04/83

SUPREME COURT OF VICTORIA

R v ARTHUR and ORS; ex parte KAPODISTRIAS

Murphy J

8 November 1982

COMMITTAL FOR TRIAL – HAND-UP BRIEF PROCEDURE – WITNESSES REQUIRED FOR CROSS-EXAMINATION – WHETHER CROWN BOUND TO CALL – NATURE OF COMMITTAL HEARING DISCUSSED: *MAGISTRATES (SUMMARY PROCEEDINGS) ACT* 1975, SS45, 46.

K. was charged on 96 counts of theft/burglary. Written statements were obtained from 56 civilian witnesses and 34 police witnesses. The police informants adopted the hand-up brief procedure as provided for in ss45 and 46 of the *Magistrates (Summary Proceedings) Act* 1975. K. gave notice that he desired to cross-examine all 90 witnesses, but the Crown declined to cause their attendance, and chose instead to rely on police evidence of written admissions alleged to have been made and signed by K. K. obtained an order calling on the police informants to show cause why a writ of mandamus should not issue to direct them to make the civilian witnesses available for cross-examination.

HELD: Order nisi discharged. The hand-up brief procedure does not place a compulsory onus upon the Crown to require the attendance of persons who have made statements when notice is given to that effect by the accused. If the witnesses do not attend, then their evidence cannot be relied upon by the court in deciding whether to commit or not.

MURPHY J: *[After setting out the facts and the submissions made by Counsel, His Honour continued]:* Mr Cummins, one of Her Majesty's Counsel for the applicant relied upon the expression of principle contained in *Barton v R* (1980) [1980] HCA 48; (1980) 147 CLR 75; 32 ALR p449 at p462; 55 ALJR 31, where Gibbs J and Mason J in a joint judgment referred to Lord Devlin's book and said this:

> "Lord Devlin in *The Criminal Prosecution in England* was able to describe committal proceedings as 'an essential safeguard against wanton or misconceived prosecutions' (see p92). This comment reflects the nature of committal proceedings and the protection which they give to the accused, viz. the need for the Crown witnesses to give their evidence on oath, the opportunity to cross-examine, to present a case and the possibility that the magistrate will not commit.
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> Mr Shand submits that the same purpose can be achieved by the supply of particulars and the delivery of copies of proofs of evidence. This is the course which is followed when the Crown decides to call at the trial a witness whose depositions were not before the magistrate. But it is one thing to supplement the evidence given before a magistrate by furnishing a copy of a proof; it is another thing to deprive the accused of the benefit of any committal proceedings at all. In such a case the accused is denied
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> (1) knowledge of what the Crown witnesses say on oath;
> (2) the opportunity of cross-examining them;
> (3) the opportunity of calling 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.
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> The deprivation of these advantages is, as the judges observed in *Fazzari* and as Fox J noted in *Kent*, a serious departure from the ordinary course of criminal justice. Moreover, it is one which, if it takes place at all, takes place rarely."

These expressions of opinion were expressions of opinion relating to the normal procedure followed at committal proceedings and of course, have no bearing upon the extraordinary procedure which might be thought to be involved in the hand-up brief procedure set out in the *Magistrates (Summary Proceedings) Act* 1975 with which we are here concerned.

Mr Casey relied upon s46(1), (2) and (3). He submitted it was a misconception to regard a committal, as it were, as a dress rehearsal where risky questions might be asked by counsel of the Crown witnesses with impunity, even though, of course, the defence is perfectly entitled to engage in this procedure when the normal committal proceedings are followed.

Mr Casey relied upon *R v Epping & Harlow Justices; ex parte Massaro* [1973] 1 All ER 1011 (1973) 1 QB 433 at p435, where the Court of Criminal Appeal were considering an application by a defendant for an order of *certiorari* to quash a committal order on the ground that he was deprived of the opportunity at the committal proceedings of cross-examining the prosecutrix as she was not called to give evidence. It would appear from the report that the only reason she was not called to give evidence was that the Crown elected not to put her through the experience, as it is called, or the ordeal, as I imagine is meant, of giving evidence both at the committal proceedings and then subsequently at trial.

It may be a special case but the expression of opinion and principle contained in the judgment of Widgery CJ is not confined to this particular case and is, I would imagine, meant by him to be of general application. He said at p435:

> "For my part I think it is clear that the function of committal proceedings is to ensure that no-one shall stand his trial unless a *prima facie* case has been made out. The prosecution have the duty of making out a *prima facie* case, and if they wish for reasons such as the present not to call one particular witness, even though a very important witness, at the committal proceedings, that in my judgment is a matter within their discretion and their failure to do so cannot on any basis be said to be a breach of the rule of natural justice."

The other members of the Court of Criminal Appeal agreed with His Lordship's judgment.

[His Honour then referred to Moss v Brown *(1979) 1 NSWLR 114, and continued]:* I agree with counsel for the respondents that the section with which we are here dealing does not require or place an onus or burden upon the Crown, which is a compulsory onus, to require the attendance of persons who have made statements if notice is given to that effect by the accused person. If the Crown desires to rely upon that person's statement in any way whatsoever, then he must attend if notice is given that his attendance is required for cross-examination. If he does not attend for one reason or another, sickness, ill-health, absence from the country or any one of a myriad number of reasons that might be imagined, then the probative value of what is contained in his statement is, as I have said, nil, and his evidence cannot be relied upon by the magistrate in any way in arriving at his decision whether or not to commit the defendant.

I can conceive of many cases where at a subsequent trial objection to the fairness of introducing fresh evidence without due notice may well be taken and the evidence, in fact, excluded by the learned trial Judge exercising his discretion, if the situation is one which involves unfairness. If it was a practice, as it were, that was adopted by way of a ruse or strategem to gain some unfair advantage for the Crown, then this sort of situation might very well arise.

But it is, I believe, a fallacy to assert that the defendant is entitled, as a matter of law, because of the terms of this statute, to have all witnesses called whose statements have been tendered to the Magistrate if the defendant gives notice that he requires their attendance for cross-examination. There must be, of course, clearly limits to that submission even though it was made in the broad sense by Mr Cummins. A committal could not fail, as it were, because a witness who had made a statement was dead, or was sick and could not attend. The only consequence would be that the evidentiary material contained in his statement would be of no probative value.

It would be, again, a fallacy, as it were, to approach committal proceedings as though they were simply a testing ground whereby the defendant could, through cross-examination, test the strength or weakness of the prosecution case against him. The purpose of the committal proceedings is as set out in the passages in the cases to which I have referred. Further reference may be made to *Richardson v R* [1974] HCA 19; (1974) 131 CLR 116; 3 ALR 115 at pp118-119; (1974) 48 ALJR 181; 18 ALT 275. Order nisi discharged.

APPEARANCES: Mr P Cummins QC, counsel for applicant Kapodistrias. Mr T Casey, counsel for respondents.