13/85

FEDERAL COURT OF AUSTRALIA

SHEPHERD v GRIFFITHS and JONES

Jenkinson J

10, 17 April 1985

[1985] FCA 126; (1985) 7 FCR 44; (1985) 60 ALR 176; (1985) 17 A Crim R 129

COMMITTAL PROCEEDINGS – EVIDENCE – ADMISSIBILITY – WHETHER A COMMITTAL PROCEEDING A "PROSECUTION": *TELECOMMUNICATIONS (INTERCEPTION) ACT* 1979 (CWTH), S7(6)(c); *MAGISTRATES (SUMMARY PROCEEDINGS) ACT* 1975, S43.

Section 7(6) of the *Telecommunications (Interception) Act* 1979 (Cwth) provides (in so far as relevant):

> "Without limiting the application of sub-section (4), a person may give information obtained by intercepting a communication passing over a telecommunications system, or obtained by virtue of a warrant issued under section 11 or 21, in evidence in a proceeding—
> (a) ... ; (b) ... ;
>
> (c) by way of a prosecution for any other offence against the law of the Commonwealth or of a State or Territory punishable by imprisonment for life or for a period, or maximum period, of not less than 3 years.

Jones and others were charged with certain indictable offences. When the committal proceedings commenced, the Prosecutor indicated that evidence would be given in proof of the interception of certain telephone conversations recorded on tapes. It was argued by the defendants' counsel that the preliminary hearing in which the Court was engaged, was not "a proceeding ... by way of a prosecution" within the meaning of that phrase in s7(6)(c) of the *Telecommunications (Interception) Act* 1979, and accordingly, the evidence relating to the recorded telephone conversations could not be received by the Court. The Magistrate acceded to this submission and indicated that he would not receive the tapes in evidence. He adjourned the proceedings to enable an application for an order to review his "ruling".

HELD: Declaration that the preliminary examination was "a proceeding ... by way of a prosecution" within the meaning of s7(6)(c) of the *Telecommunications (Interception) Act* 1979.
"Prosecution" includes the institution of or the carrying on of criminal proceedings not triable summarily, and comprehends the preliminary investigation which is set in train by the laying before a magistrate of an information for an indictable offence.
***Sankey v Whitlam* [1978] HCA 43; [1978] 142 CLR 1; 21 ALR 505; 53 ALJR 11; 37 ALT 122; and**
***Yates v R* [1885] 14 QBD 648, applied.**

JENKINSON J: *[After setting out the facts, relevant Legislative provisions, and whether the court had a discretion to review the Magistrate's order, His Honour continued]:* ... **[13]** The argument advanced on behalf of the second respondent, that what are commonly called committal proceedings are not comprehended by the phrase "a proceeding ... by way of a prosecution of an offence", rested on two grounds. First, it **[14]** was said that the conception which the word prosecution expresses in the context of s7(6) is of the instigation and the prosecution, in another sense of that word, of a single curial proceeding which commences with an accusation of a crime, and involves the trial of that accusation, and concludes with the conviction or acquittal of the accused. Committal proceedings are not within that conception, it was said: the function is not judicial, but administrative; there is no trial of the accusation, but merely an investigation to elicit and record evidence in support of the accusation and any statement by the accused and any evidence which the accused may choose to give or adduce; and the proceeding does not conclude with any determination "of any finality ... The committal proceedings determine nothing other than whether, on the material placed before the justices, there is sufficient to commit the accused for trial on any indictable offence". (*per* Anderson J in *Summers v Cosgriff* [1979] VicRp 56; [1979] VR 564 at 568).

Second, it was said that there were examples of statutory usage of the verb "to prosecute"

which demonstrated that prosecution was a process which commenced in a court of trial. Sections 351 of the *Crimes Act* 1958 (Vic) and 69(1) of the *Judiciary Act* 1903 (Cwlth) were cited. The former section is in these terms:

> "351. All treasons and misprisions of treason shall be prosecuted by indictment only, and all other indictable offences may be prosecuted by indictment or by presentment as hereinafter directed."

Section 69(1) of the *Judiciary Act* 1903 provides:

> "69(1) Indictable offences against the **[15]** laws of the Commonwealth shall be prosecuted by indictment in the name of the Attorney-General of the Commonwealth or of such other person as the Governor-General appoints in that behalf."

The second of the grounds advanced, and accepted by the magistrate, may conveniently be considered first. The verb "to prosecute" and the "prosecution" and "prosecutor" are in extensive legal usage, but to none of them is it possible to assign a meaning except by reference to the particular context in which the word is used. William Blackstone commenced the 21st chapter of Book IV of his *Commentaries* with this sentence:

> "We are now to consider the regular and ordinary method of proceeding in the courts of criminal jurisdiction; which may be distributed under twelve general heads, following each other in a progressive order: viz. 1. Arrest; 2. Commitment, and bail; 3. Prosecution; 4. Process; 5 Arraignment, and its incidents; 6. Plea, and issue; 7. Trial, and conviction; 8. Clergy; 9. Judgment, and its consequence; 10. Reversal of judgment; 11. Reprieve, or pardon; 12. Execution: all which will be discussed in the subsequent part of this book."

Having dealt in that chapter with arrest and in the next chapter with commitment and bail, he commenced the 23rd chapter with the sentence:

> "The next step towards the punishment of offenders is their prosecution, or the manner of their formal accusation."

This usage of the word "prosecution" might be thought to lend support to the submissions of counsel for the second respondent. **[16]** But the *English Act* 11 and 12 Vict c42, from which derive many of the provisions contained in Part V of the *Magistrates (Summary Proceedings) Act* 1975 (Vic) and in Division 1 of Part IV of the *Justices Act* 1902 (NSW), employs the word "prosecution" in a sense which is consonant with there being in train during committal proceedings a prosecution for the indictable offence charged. Thus, in ss9 and 10 of the *English Act* reference is made to "the Evidence adduced on the Part of the Prosecution before the Justices or Justices who shall take the Examination of the Witnesses in that Behalf". In s18 of that Act it is provided that "nothing herein enacted or contained shall prevent the Prosecutor in any Case from giving in Evidence any Admission or Confession or other Statement of the Person accused or charged, made at any Time, which by Law could be admissible as Evidence against such Person". A similar usage is found in Part V of the *Magistrates (Summary Proceedings) Act* 1975 (Vic), s43 of which refers to "counsel and solicitor for the prosecution or other person conducting the prosecution"; and s56 of which refers to "the evidence for the prosecution". There are references to "the prosecutor". A similar usage is found in Division 1 of Part IV of the *Justices Act* 1902 (NSW). There are references to "the prosecutor" and to "the evidence for the prosecution" (s41).

Counsel for the applicant sought confirmation of his submission, that a committal proceeding is a proceeding by way of a prosecution, in reasoning upon the question when a prosecution may be said to have commenced for the purposes of the law relating to the tort of malicious prosecution. But that reasoning demonstrates – and Sir John Beaumont for the Judicial Committee **[17]** expressly states in *Mohamed Amin v Jogendra Kumar Bannerjee*, [1947] UKPC 21, 177 LT 451, [1947] LJR 963, [1947] AC 322 at 330-331 – that the word is not used, in that context, "in the technical sense which it bears in criminal law".

Nor does the verbiage of s351 of the *Crimes Act* 1958 (Vic) or s69(1) of the *Judiciary Act* 1903 (Cwlth) support the contrary conclusion, in my opinion. Each of those provisions must be understood as a legislative selection, from among the modes of instituting a criminal proceeding in a court having jurisdiction to try criminal issues by jury, of the particular mode or modes

specified. By s69(1) one mode is selected. Section 351 names two modes, but until its repeal in 1980 s355 preserved two others – the information *ex officio* and the information *ex relatione*. (See *Wren v Hardy* [1951] VicLawRp 34; [1951] VLR 256; [1951] ALR 552). Each of s351 and s69(1) indicates the appropriateness of referring to those modes by the verb "to prosecute". Neither of them justifies an inference, in my opinion, that "prosecution" is an inappropriate word by which to refer to the institution, or to the carrying on, of other criminal proceedings in a forum not authorised to try criminal issues by jury.

I think that it is in accordance with common usage in legal discourse to speak of a committal proceeding as a prosecution. That usage is exemplified in the judgment of Stephen J in *Sankey v Whitlam* [1978] HCA 43; [1978] 142 CLR 1 at 79; 21 ALR 505; 53 ALJR 11; 37 ALT 122, as it is also in the language of statutory provisions regulating committal proceedings in Victoria and New South Wales, to which I have referred. And the legal conception of a criminal prosecution comprehends, in my opinion, the preliminary investigation which is **[18]** set in train by the laying before a stipendiary magistrate of an information charging the commission of an indictable offence against the law of the Commonwealth or of a State or Territory. A committal proceeding was regarded by Brett MR as within the conception of "criminal prosecution", in *Yates v R* [1885] 14 QBD 648 at 655, 657, 658. The decision in that case – that the phrase "criminal prosecution" in s3 of the *Newspaper Libel and Registration Act* 1881 be construed so as not to comprehend a prosecution by criminal information filed by leave of the High Court – rested on the great inconvenience which would have attended a construction of the section dictated by common usage of that phrase. But I find no consideration of policy or convenience against the construction which common usage of the words "a proceeding ... by way of a prosecution" suggests. It might, on the contrary, be thought that, as a committal proceeding may sometimes be transformed before its conclusion into the hearing and determination of the information, in consequence of the exercise of a power such as that conferred by s12A of the *Crimes Act* 1914 (Cwlth) or that conferred by s235(6) of the *Customs Act* 1901, the construction I adopt is the more convenient. (See *Pearce v Cocchiaro* [1977] HCA 31; [1977] 137 CLR 600; (1977) 14 ALR 440; 51 ALJR 608).

The order disposing of the application will be a declaration that the preliminary investigation which the first respondent sat on 19 and 20 November 1984 to take in respect of the indictable offence with which the second respondent was charged by the information of which exhibit KCC 1 to the affidavit **[19]** of Kevin Charles Chalker sworn the 20th day of December 1984 and filed herein is a copy is a proceeding by way of a prosecution for an offence against the law of the Commonwealth within the meaning of s7(6)(c) of the *Telecommunications (Interception) Act* 1979.

APPEARANCES: For the applicant: CN Jessup and BJ King, counsel. Director of Public Prosecutions. For the second respondent: BM Young, counsel. Campbell, Grace & Co, solicitors.
