him under Rule III. Accordingly, the order nisi will he discharged.

**APPEARANCES:** Mr PB Murdoch, counsel for applicant/defendant. Mr GM Horgan, counsel for respondent.

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