03/91

SUPREME COURT OF VICTORIA

EDWARDS v HUTCHINS

Marks J

22, 31 October 1990

CRIMINAL LAW – COMMITTAL FOR TRIAL – *NOLLE PROSEQUI* SUBSEQUENTLY ENTERED – WHETHER ACCUSED VULNERABLE TO TRIAL – DECLARATION SOUGHT THAT COMMITTAL WRONG IN LAW – GROUND FOR MAKING DECLARATION – WHETHER "LIVE" ISSUE – COSTS AGAINST COMMITTING MAGISTRATE – GENERAL PRINCIPLE TO BE APPLIED – WHETHER COSTS SHOULD BE AWARDED.

H., a magistrate, committed E. to stand trial in respect of E.'s alleged involvement in the disposal of the body of a person said to have been murdered in New South Wales. Subsequently, a *nolle prosequi* was entered by the DPP, and E. sought a declaration to the effect that his committal for trial was wrong in law and beyond jurisdiction and an order for costs against the magistrate.

HELD: Summons for declaration dismissed and application for costs refused.
(1) Due to the entry of the *nolle prosequi*, there was no 'live' issue required to be decided whereby a declaration should be made.
***Marriner v Smorgon* [1989] VicRp 47; (1989) VR 485; and**
***Sun Life Assurance Co. of Canada v Jervis* (1944) AC 111; 113 LJKB 174, applied.**

(2) In relation to an order for costs, the ordinary rule is that a magistrate in performing a statutory function without clear perversity or serious misconduct is not vulnerable to an order for costs. In the present case, there was no justification for making an order for costs against the magistrate.

MARKS J: [1] The plaintiff seeks by his originating motion and summons a declaration to the effect that his committal for trial by a Magistrate at Wodonga on 24 May 1990 on a charge under s325(1) of the *Crimes Act* 1958 was wrong in law and beyond jurisdiction. The Magistrate did indeed so commit the plaintiff but since the issue of the originating motion and the summons of 29 August 1990 a *nolle prosequi* has been entered by the Director of Public Prosecutions ("the Director"). Nevertheless the plaintiff seeks the declaration because the committal, it is submitted, remains a "stain" on his reputation and character which he says he is entitled to have removed. It is also submitted, as is incontestably the fact, that the *nolle prosequi* does not amount to an acquittal and that theoretically the plaintiff is vulnerable to representment on the same charge (see Richard G. Fox: *Victorian Criminal Procedure* 6th Ed. p37 par. 2.5.1; *Crown Pleas in Victoria* by Michael LA Antalfy par. 44 p61).

Section 325 is as follows:-

Where a person (in this section called the principal offender") has committed a serious indictable offence (in this section called "the principal offence"), any other person who, knowing or believing the principal offender to be guilty of the principal offence or some other serious indictable offence, without lawful authority or reasonable excuse does any act with the purpose of impeding the apprehension, prosecution, conviction or punishment of the principal offender shall be guilty of an indictable offence.
[2] (2) If, on the trial of any person for a serious indictable offence, the jury are satisfied that the offence charged (or some other serious indictable offence of which the accused might on that charge be found guilty) was committed, but find the accused not guilty of it, they may find him guilty of an offence under sub-section (1) of which they are satisfied that he is guilty in relation to the offence charged (or that other offence).
(3) A person charged with an offence against sub-section (1) may be indicted or presented and convicted together with or before or after the principal offender and whether or not the principal offender is amenable to justice.
(4) A person convicted of an offence against sub-section (1) shall be liable—
(a) if the principal offence is one for which the penalty is imprisonment for life, to imprisonment for not more than fifteen years; or
(b) in any other case, to imprisonment for a term which is neither—
(i) more than five years in length;

(ii) more than one-half the length of the longest term which may be imposed on first conviction for the principal offence.

(6) In this section, "serious indictable offence" means an indictable offence which, by virtue of any enactment, is punishable on first conviction with imprisonment for life or for a term of five years or more."

The principal offence was the murder of a youth named Paul Hetherington at Lavington, New South Wales. One of the offenders was a step-brother of the plaintiff named Stephen McCarthy who with his co-offender brought the body across the border into Victoria and dumped it in a mineshaft at Mount Firebrace near Granya. It is alleged and the plaintiff allegedly admitted, that he assisted **[3]** McCarthy to dismember the body and perhaps do other things capable of attracting s325. The salient facts bearing on jurisdiction are the commission of the murder, the "principal offence", in New South Wales and of the acts or omissions of the plaintiff "after the fact" in Victoria.

The question is whether the murder in New South Wales constitutes a "serious indictable offence" within the meaning of s325(1), a meaning which is confined to what appears in s325(6). According to it, the principal offence must be one which "by virtue of any enactment" is punishable etc. It may be assumed that there is good reason to suppose that the word "enactment" must be Victorian only. If it were not so, there could be constitutional obstacles to validity, alternatively, difficulty in attributing to the Victorian legislature an intention to define "serious indictable offence" to include provisions of foreign statutes. If effect were given to such an intention the consequences would be very far reaching.

In these circumstances, it may well be supposed that the plaintiff was not vulnerable to a charge under s325(1), a supposition which is to a degree reinforced by the entry of the *nolle prosequi* and the declination of counsel for the defendant to contest the motion on the substantive issue. Whether I should say more is debatable. If I were to make an affirmative ruling on the matter I would necessarily do so without the advantage of full argument. **[4]** The fundamental question is whether the court should in the circumstances make the declaration sought, there being no practical purpose which it can serve. As I have said, I assume without affirmatively deciding, that the facts relied on by the prosecution were not capable of supporting a charge against the plaintiff under s325(1). As a *nolle prosequi* has now been entered, the charge has been effectively withdrawn against the plaintiff and he is not vulnerable to trial on that charge. While the withdrawal does not amount to an acquittal and the plaintiff is technically vulnerable to re-presentment, there is nothing to suggest that the chance of it is real.

Mr Black QC who with Mr Grant appeared for the plaintiff submitted that the Magistrate's refusal to uphold the submission as to jurisdiction at the committal proceedings and his decision to commit the plaintiff for trial remain as a "stain" on his character which he is entitled to have removed. He concedes that the matter of declaration is one for the discretion of the court and that the court is entitled to take into account that there is no "live" issue if it reaches such a conclusion. Mr Black QC submitted that there is a "living" issue because the "order" for committal stands even though the subsequent executive act means that the plaintiff will not stand trial. In *Marriner v Smorgon* [1989] VicRp 47; [1989] VR 485 the Full Court refused to act in circumstances where it considered that there was no practical purpose to be served by **[5]** setting aside a warrant which had been fully executed but which was irregular and should not have issued. The High Court ([1989] 63 ALJR 518) rescinded its grant of special leave to appeal from the decision of the Full Court stating that because the warrant was spent the proceeding had no practical purpose. I am of the view that no purpose would be served by making the declaration here. Mr Black QC submitted that this case is different from *Marriner* because the warrant there was executed and accordingly "spent".

It is true that the facts are different. The guiding principle is nevertheless the same. It is whether there is a "live" issue which the court is required to decide and alternatively whether any purpose is to be served by a court order or declaration. It is said that the purpose here is to remove the "committal" order and thus the stigma or stain on the reputation of the plaintiff. A similar, if not identical, submission was rejected by the Full Court in *Marriner* (see Murphy J at p491). A "stain" or "stigma" in itself is incapable of constituting a "live" issue in the relevant sense here. The court is not called upon to decide a question of "stain", "stigma" or other matter of reputation of the plaintiff. If it were, there might be other considerations to take into account for example, whether the acts of the plaintiff constituted some other offence or some other form

of reprehensible conduct. **[6]** In *Sun Life Assurance Company of Canada v Jervis* [1944] AC 111 at p113-114; 113 LJKB 174 Viscount Simon LC said:

> "I do not think that it would be a proper exercise of the authority which this House possesses to hear appeals if it occupies time in this case in deciding an academic question, the answer to which cannot affect the respondent in any way. If the House undertook to do so, it would not be deciding an existing *lis* between the parties who are before it, but would be merely expressing its view on a legal conundrum which the appellants hope to get decided in their favour without in any way affecting the position between the parties (at p114) ... I think it is an essential quality of an appeal fit to be disposed of by this House that there should exist between the parties a matter in actual controversy which the House undertakes to decide as a living issue."

Subsequently, in *Ainsbury v Millington* [1987] 1 All ER 929; [1987] 1 WLR 379 the House reaffirmed the above statement of principles by Lord Simon. Lord Bridge, who delivered the principal opinion, said at p381 (WLR); p930-1 (All ER):

> "It has always been a fundamental feature of our judicial system that the courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved."

In the result I am not persuaded that there is any longer before the court a "live" issue to which a declaration might properly be directed. If a contrary view were to be taken I would nevertheless regard the circumstances as persuasive of an exercise of discretion against making one. The power to make a declaration and the exercise by a court of its discretion to do so in circumstances **[7]** like the present was discussed by Mason J, as he then was, in *Sankey v Whitlam* [1978] HCA 43; (1978) 142 CLR 1 at pp81ff; 21 ALR 505; 53 ALJR 11; 37 ALT 122. At CLR p84 His Honour said:-

> "If the Magistrate, when he exceeds his jurisdiction, is subject to supervision by the prerogative writs, then there is little to be said for the view that the court should not intervene by making a declaration of right when the offence charged in the summons and information is one which is not known to the law".

It is this statement on which the plaintiff relied. However, earlier in his judgment Mason J referred to *Forster v Jododex Australia Pty Ltd* [1972] HCA 61; (1972) 127 CLR 421; [1972-73] ALR 1303; 46 ALJR 701 in which members of the High Court referred to Lord Radcliffe's observation in *Ibeneweka v Egbuna* [1964] UKPC 5; [1964] 1 WLR 219 at p225; 108 Sol Jo 114 that:

> "the power to grant a declaration should be exercised with a proper sense of responsibility and a full realisation that judicial pronouncements ought not to be issued unless there are circumstances that call for their making."

It goes without saying that it is also relevant to the exercise of my discretion that the Magistrate conducted the committal proceeding only to decide whether there was a case against the plaintiff which warranted his being put on trial. He made no determination of his guilt of the offence charged (see Mason J *ibid* at p82). At p82 Mason J said that all these factors:

> "... tend to indicate that a plaintiff for declaratory relief in relation to committal proceedings needs to show some special reason why the court should grant the relief sought in lieu of allowing the committal proceedings to pursue their ordinary course."

[8] While it may well be that want of jurisdiction, as is contended is the case here, constitutes "a special reason" such a reason may be thought to have evaporated once the charge is withdrawn. There can be little doubt that should there be a re-presentment on the same charge, a possibility which I regard as remote in the extreme, the plaintiff is not precluded from applying for appropriate relief. It is also to be observed that the defendant Magistrate performed no more than an administrative function. It was to "do all necessary acts" preliminary to the "committal hearing" and, if of a certain opinion, to "direct an accused person to be tried" (see s22A(e) and (f) *Magistrates' Courts Act* 1971). The statutory provisions governing preliminary examination by a Magistrate in proceedings for indictable offences are contained in Part V of the *Magistrates (Summary Proceedings) Act* 1975. Transcending the submissions of counsel for the plaintiff was the assumption, at times express and at others tacit, that the Magistrate had made a "committal

order". It was then contended that it was this "order" which the plaintiff sought to have removed or set aside. But the Magistrate did not, as I understand it, make an "order". The power which he exercised was pursuant to s59(7A) of the *Magistrates (Summary Proceedings) Act* 1975 to ".... direct that the accused person be tried for the offence at the next sittings of the Supreme Court or County Court". It follows that the Magistrate made no **[9]** "order" against the plaintiff nor any finding other than an opinion that "the evidence is of sufficient weight to support a conviction": (s59(7A)). This opinion, albeit that it may have been founded on the misapplication of s325 of the Crimes Act, has no legal adverse consequence for the plaintiff which has not been nullified by the *nolle prosequi*.

The plaintiff seeks an order for costs as also does the defendant. Although in the result I do not propose to make any declaration sought, it is substantially if not wholly due to the entry of the *nolle prosequi*. At the times that the originating motion and the summons were issued the Director had not responded to a request for entry of the *nolle* so that the proceedings can, in my opinion, be said to have been justified. However it does not follow that the plaintiff is entitled to costs against the defendant Magistrate. The ordinary rule is that a Magistrate performing a statutory function without clear perversity or serious misconduct is not vulnerable to an order for costs. Mr Dennis for the defendant referred to s101 of the *Magistrates' Courts Act* 1971 which provides:-

> "No justice shall be liable to any costs in respect or by reason of any decision judgment or order of the court or Judge upon any order to review or appeal."

Mr Dennis conceded, I think correctly, that it is unclear that s101 applies to the present proceedings which is not strictly speaking either a review or an appeal. However, the section gives some support to the **[10]** public policy considerations against an order for costs against a judicial officer performing in good faith his or her statutory functions. Assuming that s101 does not apply (which I find unnecessary to decide) I would not order costs against the Magistrate defendant. I was informed by counsel for the defendant that the Magistrate himself would not be required to pay the costs if an order was made as the Victorian Government Solicitor would indemnify him. Nevertheless, the matter must be decided according to principle. It would be contrary to the interests of justice that a Magistrate be personally vulnerable to an order for costs in the event that a *bona fide* ruling on a matter of law or expression of opinion on facts should come to be reversed by a superior court. Mr Dennis referred me to a line of cases in New South Wales which supports the proposition that an order for costs against a Magistrate will not ordinarily be made in the absence of perverse or shameful conduct (see *Ex parte Cox* (1896) 12 WN (NSW) 172; *Ex parte Blume; Re Osborn* [1958] SR (NSW) 334; *Ex parte Herman: Re Mathieson* (1961) 78 WN (NSW) 6 at p8, 10-11, 12; [1961] NSWR 1145; *Willesee v Willesee* [1974] 2 NSWLR 275 at p284-5; *Carr v Werry* [1979] 1 NSWLR 144 at p147; *Cummins v Mackenzie* [1979] 2 NSWLR 803 at p810-11).

So far as I am aware the so-called rule in New South Wales accords with the practice in Victoria. Mr Dennis on the other hand applied for costs against the plaintiff. He submitted that the defendant **[11]** was represented at this hearing solely on the question of costs and this resulted from communication on behalf of the plaintiff that costs against the defendant would be sought. Mr Dennis submitted that if he were successful, as he has been in this regard, then the plaintiff should pay costs of the appearance. His submission was based on the assumption that but for the application by the plaintiff for costs, the defendant would not have incurred the costs of representation at the hearing. No submissions were made on behalf of the defendant on any other matter save that at the invitation of the Court Mr Dennis made submissions in writing as *amicus curiae*. The latter resulted entirely from the invitation of the Court when I indicated that I would appreciate assistance in that capacity. No doubt there is some substance in the submissions on behalf of the defendant as regards costs. However, I have concluded that in the proper exercise of my discretion there should be no order. The plaintiff was justified in bringing the proceedings and having regard to subsequent events I am not disposed to order costs against the plaintiff merely on the basis that his application for costs against the defendant has not succeeded. The originating motion and summons are dismissed. I make no order as to costs.

APPEARANCES: For the plaintiff Edwards: Mr MEJ Black QC with Mr S Grant, counsel. Wisewould Schilling Cohen (as agents for Marshall Sheehan & Associates, solicitors. For the defendant Mr J Hutchins (Magistrate): Mr BM Dennis, counsel. AG McLean, Acting Victorian Government Solicitor.