19/91

SUPREME COURT OF VICTORIA

RANDALL v WHEELER and ANOR

Fullagar J

14 March 1991

PROCEDURE – COMMITTAL FOR TRIAL – EVIDENCE OF SUFFICIENT WEIGHT TO SUPPORT A CONVICTION – WRONG TEST APPLIED BY COMMITTING MAGISTRATE – WHETHER SUCH ORDER REVIEWABLE – *CERTIORARI*/MANDAMUS/DECLARATION – NO INJUSTICE OR UNFAIRNESS – WHETHER RELIEF SHOULD BE GRANTED: *MAGISTRATES' COURT ACT* 1989, S11(2) of Schedule 5.

***Certiorari* does not lie against the decision of a magistrate to commit for trial. Even if the Supreme Court had power to interfere with a Magistrate's order to commit for trial by way of declaration or an order in the nature of mandamus, such may be refused where the:**

(1) evidence was such as to lead a reasonable magistrate correctly applying the law to commit for trial;

(2) person committed has not suffered any injustice, unfairness or disadvantage.

***Waterhouse v Gilmore* (1988) 12 NSWLR 270, applied.**

FULLAGAR J: [1] This is an application by originating motion on behalf of a woman who was with others committed for trial on 11th November 1990 for the murder of one P.J Snabel. The originating motion, filed 30th January 1991, seeks an order by way of judicial review, and in particular an order in the nature of *certiorari*, pursuant to Order 56 of the Rules quashing or setting aside the order for committal. The plaintiff Donna Marie Randall and her sister Karen Lee Randall were committed together with two men. Karen Lee Randall is the plaintiff in originating motion 1991 No. 4551 and the result in that case must be the same as in this one. The defendants are the policeman informant and the magistrate who made the orders for committal.

Section 11(2) of Schedule 5 of the *Magistrates' Court Act* 1989 provides in respect of committal proceedings that, at the conclusion of the evidence for the prosecution and evidence for the defendant if any, the Court must—

> (a) if in its opinion the evidence is not of sufficient weight to support a conviction for the offence with which the defendant is charged, order the defendant to be discharged; or
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> (b) if in its opinion the evidence is of sufficient weight to support a conviction for the offence with which the defendant is charged, commit the defendant for trial at the next sittings of the Supreme Court or County Court.

The reasons given by the magistrate for committing each of the present applicants for trial for murder are **[2]** somewhat confused in the way in which they are expressed, but upon full consideration they leave me with the clear impression that the magistrate was of opinion in each case that the evidence was of sufficient weight to support a conviction for murder. In the course of his reasons, however, he appeared to adopt the following passage from the notes in the current paragraph 789 to s11 of the Act in Mr Nash's loose-leaf work on *Magistrates' Courts* (Law Book Co Ltd) -

> "For the obligation to discharge to arise he (the magistrate) must be satisfied that a reasonable jury must or would be satisfied that there are reasonable hypotheses consistent with innocence. ... It is not his function to weigh the evidence or assess its acceptability whether in relation to the character of the evidence itself or the credibility of the witnesses who gave it. He is required to assume that it is accepted without reservation by a jury."

The reasons given by the magistrate expressly adopt the last sentence above quoted and by inference seem to adopt the second sentence as well. It was said for the plaintiffs that the last two sentences quoted do not accurately reflect the law. In the result the reasons given for committing

the applicant at the end of a very long hearing are unsatisfactory, although I am left with the clear impression that the magistrate was of opinion that the evidence was of sufficient weight to support a conviction for murder. It should be noted that no attempt was made to demonstrate to the Supreme Court that the evidence before the magistrate did not justify a committal, and the transcript of evidence produced on behalf of the respondent is extremely lengthy.

The superior court should, I think, be reluctant to interfere with a decision of a magistrate to commit for **[3]** trial, at all events unless it is satisfied that some serious injustice or unfairness attended the committal proceedings. The proceedings in the Supreme Court are brought by an originating motion filed 30th January 1991 which seeks:

> "orders pursuant to Order 56 of the *Supreme Court Rules* including orders in the nature of *certiorari* quashing the order made by the magistrate ... whereby he committed the plaintiff to stand trial for the murder of Paul Joseph Snabel."

The heading on the originating motion is reproduced in that form upon these reasons. It is to be observed that the time for bringing proceedings under Order 56 is limited to "60 days after the date when grounds for the grant of the relief or remedy claimed first arose": Rule 56.02(1); and that the originating motion was issued on a date extended to 58 days after the magistrate's order committing for trial. It is also to be observed that application under the *Administrative Law Act* 1978 must be brought within 30 days of the making of the administrative "decision": s4. It is unnecessary for me to decide whether the decision to commit for trial was a "decision" within the meaning of that word in s2 of that Act.

In my opinion *certiorari* will not lie against a decision of a magistrate to commit for trial. The changes introduced in Victoria by Order 56 are merely procedural, in order to provide for the seeking of a judgment or order *inter partes* instead of for the seeking *ex parte* of an order nisi which if granted would result in proceedings entitled "The Queen against" the respondent *ex parte* the applicant. **[4]** It has been held in a long line of cases in the Supreme Court of New South Wales, since *Ex parte Cousens: Re Blacket* (1946) 47 SR NSW 145; 63 WN (NSW) 228, that "a magistrate's decision as to whether or not he will commit for trial is purely executive in nature and not within that category of executive acts which are accessible to correction by this Court in the exercise of its supervisory jurisdiction at common law by way of prohibition or *certiorari*": see *Waterhouse v Gilmore* (1988) 12 NSWLR 270 at p275 per Hunt J and the list of cases there cited by his Honour who points out that,

> "notwithstanding the ultimately inconclusive views of Mason CJ in *Sankey v Whitlam* [1978] HCA 43; (1978) 142 CLR 1; 21 ALR 505 at p83-84; 53 ALJR 11; 37 ALT 122, ... *Cousens' case* has continued to be applied, e.g. in *Attorney-General (NSW) v Mirror Newspapers Ltd* [1980] 1 NSWLR 374 at p385 and *Wentworth v Rogers* [1984] 2 NSWLR 422 at p434; (1984) 15 A Crim R 376."

In my opinion these statements by Hunt J correctly state also the law in Victoria. As early as 1893 in Victoria Holroyd J said in *In Re Mercantile Bank; ex parte Millidge* [1893] VicLawRp 85; (1893) 19 VLR 527 at p539, "when a Justice takes depositions and commits a person for trial, his act is now said to be ministerial as opposed to judicial". In *Phelan v Allen* [1970] VicRp 28; [1970] VR 219 the Full Court held that a determination by a magistrate in committal proceedings, to commit or not to commit, was a ministerial act and not a judicial act, and was not an "order" within the meaning of s155(1) of the *Justices Act* 1958 and accordingly was not reviewable under that Act. In delivering the principal judgment in the Full Court, Smith J at p223 pointed out that, as early as 1907, **[5]** "orders committing or refusing to commit had for a very long time been regarded as ministerial, and therefore as not subject to judicial supervision".

Mr Maguire for the defendants contended, correctly in my opinion, that no appeal lies from a decision of a magistrate to commit for trial unless some statute provides for such an appeal, that no statute does provide for any appeal, and that the only statute providing for judicial review of such an administrative decision of a Victorian magistrate is the *Administrative Law Act* 1978. As I say, I do not need to decide whether the latter Act provides for such judicial review.

It is true, I think, that the prerogative writ of mandamus, and now an order in the nature of mandamus, will lie in relation to decisions of a magistrate to commit or not commit, and it seems then an inability to grant *certiorari*, in order "to quash the erroneous determination and

thus clear the way for the fresh consideration and determination of that matter", will not stand in the way of an order in the nature of mandamus – see per Hunt J in *Waterhouse v Gilmore* (1988) 12 NSWLR 270 at p276. But his Honour points out that, before such an order will be granted -

> "the mistake of law (by the magistrate) must be one which shows that the determination arrived at in the purported exercise of jurisdiction is nugatory and void, so that the ostensible determination by the magistrate was not a real performance of the duty imposed by law upon him."

As I have indicated I am not satisfied that the magistrate in this case made such a drastic mistake of law, or that he was under any real or effective misunderstanding as to the nature of the opinion which he was to form. A **[6]** decision upon that question would in any event involve this Court in a study of the very long transcript of the very lengthy proceedings. But in the end, assuming that this Court has jurisdiction to interfere by order in the nature of mandamus or by declaration – neither of which is sought by the terms of either the originating motion or the summons – still I am firmly of opinion that relief should be refused in the exercise of the Court's discretion. I have already acknowledged my indebtedness to the informative judgment of Hunt J in *Waterhouse v Gilmore* (*supra*), and I respectfully adopt what he says about the exercise of a discretion to interfere with an order of a magistrate in committal proceedings. I refer also to what the High Court said in refusing special leave in *Yates v Wilson* [1989] HCA 68; (1989) 168 CLR 338 at p339; (1989) 86 ALR 311; 40 A Crim R 113; 20 ATR 663; 64 ALJR 140 concerning "the undesirability of fragmenting the criminal process".

The principal reasons why I think any relief should now be refused by this court as an exercise of discretion may be summarized as follows -

> (1) It was not contended that the evidence was such that no reasonable magistrate, correctly applying the law, could not have committed these plaintiffs for trial, and I think counsel for the plaintiffs expressly disavowed any such contention.
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> (2) It was not contended that the plaintiffs suffered the slightest injustice or unfairness in the committal proceedings – apart from the alleged error of law. That is **[7]** to say, the plaintiffs were able by counsel to cross-examine all the numerous Crown witnesses and to address the magistrate at length. The plaintiffs have had a full dress rehearsal for the trial.
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> (3) The Director of Public Prosecutions could not be bound by any future decision not to commit by the magistrate – e.g. after an order in the nature of mandamus to reconsider – and the Director of Public Prosecutions has expressly stated to this Court, through counsel for the defendants, that he intends to present for trial both of the plaintiffs in any event. Indeed the presentment has already been signed, and the only reason why it has not been already formally presented is the Victorian practice under which the presentment is presented only to the trial Judge as the trial commences.
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> (4) In the light of the above it is difficult to see that any disadvantage has been or could be suffered by the plaintiffs by allowing the order for committal to stand. In this connexion, the remarks of the Full Court of the Federal Court in *Forsyth v Rodda* [1989] FCA 312; (1989) 87 ALR 699 at p718; (1989) 42 A Crim R 197 seem apposite -
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> "The matter is now pending in the Supreme Court of Victoria ... The appellant's rights are preserved ... It is true that he has to undergo the ordeal and expense of a criminal trial. But this is the lot of many. It is the way in which our criminal process works. At the end of the Crown case, or after evidence given by the appellant or on his **[8]** behalf, he may apply to have the case taken from the jury."

For these reasons the applications for orders of this Court, in originating motions Nos. 4550 and 4551 of 1991, are dismissed. I will hear counsel as to costs.

APPEARANCES: For the plaintiff Randall: Mr A Bristow, counsel. Robert Wood & Associates, solicitors. For the first-named defendant Wheeler: Mr G Maguire, counsel. AG McLean, Acting Victorian Government Solicitor.
