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SUPREME COURT OF VICTORIA — FULL COURT

R v THE MAGISTRATES' COURT at PRAHRAN; ex parte HAMILTON & ANOR

Young CJ, Anderson and Brooking JJ

21 July 1980

CRIMINAL LAW – COMMITTAL PROCEEDINGS – HAND-UP BRIEF PROCEDURE – APPLICATION FOR ADJOURNMENT OF PROCEEDINGS NOT GRANTED – ACCUSED COMMITTED FOR TRIAL – ORDER NISI TO REVIEW GRANTED – NATURE OF COMMITTAL PROCEEDINGS – WHETHER COMMITTAL PROCEEDINGS ARE JUDICIAL – WHETHER *CERTIORARI* WILL GO TO QUASH AN ORDER FOR COMMITTAL.

1. *Certiorari* will not go to quash an order of committal. It has frequently been said that the function of a Magistrate in committal proceedings is not judicial but is executive or ministerial. This statement however does not of itself mean that the function is beyond the reach of the prerogative writs, for as Jordan CJ pointed out when delivering the judgment of the Full Court of New South Wales in *Ex Parte Cousens Re Blacket* (1946) 47 SR (NSW) 145 at p147; 63 WN (NSW) 228, "there are many cases in which persons performing executive functions are subject to the prerogative writs."

2. The executive or ministerial function of an examining Magistrate determines nothing save that in his opinion the evidence led by the prosecution is sufficient to put the accused upon his trial for an indictable offence. The order of committal, if made, does not determine the guilt or innocence of the accused: it does not even ensure that he will be presented for trial. That function lies within the province of the Attorney-General, the Solicitor-General and the Prosecutors for the Queen: *Crimes Act* 1958, s353.

3. Accordingly, an order quashing the order of committal would be of no effect and even if there were power to do so no such order should be made.

YOUNG CJ, ANDERSON and BROOKING JJ: This is the return of an order nisi for *certiorari* which was granted by Murphy J on 28th March 1980. The object of the proceedings was to quash certain orders for committal for trial made against the applicants on 10th December 1979 and we were told that the substantial ground sought to be relied upon was that at the hearing which preceded the making of the orders of committal the applicants were denied natural justice in that they were denied the opportunity to cross-examine witnesses upon whose evidence the Crown relied.

A number of circumstances giving rise to a good deal of suspicion surround the obtaining of the order nisi, such as the lapse of time between the making of the orders of committal and the application for the order nisi and the failure to disclose relevant information to the Judge to whom the application was made. Further, in disregard of rule 1(2) of Order 53 the order nisi was directed only to the tribunal whose order it was desired to have quashed and not to the party interested in resisting the application. Cf. *R v Australian Broadcasting Tribunal* [1980] HCA 13; (1980) 144 CLR 13; 29 ALR 289 at p306; (1980) 54 ALJR 314.

The application for an order nisi was supported by an affidavit sworn jointly by the applicants. This is undesirable in any event but we think that a separate order nisi should have been sought in respect of each order of committal, but in the view which we have formed as to the outcome of the proceedings, we find it unnecessary to consider the consequences of this departure from proper practice.

The facts deposed to in the joint affidavit of the applicants may be summarised as follows. The applicants were arrested on 13th April 1979 and charged with possession of Indian hemp (a summary offence) and with trafficking in Indian hemp (an indictable offence). Each was released on bail. In due course they retained Mr TF O'Brien, solicitor, and instructed him to brief counsel to appear on their behalf and to contest the committal proceedings. Mr Hampel QC, and Mr McGuinness were briefed for the male applicant and Mr Vernon for his wife. Mr Hampel raised the question of the wisdom of contesting the committal proceedings but was told that the instructions

to do so were maintained. The applicants were remanded to appear at the Prahran Magistrates' Court on 23rd July 1979. Late in the afternoon of 20th July 1979, the applicants were informed that certain material which they had been seeking from the police had been delivered to their instructing solicitor. On 23rd July 1979 the applicants and their counsel appeared at the Prahran Magistrates' Court. However, a third person charged with the applicants failed to appear and the police prosecutor applied to the Court for an adjournment until 10th December 1979. The applicants deposed that the police prosecutor said that a special fixture had been obtained for the hearing of the contested committal proceedings.

The applicants further deposed that they wrote a letter of complaint to "the Victorian Attorney-General's Department" about certain occurrences at the Melbourne Magistrates' Court on 24th July when the applicants appeared on other charges and were represented by the same counsel. They also said that they were told by Mr O'Brien that Inspector Horman, the police officer in charge of the prosecution of committals at Prahran Committals Court, had untruly told Mr Hampel and Mr Vernon that the applicant's letter to the Attorney-General's Department contained allegations of impropriety on their part in the conduct of the applicants' affairs. Counsel advised Mr O'Brien that they were embarrassed by these allegations and could no longer act for the applicants.

A remarkable feature of the case is that no copy of the applicants' letter to the Attorney-General was placed before Murphy J. Mr O'Brien saw it for the first time on 5th December 1979 and in an affidavit filed in reply after the granting of the order nisi deposed, "I can only state that I was under strict instructions not to exhibit that letter at that stage of the proceedings" (i.e. to his affidavit sworn in support of the application for an order nisi). Such a reason for not exhibiting a material document in *ex parte* proceedings is quite unacceptable and ignores altogether the duty of the legal practitioner to the Court. It is axiomatic that in *ex parte* proceedings the utmost good faith is essential. Similarly Mr O'Brien did not disclose to Murphy J that on 12th July 1979 he had by letter stated his willingness to accept short service of documents "whether by way of hand up brief or otherwise" or that on 20th July 1979 his associate had signed two consents to short service of the "hand-up briefs".

The applicants deposed in their affidavit founding the application for an order nisi that when, on 5th December 1979 Mr Hampel and Mr Vernon learned of the true contents of the applicants' letter they ceased to be embarrassed but could not appear on 10th December because they had in the meantime accepted other professional engagements for that and the following days.

In these circumstances the applicants instructed Mr O'Brien to make a special application to the Prahran Magistrates' Court for an adjournment of the committal proceedings to a date convenient to their counsel. Such an application was made but it was refused. Thereupon no attempt appears to have been made to instruct other counsel except that late on 9th December 1979. Mr Kelly QC and Mr Dee were briefed to make a further application for an adjournment on the following morning and if unsuccessful to make application to the Supreme Court for an order nisi for a writ of prohibition. On the morning of 10th December 1979 Mr Kelly appeared at the Prahran Magistrates' Court and applied for an adjournment of the proceedings. This application was refused and Mr Kelly and Mr O'Brien went to the Practice Court where Mr Dee was waiting. Before an application for prohibition could be made, however, the applicants advised their legal advisors that they had each been committed for trial pursuant to what is usually called the "hand-up brief procedure" (i.e. pursuant to ss45 and 46 of the *Magistrates (Summary Proceedings) Act* 1975 (No. 8731)). We ultimately discovered when the Register of the Prahran Magistrates' Court was produced in this Court that each applicant had been committed for trial at the County Court at Melbourne commencing on the 14th January 1980, on a charge of trafficking in Indian hemp. Each applicant was released on bail.

The order nisi granted by Murphy J called upon the Magistrates' Court at Prahran constituted by Mr GP Murphy SM to show cause before the Court why —

> "1. A Writ of *Certiorari* should not issue directing that the record of the Magistrates' Court at Prahran in the matter of a committal for trial of Ronald John Hamilton and Shirley Margaret Hamilton made on the 10th December 1979, be brought into this Court and directing that the said committal proceedings, the committals and the consequent orders made thereon be quashed;

2. Such further or other relief should not be granted, as the Court thinks proper in the circumstances on the following ground, namely that the said Magistrates' Court had failed to observe the principles of natural justice and/or exceeded its jurisdiction, in that it had:

(a) refused an application to adjourn the said committal proceedings;

(b) refused to stand down the said committal proceedings until 2.15 pm. of the 10th December 1979 so as to enable Counsel appearing for the said Ronald John Hamilton and Shirley Margaret Hamilton to make an application to the Supreme Court of Victoria for an Order Nisi for a Writ of Prohibition;

(c) Dealt with the said committal proceedings on the basis of the information contained in the 'hand-up' brief pursuant to ss45 and 46 of the *Magistrates (Summary Proceedings) Act* 1975 (No. 8731) although it was at all material tinges known to and understood by all parties to the committal proceedings that the said proceedings would be fully contested, that witnesses for the prosecution would be examined *viva-voce* and cross-examined and that the Defendants would tender their own evidence;

(d) Further or alternatively to (c), followed, in the events that have happened, the 'hand-up' brief procedure pursuant to ss45 and 46 of the said Act which was not available in the said committal proceedings;

(e) Used, in the circumstances prevailing at the said committal proceedings on the 10th December 1979, the said 'hand-up' brief procedure, when it knew or must be taken to have known that the committal proceedings would have been finalised and Orders for Committal would have been made before an Order Nisi for a Writ of Prohibition could have been obtained, thus rendering the application for the said Order Nisi (and the costs thereby incurred) futile;

(f) Made it impossible for the said Ronald John Hamilton and Shirley Margaret Hamilton to be represented by and have the advice or assistance of a barrister or solicitor fully instructed and conversant with all details of the Defendants' case;

(g) Not given the said Ronald John Hamilton and Shirley Margaret Hamilton a real opportunity to put any matters in defence or to give or call evidence on their own behalf."

His Honour also ordered that "until the hearing and determination of this matter or until further order all proceedings against the said Ronald John Hamilton and Shirley Margaret Hamilton in respect of the said committals or of their consequential orders be stayed."

Murphy J took the unusual course of delivering reasons for judgment when granting the order nisi. In so doing His Honour was necessarily proceeding upon an account of the facts by one side only and as we have already observed certain material facts were not disclosed to him. Upon that one-sided view of the facts his Honour made some strong comments in favour of the applicants' case. We are satisfied that His Honour would not have made these comments if he had had a fuller statement of the facts before him. Not surprisingly His Honour's remarks attracted considerable publicity in the Press. We have reached a clear conclusion that *certiorari* will not go to quash an order of committal and accordingly the order nisi must be discharged. It is therefore unnecessary for us to hear further argument in the matter or to resolve any of the other questions which the proceedings raise. It will be sufficient if we give our reasons for the conclusion that *certiorari* will not go to quash an order of committal.

It has frequently been said both in this Court and elsewhere that the function of a Magistrate in committal proceedings is not judicial but is executive or ministerial. This statement however does not of itself mean that the function is beyond the reach of the prerogative writs, for as Jordan CJ pointed out when delivering the judgment of the Full Court of New South Wales in *Ex Parte Cousens Re Blacket* [1946] NSWStRp 36; (1946) 47 SR (NSW) 145 at p147; 63 WN (NSW) 228, "there are many cases in which persons performing executive functions are subject to the prerogative writs."

The executive or ministerial function of an examining Magistrate, however, determines nothing save that in his opinion the evidence led by the prosecution is sufficient to put the accused upon his trial for an indictable offence. The order of committal, if made, does not determine the guilt or innocence of the accused: it does not even ensure that he will be presented for trial. That function lies within the province of the Attorney-General, the Solicitor-General and the Prosecutors for the Queen: *Crimes Act* 1958, s353.

The earliest Victorian case to which we were referred was *Kennedy v Purser* [1898] VicLawRp

113; (1898) 23 VLR 530; 4 ALR 54. In that case the defendants were charged with a breach of the *Unlawful Assemblies and Processions Act* 1850 and they were committed for trial by one of the justices of the peace sitting in the Brunswick Court of Petty Sessions. They were released on bail and obtained an order nisi under s141 of the *Justices Act* 1890 (see now s88 of the *Magistrates' Courts Act* 1971) to review the justice's decision upon the ground that the justice was biassed. The Full Court held that an order to review could not be obtained because the order made by the justice did not determine anything. Next, we were referred to *R v Woodhouse* [1919] VicLawRp 105; (1919) VLR 736; 25 ALR 415; 41 ALT in which it was held by the Full Court of this Court that the withdrawal of a charge before justices in the case of an indictable offence where the justices have no summary jurisdiction and before the prisoner has pleaded is not a bar to a subsequent presentment for the same alleged offence. It was contended that the withdrawal of the charge was equivalent to a dismissal, but the Court said that, even if that were so, a dismissal would be of no effect because the Magistrates had no power to hear the case summarily. As the Magistrates had no jurisdiction to hear and determine the matter, their decision could not be pleaded by way of *autrefois acquit* to any subsequent proceedings.

In the following year in *Cox v Duke* [1920] VicLawRp 32; (1920) VLR 152; 26 ALR 82, Mann J (as he then was) held that a refusal by justices to commit for trial could not be called in question by way of order to review in the Supreme Court because the refusal to commit was not an order within the meaning of the relevant section of the *Justices Act* 1915. (Cf. *Byrne v Baker* [1964] VicRp 57; (1964) VR 443). Finally, in this Court, there is the decision of Winneke CJ, Smith and Gowans JJ in *Phelan v Ellen* [1970] VicRp 28; (1970) VR 219. In that case the defendant was charged in a court of petty sessions with an indictable offence but upon learning what evidence the prosecutor proposed to adduce, the Magistrate held that it would not support the charge and accordingly struck out the information. An attempt was made to review the Magistrate's decision but this Court held, after considering the Victorian authorities to which we have referred, that an order committing or refusing to commit was and had for a very long time, been regarded as not judicial but ministerial and was accordingly not an order which could be reviewed pursuant to s155 of the *Justices Act* 1958 (now s88 of the *Magistrates' Court Act* 1971). This formidable body of authority would certainly require us to hold that an order of committal for trial for an indictable offence was a ministerial and not a judicial order and although we are not technically bound to follow the decisions of the Full Court of the Supreme Court of New South Wales, the decision of that Court in *Ex parte Cousens* (*supra*) carrying the high authority of Jordan CJ, would go far to incline us to take the further step of holding that *certiorari* does not go to quash such an order. Indeed the cases in this Court alone almost necessarily involve the same conclusion.

In *Ammann v Wegener* [1972] HCA 58; (1972) 129 CLR 415; [1972-73] ALR 675; 46 ALJR 638 where the question for decision was whether a summons requiring a person to appear and give evidence on a preliminary examination of a person charged with an indictable offence could be validly enforced by further process under the *Service and Execution of Process Act* 1901–1968 (Cth), Gibbs J (at p435) dealt with the submission that a Magistrate who conducts a preliminary examination for the purpose of deciding whether a person charged with an indictable offence should be committed for trial is performing a ministerial and not a judicial function and His Honour observed that the proposition was supported by a considerable body of authority to which he referred. Walsh and Stephen JJ agreed in His Honour's reasons.

In Victoria on the other hand a presentment may be filed notwithstanding that there has been no order of committal. The nature of committal proceedings in Victoria has recently been described by Anderson J in *Summers v Cosgriff* [1979] VicRp 56; (1979) VR 564 at p568 as follows:

> "Committal proceedings are of different order. Nothing is determined with any finality in respect of an indictable offence which is being investigated in committal proceedings before justices. The accused is not asked to plead to any charge until the evidence which the prosecutor intends to lead has been tendered. Before an accused person is asked to plead, it may happen that the information as originally laid is amended or a fresh information, considered as appropriate in light of the evidence tendered, may be substituted. No question of the accused being taken by surprise arises in the sense that there is any final determination of the issue without the accused knowing what the charge he has to answer is, or without his being afforded an opportunity to prepare and present his defence. 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. Sections 43 to 75 of the *Magistrates (Summary Proceedings) Act* 1975 set out in most detailed form the code

> which governs committal proceedings, and the procedures, though overhauled as recently as 1975, have remained in substantially the same form for well over one hundred years. Section 56(3) and other sections in terms provide for adjournments to enable an accused to take legal advice after he has pleaded, and to call witnesses and give evidence himself, if he so desires. Even if he does call witnesses or himself give evidence, nothing is finally determined. If the justices decide not to commit him for trial, the Attorney-General may nevertheless present him for trial. If the justices decide to commit him for trial, the Attorney-General may decide not to present him for trial."

If the law which has been so understood for very many years is to be changed so as to afford this Court the power to issue a writ of *certiorari* to quash an order of committal we think that it should be changed by the Legislature, after considering the opportunities for delaying and disrupting the administration of the criminal law, which the grant of such a power might afford, and not by the Court.

These proceedings are an example of how the procedure may be used to delay the processes of the criminal law. We were told by counsel for the respondent that that part of the order nisi which read "until the hearing and determination of this matter or until further order all proceedings against the said Ronald John Hamilton and Shirley Margaret Hamilton in respect of the said committals or of their consequential orders be stayed" had been construed by the Crown as precluding the Crown from presenting the applicants for trial.

Somewhat surprisingly counsel for the applicants conceded that the order did not have that effect. At the conclusion of the argument we indicated to counsel that if the applicants were in fact presented for trial the Court might think it inappropriate to give a decision on the question that had been argued. Counsel then indicated that the applicants would not be presented pending the delivery of this Court's judgment.

In the circumstances it is unnecessary for us to reach a conclusion as to the proper construction and operation of the order nisi. But the concession made by counsel for the applicants may be said to underline the futility of the proceedings. An order quashing the order of committal would be of no effect and accordingly even if there were power to do so no such order should be made. *Lex nil frustra facit.* The order nisi will be discharged with costs.
