

22/90

## SUPREME COURT OF VICTORIA

**FLANAGAN v CASTLES**

Marks J

13 February 1990

**CRIMINAL LAW – PRELIMINARY EXAMINATION – ACCUSED CHARGED WITH ASSAULT WITH INTENT TO RAPE – ALSO CHARGED WITH OTHER INDICTABLE OFFENCES TRIABLE SUMMARILY – TIME LIMIT FOR ASSAULT CHARGE EXPIRED – CHARGE DISMISSED – WHETHER TIME LIMIT APPLIES TO OTHER CHARGES: MAGISTRATES (SUMMARY PROCEEDINGS) ACT 1975, S47A.**

Section 47A of the *Magistrates (Summary Proceedings) Act 1975* lays down special rules relating to preliminary examinations in respect of certain offences involving rape. If a preliminary examination is being conducted in relation to charges within s47A and charges not within s47A, a magistrate must apply the special rules provided for in s47A. Where a person was charged with offences, one within s47A, others not within s47A, and the charge under s47A was not proceeded with, a magistrate was in error in dismissing the charges to which s47A did not apply.

**MARKS J: [1]** I will state shortly my reasons why I think the order nisi should be made absolute in the case of the order to review number 151A and order to review number 151B. These proceedings relate to charges against the defendant which are not envisaged by s47A of the *Magistrates (Summary Proceedings) Act 1975*. On the one hand the defendant was charged with indecent assault, contrary to s44(1) of the *Crimes Act 1958* and on the other he was charged with entering a building as a trespasser with intent to rape, contrary to s76(1)(b)(i). It was conceded by Mr Billings of counsel on behalf of the defendant that both those offences are outside s47A and do not have attached to them the time limit which operates in respect of the offences actually specified in s47A(1) of the *Magistrates (Summary Proceedings) Act 1975*.

He made a submission before the Magistrate which was upheld that the words "whether or not the examination relates etcetera" mean that because at that time the defendant had been charged with assault with intent to rape, an offence specifically mentioned in s47A, and the prosecution was unable to proceed because of the expiry of the time limit with the committal proceeding on that charge, then all the charges including those outside s47A(1) should be dismissed. It is difficult to understand why that submission was upheld for clearly it ought not to have been. In my opinion s47A(1) means simply that in the case where committal proceedings involve the charges expressly referred to and other charges to which the section would not otherwise apply then the rules of s47A must be followed on the committal proceedings. In other words, where a [2] committal proceeding involves a charge to which s47A relates it matters not that the committal proceeding also deals with charges to which that section does not apply.

If the committal proceeding is being heard in respect of all the charges together then the rules apply to that proceeding. When the matter was finally brought on in October 1989 the police prosecutor indicated that there would be no charge under s47A pursued. The Magistrate clearly was wrong in dismissing those charges to which the section did not refer in those circumstances. The order nisi in order to review number 151 is discharged. The orders nisi in order to review number 151A and number 1513 are made absolute with costs including reserved costs and I will grant a certificate to the defendant under the *Appeal Costs Fund Act*. Further order that the informations, the subject of order to review number 151A and order to review number 151B, namely for the offences of entering as a trespasser with intent to rape a person contrary to s76(1)(b)(i) of the *Crimes Act* and for indecent assault contrary to s44(1) of the *Crimes Act* be remitted to the Magistrates' Court at Melbourne for hearing and determination according to law.

**APPEARANCES:** For the applicant Flanagan: Mr T Ginnane, counsel. Victorian Government Solicitor. For the respondent Castles: Mr P Billings, counsel. Rogers & Gaylard, solicitors.