09/81

SUPREME COURT OF VICTORIA

JOHNSON v COLLIS & KRISOHOS

Tadgell J

12 December 1980 — [1981] VicRp 37; [1981] VR 349

PRACTICE AND PROCEDURE – ORDER MADE BY MAGISTRATE IN RELATION TO WHETHER ACCUSED SHOULD STAND TRIAL IN RELATION TO RAPE CHARGES – WHETHER SUCH ORDER JUDICIAL OR MINISTERIAL IN NATURE – MEANING OF "ORDER" – WHETHER SUCH ORDER REVIEWABLE – PERIOD OF TIME FOR COMMENCING PROCEEDING EXTENDED BUT NO RECORD MADE IN COURT REGISTER OR ON COURT FILES – FINDING BY MAGISTRATE THAT A MAGISTRATES' COURT IS A COURT OF RECORD – WHETHER FINDING RELEVANT IN THE CIRCUMSTANCES – FINDING BY MAGISTRATE THAT THERE WAS NO RECORD OF A MAGISTRATE FIXING A RELEVANT LONGER PERIOD – RULING BY MAGISTRATE THAT ACCUSED SHOULD NOT STAND TRIAL – WHETHER MAGISTRATE IN ERROR: *MAGISTRATES' COURTS ACT* 1971, SS3, 88(1); *MAGISTRATES (SUMMARY PROCEEDINGS) ACT* 1975, S47A(9).

1. Where a magistrate made an order in relation to committal proceedings that the accused should not stand trial for charges of rape, the jurisdiction the magistrate exercised was an "order" in terms of s88(1) of the *Magistrates' Courts Act* 1971. The exercise of the jurisdiction by the magistrate called for the exercise of judicial functions and accordingly, was reviewable.

2. A magistrate acting under rule 9 of s47 of the *Magistrates (Summary Proceedings) Act* 1975 is not exercising the jurisdiction of a Magistrates' Court and is not making an "order" of a Magistrates' Court. There is no provision for any entry to be made in the register with respect to the exercise of the power. It is beside the point to consider whether a Magistrates' Court is a court of record or whether the only way of properly proving an order of the court is by its records.

3. Accordingly, the magistrate was in error in deciding that the informant was precluded from proving any relevant extension of the prescribed period merely because there was no record of an exercise of the power to extend.

TADGELL J: Orders made by a Stipendiary Magistrate on 23rd September 1980 pursuant to rule (10) of s 47A of the *Magistrates (Summary Proceedings) Act* 1975 that the respondents should not stand trial for certain alleged offences of rape.

The facts which gave rise to the impugned orders in this case, stated chronologically, are these: On 29th January 1980, the applicant John Garry Johnson, a detective senior constable of police, served an information in which he was the informant upon the respondent Alan Gordon Collis, the defendant named therein, which alleged two charges of rape. The offences were alleged to have occurred on 21st December 1979 and 25th January 1980. Collis was released on bail on condition that he appear at the Prahran Magistrates' Court on 7th February 1980 and further adjourned on that date to 6th June 1980,

According to an affidavit filed in the proceedings before me, a legal officer of the Crown Solicitor, appeared on 26th February 1980 before Mr MM Saunder SM at the Prahran Magistrates' Court. He then applied *ex parte* pursuant to rule (9)(a) of s47A of the *Magistrates (Summary Proceedings) Act* 1975 for an extension of the prescribed period referred to therein in relation to the said charges of rape against Collis. The extension sought was to 6th June 1980, the date to which the information had been adjourned. Mr Saunder ordered that the prescribed period be so extended. On 2nd April 1980 the applicant served an information in which he was informant upon the respondent Constantine Krisohos, the defendant named therein, which alleged two charges of rape. The offences were alleged to have been committed on the same dates and at the same place and against the same woman as those which had been alleged against the respondent Collis. Krisohos was released on bail on condition that he appear at the Prahran Magistrates' Court on 6th June 1980, the date to which the information against Collis had been adjourned.

According to an affidavit filed in the proceedings before me, Peter Hiland appeared before Mr GP Murphy SM at the Prahran Magistrates' Court on 16th April 1980, he then applied *ex parte* pursuant to rule (9)(a) of s47A of the *Magistrates (Summary Proceedings Act* 1975 for extensions of the prescribed period referred to therein in relation to the said charges of rape against both Krisohos and Collis. The extension sought was to 15th July 1980 and the said Stipendiary Magistrate ordered that the prescribed period be so extended.

On 6th June 1980, the applicant as informant and both the respondents as defendants to the informations were represented at the Prahran Magistrates' Court. Mr WJS Maloney SM adjourned both the informations by consent to 23rd September 1980 and respited bail in each case. At the time counsel for the informant applied, according to Mr Hiland's affidavit in the proceedings before me, pursuant to rule (9)(a) of s47A of the *Magistrates (Summary Proceedings) Act* 1975, in effect that the prescribed period in relation to the charges preferred by each of the said informations be extended to 23rd September 1980, and Mr Maloney "ordered that the prescribed period for the commencement of the proceedings in relation to the said respondents be so extended."

On 23rd September 1980, the date to which the informations had been adjourned, the applicant appeared by counsel before the magistrate for the hearing of a preliminary examination in relation to the charges of rape alleged by the informations against the respondents. The respondents also were represented and before the preliminary examination began the legal representatives of the respondents applied for and obtained the orders which the applicant now seeks to challenge.

It appears that the basis upon which the applications for the orders under rule (10) of s47A were made was that no periods longer than three months after the dates on which the respondents had respectively been charged had been shown to have been fixed pursuant to rule (9)(a) of s47A. It was common ground before the Stipendiary Magistrate on 23rd September, however, that no notation on the registers or any other document kept at the Prahran Magistrates' Court had recorded the fact that any extension of the period prescribed by rule (9) of s47A had been fixed. Counsel for the applicant before the Stipendiary Magistrate sought to overcome that difficulty by calling oral evidence from the informant as to the dates on which the respondents had been respectively charged and from Mr Hiland (who was instructing counsel for the informant) as to what had occurred at the Prahran Magistrates' Court in relation to the two informations on 16th April and 6th June. The evidence given by Mr Hiland was to the effect of what he swore in his affidavit filed in this court, and it was uncontradicted.

It was contended before the SM on behalf of the respondents that, because the applicant could not point to any record of the fixing of a longer period than the basic prescribed period of three months, no such longer period could be taken to have been fixed. The transcript of the proceedings before the Stipendiary Magistrate indicates that the solicitor for the respondent Krisohos put the submission succinctly thus:

> "...there is no order of the Court fixing the time or extending the time unless that order is endorsed on the file of the Court ... All I am saying is that it doesn't become an order until it becomes on record."

The SM ruled *inter alia*:

> "... Nowhere on the Court files is there any notation or, in fact, is there any document which refers to the period being extended beyond the period of three months. There is no record in the Court register in relation to the 16th April or the 6th June – extending the period to the 23rd September. I am satisfied that pursuant to the provisions of s47A(10) of the *Magistrates (Summary Proceedings) Act* that the preliminary examination which was to commence before me today has not been commenced within the prescribed period. The section goes on to state the defendants should appear or be brought before a Stipendiary Magistrate who shall unless he is satisfied of special circumstances, warrant a later fixation in accordance with Rule (9). I am satisfied the defendants are present and I am satisfied there are no special circumstances to warrant a later fixation of the date."

The Stipendiary Magistrate thereupon ordered pursuant to rule (10) of s47A that the respondent Collis and the respondent Krisohos should not stand trial for the offences of rape with which they had been charged. I should refer to an argument on a preliminary point which was advanced on behalf of the respondents that the orders made on 23rd September were not

reviewable at all and that the orders to review should not have been granted. The preliminary submission for the respondents was that the orders made under rule (10) of s47A were no more than administrative or ministerial orders of a kind which proceedings by way of order to review are not designed to call in question. The argument relied on what the Full Court in *Byrne v Baker* [1964] VicRp 57; (1964) VR 443, 464, referred to as "established doctrine" that an "order" of a kind which is reviewable by the order to review procedure, is confined to a decision which is judicial and not merely ministerial. The Full Court also said:-

> "The cases upon which this doctrine rests have established, also, that in proceedings before justices with respect to an indictable offence a committal for trial and a dismissal of the information are ministerial, not judicial, orders ..."

Counsel for the respondents contended that the proceedings in which the stipendiary magistrate made the impugned orders, whilst not part of a preliminary examination, were peripheral to such an examination. If a preliminary examination involves only an administrative jurisdiction, he argued, an order which effectively precludes the conduct of a preliminary examination can scarcely be less so.

The order made under Rule 10 of s47A had nothing to say as to whether a preliminary examination should be commenced. What an order under rule (10) does is to preclude the commencement of a trial for the relevant offence or offences with which the accused has been charged on information; and that result is brought about by a combination of the order made under rule (10) itself and s359A(1)(a) of the *Crimes Act*. An order made under rule (10) of s47A is therefore determinative not only of the fate of the information which alleges the charges with which the order deals. It also effectively disposes of the offences themselves in the sense that the accused can never be tried for them; and this means that he could never be convicted of them even if he were to plead guilty if presented on those offences: *R v Symons* [1981] VicRp 33; [1981] VR 297.

Plainly, the stipendiary magistrate in making an order under rule (10) was not doing so in the course of a preliminary examination or anything equivalent to it, for *ex hypothesi* no preliminary examination had been commenced. He was in my opinion exercising a specific statutory jurisdiction which exercise resulted in a decision embodied in an order of a kind which is reviewable. Irrespective of the label which one might place upon the order, the important thing to appreciate is that it was one made by the stipendiary magistrate in the course of exercising a statutory jurisdiction to determine whether in the circumstances the respondents should not stand trial for the charges of rape. He was also called on, if he found that the prescribed period had elapsed, to exercise a discretion which depended upon his satisfaction that special circumstances did not warrant what is called a "later fixation" in accordance with rule (9)(b). In these cases the respondents, as defendants to the informations, themselves sought respectively to invoke the jurisdiction. The exercise of the jurisdiction in my opinion calls for the exercise of judicial functions. There was a contest before him as to whether in the circumstances the jurisdiction to make the order existed; and in resolving it he was called on to exercise judicial functions. Once he entered upon a consideration of the question whether he had jurisdiction he entered upon a judicial enquiry. In the present case the "definite jurisdiction" which the magistrate was called on to exercise, and which he did exercise, in my opinion involved his making an "order of a ... justice" in terms of s88(1) of the *Magistrates' Courts Act* 1971. It was, as I shall indicate, not an order of a Magistrates' Court but it was, by reason of its being a decision of a justice (a stipendiary magistrate being a justice by force of s17 of the *Magistrates' Courts Act* 1971) an "order", as defined in s3 of the *Magistrates' Courts* Act, of a kind referred to in s88.

I turn now to consider whether, in making the orders he did, the stipendiary magistrate was right. The reasons which he gave for his decision indicate that in reaching it he took the following steps. He regarded a Magistrates' Court as a court of record; he treated the proceedings of the court as being provable only by the record of the court; he treated the record of the court as being its register and, perhaps, its files; he found that there was no record of the fixing by a stipendiary magistrate of any relevant longer period than the basic prescribed period of three months referred to in rule (9); and he concluded that therefore no extension of the period could be proved. In reasoning in that way I consider that the stipendiary magistrate misdirected himself. I think he left out of consideration one basic question: what is the nature of the act of a stipendiary

magistrate under rule (9)(a) in fixing a longer period than the basic prescribed period of three months? The stipendiary magistrate appears to have assumed that any fixing of a longer period pursuant to rule (9)(a) would have been by an order of the Prahran Magistrates' Court: otherwise the question whether it ought or might be expected to have been the subject of a record of that court would have been irrelevant, as would the question whether Magistrates' Courts are courts of record.

In my opinion a stipendiary magistrate who acts under rule (9) of s47 of the *Magistrates (Summary Proceedings) Act* 1975 is not exercising the jurisdiction of a Magistrates' Court. It follows that when he acts under the rule he is not making an order of a Magistrates' Court. Power to act under the rule is specifically granted to a stipendiary magistrate and not to a Magistrates' Court. Even though an exercise of power under rule (9)(a) would not be upon the hearing of a preliminary examination it would in my opinion be "in relation to" one. The provisions of s52 of the *Magistrates' Courts Act* therefore do not apply. In any event, although a preliminary examination may be conducted by a Magistrates' Court, the context of s47A is such as to exclude any of the powers or jurisdiction to which it refers being exercisable by a Magistrates' Court consisting of two or more justices of the peace.

Because the exercise by the stipendiary magistrate of his power under rule (9)(a) is not an act or proceeding of a Magistrates' Court it is beside the point to consider whether a Magistrates' Court is a court of record, or whether the only way of properly proving an order of the court is by its records. There is no provision in the *Magistrates' Courts Act* or in the rules made thereunder for any entry to be made in the register with respect to an exercise of power under rule (9)(a). It might be convenient to use the register to record an exercise of power under the rule but a failure to do so would not mean that the exercise could not be proved. Of course, no endorsement on a file or other document in the office of the clerk of the Magistrates' Court, not being the court register, which might record an exercise of power under rule (9)(a) in relation to the respondents would have any statutory efficacy which the register did not have. Likewise, the absence of any such endorsement would have no more or less significance than the absence of an entry in the register recording an exercise of the power.

For these reasons I conclude that the stipendiary magistrate was in error in deciding that the applicant's counsel was precluded from proving any relevant extension of the prescribed periods in relation to the commencement of the respondents' preliminary examinations merely because there was no record of an exercise of the power to extend. In my opinion it was open to counsel to prove an exercise of the power as a fact by any appropriate and receivable form of evidence; and parol evidence was receivable in the absence of a minute or memorandum.

Ordinarily, an order of a Magistrates' Court need not be drawn up. That is no doubt a sensible rule of practice concomitant with the statutory provision that an order of the court may be proved by the register or a certified extract. An order of justices or of a stipendiary magistrate not constituting a Magistrates' Court is in a different position, however, if there is no provision for entering it in the register of the court. It is correct practice for a stipendiary magistrate or justices not sitting as a Magistrates' Court who make an order in judicial proceedings to sign it; and it should not be treated as an order of a Magistrates' Court,

If a stipendiary magistrate, not constituting a Magistrates' Court, makes an order in judicial proceedings the best and most convenient mode of proving it is to produce his signed order. If a stipendiary magistrate exercises an administrative power its exercise will be conveniently provable (again unless another mode is prescribed) by having him sign a minute or memorandum of its exercise and tendering it when the exercise is desired to be proved. It may also be appropriate to say that an order, minute or memorandum may be signed, and even an entry in the register may be made (if an entry is appropriate) at any time if its contemporaneous preparation has been omitted by inadvertence or otherwise: for even the record of a court of record may be made up at any time, whenever it may become necessary to establish an issue duly decided or raised.

It was open to the stipendiary magistrate in this case to act on such admissible evidence before him as he thought credible for the purpose of determining as a fact whether the prescribed period in terms of rule (10) of s47A of the *Magistrates (Summary Proceedings) Act* had elapsed. Alternatively, the magistrate might have treated the hearing of the evidence on 23rd September

of what had taken place before him on 15th April as affording information from which to compile and sign an appropriate minute or memorandum. Since he was led into confining himself to matters which were not relevant and omitting to consider the evidence which had been adduced on behalf of the applicant, error has been shown. I think I should content myself with saying that it was certainly open to the stipendiary magistrate to have concluded on the evidence before him that the prescribed period had not elapsed at the date he made his order. In my opinion each of the orders to review should be made absolute.
