64/78

SUPREME COURT OF VICTORIA

SUMMERS v COSGRIFF

Anderson J

18-19, 29 September 1978 — [1979] VicRp 56; [1979] VR 564

CRIMINAL LAW – COMMITTAL PROCEEDINGS – BREACHES OF THE *SECURITIES INDUSTRY ACT* 1975 – REQUEST FOR FURTHER AND BETTER PARTICULARS OF THE ALLEGED OFFENCES – NATURE OF COMMITTAL PROCEEDINGS – WHETHER COMMITTAL PROCEEDINGS ARE JUDICIAL OR MINISTERIAL OR ADMINISTRATIVE IN NATURE – REQUEST REFUSED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR.

HELD: Appeal dismissed.
1. The non-supplying of particulars in the committal proceedings, even the rejection of evidence at the committal proceedings, cannot control what may happen at the trial. The committal proceedings are in effect a means of supplying an accused person with further particulars and is the alternative in the criminal sphere to the provisions relating to the rules in civil proceedings for the supplying of further particulars.

2. Though no provision is made in the *Magistrates (Summary Proceedings) Act* 1975 for requesting particulars and for the supplying of such particulars, if particulars are necessary to enable the accused to know what charge he has to meet then they may be ordered, and, in keeping with the investigative nature of the proceedings, particulars may be ordered in a particular case but the accused has no right to particulars in every case, nor is the accused entitled to determine what further particulars he should have.

3. The magistrate in the present case had a discretion as to whether he would order further particulars of the charges. The magistrate, who took time to consider his decision clearly exercised that discretion in a manner that did not justify interference. As it had not been shown that he acted upon a wrong principle, or that he mistakenly gave weight to extraneous or irrelevant matters, or failed to give weight or sufficient weight to relevant considerations, or made a mistake as to the facts, the strong presumption in favour of his decision must prevail unless the decision and its consequences had been shown to be so plainly unreasonable and unjust that in the interests of justice it was imperative for the Supreme Court to interfere. None of these blemishes appeared in the magistrate's decision.
***Australian Coal and Shale Employees Federation v Commonwealth* [1953] HCA 25; (1953) 94 CLR 621; and**
***Atkinson v Atkinson* [1969] VicRp 34; (1969) VR 278, at 279; [1969] ALR 269; (1968) 13 FLR 322, applied.**

ANDERSON J: In this action the plaintiffs, Anthony Gilbert Summers and Intensive Industries Pty Ltd seek declarations and orders, including the issue of a writ of mandamus, in circumstances which are somewhat unusual. The defendants are Brian John Cosgriff, a Stipendiary Magistrate, and Leo Valentine Marchesi the Deputy Commissioner of Corporate Affairs.

The action arises in this way. The defendant Marchesi, on 15 May 1978, laid three informations against the plaintiff Summers, alleging breaches by him of s11C of the *Securities Industry Act* 1975. Marchesi also laid three informations against the second plaintiff Intensive Industries Pty Ltd on the same day alleging breaches of s112 of the Act. Because of the titles of the parties in this action and the pending prosecutions being likely to create confusion, I shall hereafter, except where otherwise indicated, refer to the Magistrate as such, to the plaintiffs as the accused and to Marchesi as the informant.

The summonses issued in respect of the above mentioned informations were returnable on 17 July 1978 before the Magistrates' Court at Melbourne, and came on for hearing before the magistrate sitting alone. As the alleged offences were indictable the proceedings were a magisterial inquiry to determine whether the accused should be committed for trial before the Supreme Court or the County Court on the evidence tendered by the prosecution. Prior to the return date, the

accused applied in writing to the informant for further and better particulars of the alleged offences. The notice seeking such further and better particulars resembled the conventional verbose request often found in such notices and interrogatories in civil actions. The requests were not complied with by the informant, and on the return date, 17 July, counsel for the accused made application to the magistrate for an order requiring the giving of such particulars. The magistrate refused to make an order for further particulars, and adjourned the proceedings, to enable the accused to seek orders from this Court requiring the supply of further particulars.

I heard extensive argument on a variety of aspects of the cases, but eventually it transpired that the only matter in issue between the parties was whether this was a case in which the Court should order further and better as to whether committal proceedings are judicial or ministerial or administrative in nature.

Mr Charles QC, with whom Mr Dowling appeared, submitted on behalf of the accused that the charges and the law relating to them were most complex and that the accused were entitled to know, before the preliminary hearing began, what particular facts were alleged so that Counsel might get instructions from their clients and so be enabled to cross-examine witnesses adequately and also prepare their clients' defence, into which they were entitled to enter, and might enter, in the course of the preliminary hearing, in an endeavour to persuade the magistrate not to commit for trial.

He referred to many cases where English and Australian Courts had repeatedly said that it was the duty of tribunals, whether judicial, administrative or ministerial to act fairly. Depending on the circumstances of the case, one of the relevant considerations is that particulars in a charge should be sufficiently explicit to enable a party against whom allegations are made (and whether the proceedings are before a court properly so described or other tribunal acting in a judicial capacity or otherwise) to understand the case which the party has to meet and to prepare his answer and his own case. (*Halsbury's Laws of England*, 4th ed., Vol 1, para.75, p92; *Wood v Wood* (1874) LR 9 Ch 190, at p196; *R v Thames Magistrates Court* (1974) 2 All ER 1219, at p1223; [1974] 1 WLR 1371. In our own courts there are observations of a similar nature. The cases are numerous, e.g. *R v Magistrates' Court at Heidelberg; ex parte Karasiewicz* [1976] VicRp 73; (1976) VR 680; and cases referred to therein; *Lodge v Lawton* [1978] VicRp 10; (1978) VR 112, *Heatley v Tasmanian Racing and Gaming Commission* [1977] HCA 39; (1977) 137 CLR 487; (1977) 51 ALJR 703, (1977) 14 ALR 519; *Ex parte Graham Re Dowling* (1968) 88 WN (NSW) 270, at pp280-1, 283; and there are many others.

One consideration to be noted is the nature of the proceedings, and it is relevant to observe that in almost all the cases in which it has been held that fairness required the furnishing of further particulars, the proceedings, whether before a court or some less formal tribunal, were cases to be dealt with by a decision of the tribunal which would, subject to appeal, finally determine the matter. Committal proceedings are of a 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.

He may be presented for trial on quite different charges from those on which he was committed. Evidence additional to what was given at the committal proceedings may be given on the trial, of which due notice is given by the Crown. A person may be presented for trial without any committal proceedings. All these features of committal proceedings emphasise the investigatory, tentative and non-conclusive nature of committal proceedings. At the committal proceedings, the accused cannot, so to speak, call the tune, as indicated in *R v Epping and Harlow Justices ex parte Massaro* [1973] QB 433; (1973) 1 All ER 1011, where on committal proceedings it was held that the accused, desiring to cross-examine the prosecutrix, was not entitled to require her to be called as a witness though she was available.

Assuming a prosecutor did supply further particulars and thereafter sought to lead evidence not included in the particulars but germane to the charge, he would not be precluded from leading such evidence. His leading it would be the supplying of still further particulars and the accused would be the better informed of what was alleged against him so that when all the evidence was in he would make his decision as to whether he would lead evidence in rebuttal, seeking an adjournment as the Act allows if he thought fit. The non-supplying of particulars in the committal proceedings, even the rejection of evidence at the committal proceedings, cannot control what may happen at the trial. The committal proceedings are in effect a means of supplying an accused person with further particulars and is the alternative in the criminal sphere to the provisions relating to the rules in civil proceedings for the supplying of further particulars.

Though no provision is made in the Act for requesting particulars and for the supplying of such particulars, if particulars are necessary to enable the accused to know what charge he has to meet then they may be ordered, and, in keeping with the investigative nature of the proceedings, particulars may be ordered in a particular case but the accused has no right to particulars in every case, nor is the accused entitled to determine what further particulars he should have. In this respect, the observations of Walsh JA in *Ex parte Donald; Re McMurray* (1968) 89 WN (NSW) 462; at p470, are relevant. In a case where several accused persons were charged with conspiracy and had sought particulars of the overt acts relied on by the prosecution and the magistrate had refused to order further particulars, His Honour said:

> 'I think that, in any case in which it appears that the giving of particulars is necessary for a proper performance of the duty to"take the evidence", including, as it does, the duty to allow the defendant to examine and cross-examine witnesses and to give evidence himself, the magistrate has an inherent power to order the giving of particulars ... the applicants were not entitled as of right to have the order for particulars made. Assuming the existence of the power to make it, the exercise of that power was, in my opinion, a matter of discretion of the Magistrate. In my opinion, although it may be proper to regard him as having an inherent power, there is no warrant for implying a mandatory obligation to order particulars, whether in a conspiracy case or any other cases to which committal proceedings relate.'

In *Ex parte Donald's case*, the majority of the Court of Appeal (Walsh and Holmes JJA) held that the magistrate had exercised his discretion, and was not shown to have wrongly exercised it, and they left the refusal of the magistrate to order particulars undisturbed. Wallace JP dissented because he was of opinion that the magistrate had not in fact exercised his discretion. Subsequently, in *Ex Parte Coffey, Re Evans* (1971) 1 NSWLR 434 at pp451 and 460, the Court of Appeal (comprising Herron CJ, Holmes and Moffitt JJA) affirmed the position as predicted by Walsh JA in *Ex parte Donald, Re Murray*. These and other cases emphasise the distinction between trial proceedings where on the one hand an issue is determined, and committal proceedings, where nothing is determined. The relevant legislation in New South Wales is a close parallel to the Victorian legislation, and I adopt with respect what Their Honours said.

I have not overlooked what Samuels JA said in *Maddison v Goldrick* (1976) 1 NSWLR 651, at pp659-660, concerning the possible incarceration of a person committed for trial. Such a consideration may, however, have the effect of distorting the nature of committal proceedings and tend to transform them into a trial which they are not. I emphasise that, in a proper case, the justices have a discretion to adjourn and to order further particulars. However the purpose and nature of the particular proceedings under consideration is relevant. To quote the words of

Kitto J in *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* [1963] HCA 41; (1963) 113 CLR 475, at pp503-4; [1964] ALR 517; (1963) 37 ALJR 182; 13 ATD 135; 9 AITR 133;

> 'The books are full of cases which illustrate both the impossibility of laying down a universally valid test by which to ascertain what may constitute such an opportunity (of being fair) in the infinite variety of circumstances that may exist, and the necessity of allowing full effect in every case to the particular statutory framework within which the proceeding takes place. By statutory framework I mean the express and implied intention to be drawn from the circumstances to which the Act was directed and from its subject matter.'

It is evident from what I have said, I am of opinion that the magistrate in this case had a discretion as to whether he would order further particulars of the charges. I think that the magistrate, who took time to consider his decision clearly exercised that discretion in a manner that does not justify interference. I do not think that a piecemeal examination of the words he used when giving his decision reveals any error on his part. As it has not been shown that he acted upon a wrong principle, or that he mistakenly gave weight to extraneous or irrelevant matters, or failed to give weight or sufficient weight to relevant considerations, or made a mistake as to the facts, the strong presumption in favour of his decision must prevail unless the decision and its consequences have been shown to be so plainly unreasonable and unjust that in the interests of justice it is imperative for this Court to interfere; *Australian Coal and Shale Employees Federation v Commonwealth* [1953] HCA 25; (1953) 94 CLR 621, at p627 per Kitto J and other cases quoted in *Atkinson v Atkinson* [1969] VicRp 34; (1969) VR 278, at p279; [1969] ALR 269; (1968) 13 FLR 322. To my mind, none of these blemishes appears in the magistrate's decision.

If indeed, I had to determine whether the magistrate, as a matter of fairness to the accused, should have exercised his discretion otherwise, I am inclined to the view that I would have reached the same conclusion as the magistrate did.

I must confess I found it difficult to appreciate why the accused were labouring under such a disability, having regard to the nature of the proceedings and to the admitted fact that Summers was at the relevant time a director of both Australian Bacon Ltd and Intensive Securities Pty Ltd, from which fact it may readily be assumed that he would be aware of a variety of circumstances in relation to both companies. The charges are to my mind sufficiently explicit, for they relate to the securities of Australian Bacon Ltd and they give as well the short periods during which each of the offences is alleged to have been committed. It is being somewhat naive to say at the present stage that the accused are being treated unfairly in not being provided with further particulars of what Summers is alleged to know about the affairs of the two companies of which he was a director and the dealings by one company in the shares of the other.

From what I have said it will appear that the plaintiffs have not been successful in their action, which is accordingly dismissed. Judgment for the defendants. Order that the plaintiffs pay the defendant's costs.

Solicitors for the plaintiffs: Mallesons. Solicitor for the second named defendant: L. La Fontaine.
