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MAGISTRATES' COURT AT PRAHRAN

LAWRENCE & ORS v ISRAEL

M Gerkens SM

18 May 1982

COMMITTAL PROCEEDINGS – HAND-UP BRIEF PROCEDURE – EXTENT TO WHICH STATUTORY PROVISIONS REGARDING COMMITTAL PROCEEDINGS MODIFY THE COMMON LAW: *MAGISTRATES (SUMMARY PROCEEDINGS) ACT* 1975, SS45, 46.

Where in committal proceedings an informant serves a hand-up brief and notice under s45(9) of the *Magistrates (Summary Proceedings) Act* 1975 ('Act'), and wishes to rely on the evidence of certain witnesses, it is open to the informant to arrange for the required witnesses to be present to give evidence. If being prepared to proceed without their evidence, the informant takes all the risks appointed with that course. The prosecution in the present case is not obliged to call the witnesses required by notice under s45(9) of the Act unless they intend to rely on their evidence. If they do not call them their case stands or falls on the evidence which they do call.

M GERKENS SM: The real question involved in this matter is the extent to which the hand-up brief provisions contained in ss45, 46 etc. of the *Magistrates (Summary Proceedings) Act* 1975 modify the common law. The common law position in England was enunciated in *R v Epping and Harlow Justices: ex parte Massaro* [1973] QB 433; [1973] 1 All ER 1011. In that case the prosecution did not wish to subject a young female victim of an alleged indecent assault to the traumatic experience of being cross-examined both at the preliminary hearing and at the trial. Against the wishes of defence counsel who wanted to cross-examine her, she was not called and the matter went to *certiorari*. Lord Widgery CJ, (Ashworth and Willis JJ concurring) said:

> "Thus stated, this as a point is a very short one: what is the function of the committal proceedings for this purpose? Is it, as the prosecution might contend, simply a safeguard for the citizen to ensure that he cannot be made to stand his trial without a *prima facie* case being shown; or is it, as Mr Beckman would contend, a rehearsal proceeding so that the defence may try out their cross-examination on the prosecution witnesses with a view to using the results to advantage in the Crown Court at a later stage? This matter has never been raised to be the subject of authority, and that was another reason why leave was given in the present case. For my part I think it is clear that the function of committal proceedings is to ensure that no one shall stand his trial unless a *prima facie* case has been made out. The prosecution have the duty of making out a *prima facie* case, and if they wish for reasons such as the present not to call one particular witness, even though a very important witness, at the committal proceedings, that in my judgment is a matter within their discretion, and their failure to do so cannot on any basis be said to be a breach of natural justice."

Mr Slade suggests that the law in Australia has taken a different direction and he has referred me to the decision of the High Court of Australia in *Barton & Anor v R*; *Gruzman v The Attorney-General (NSW) & Ors*; *Barton v Walker* [1980] HCA 48; [1980] 147 CLR 75; (1980) 32 ALR 449; (1981) 55 ALJR 31. It should be noted first that the High Court was deciding not what the function of committal proceedings is but rather whether or not *ex officio* informations laid by the Attorney-General for New South Wales should proceed to trial without preliminary hearings having taken place at all. Nevertheless, there are a number of passages in the judgments (especially those of Gibbs and Mason JJ) which refer to the objects of preliminary hearings.

I propose to quote from one passage at p37:

> "Then Mr Shand says that there can be no unfairness to the accused in dispensing with committal proceedings because the nature and purpose of such proceedings, as provided for in the *Justices Act*, is merely to ensure that "no one shall stand his trial unless a *prima facie* case has been made out" (*R v Epping Harlow Justices, Ex parte Massaro* (1973) QB 433, at p435; [1973] 1 All ER 1011, per Lord Widgery CJ): See also *In re Van Beelen* (1974) 9 SASR 167 at pp244-247. Similarly, in *Moss v Brown* (1975) 1 NSWLR 114, the Court of Appeal held (1) that the nature and purpose of a magisterial

> inquiry, as provided for in s41 of the *Justices Act*, is to receive, examine and permit the testing of evidence introduced by the prosecutor, in order to determine whether there is sufficient evidence to warrant the person charged being put on trial and, if not, to discharge that person; and (2) that it is not part of the function of the inquiry to ensure that the tactical objectives of either party are served. The consequence was that it was not open to the defendants to argue that the magistrate, by not serving these objectives, had so conducted the inquiry as to deny them justice. At the same time, the Court of Appeal expressly recognised (at p120) that, if material not presented at the inquiry was used at the trial in a manner which was unfair to the accused, the trial judge would have power to deal with the situation. These cases do not establish that there can be no unfairness or abuse of process in proceeding to trial without a preliminary examination. On the contrary, they show that the principal purpose of that examination is to ensure that the accused will not be brought to trial unless a *prima facie* case is shown or there is sufficient evidence to warrant his being put on trial or the evidence raises a strong or probable presumption of guilt (*Justices Act*, s41(6)). For this reason, apart from any other, committal proceedings constitute an important element in the protection which the criminal process gives to an accused person."

By those words, their Honours seem to me to be accepting the authority of *Massaro's case* and indeed the authority of *In re Van Beelen* (1974) 9 SASR 163 and *Moss v Brown* (1979) 1 NSWLR 114 and, where they go on further to discuss denial of rights to the accused, they are discussing not the fact that he has not had a preliminary hearing according to the principles laid down in *Massaro* but rather that he has not had a preliminary hearing at all. In other words they are saying that, in normal circumstances, a person should not stand trial unless he has had the benefit of committal proceedings at which sufficient evidence was called to warrant committal and that, in relation to that evidence he has had the opportunity to hear and cross-examine, the opportunity to call evidence in rebuttal and the opportunity of obtaining a discharge based on that evidence. I am satisfied that *Barton's case* does not alter the function of committal proceedings as laid down in *Massaro's case*.

The problem then is to determine how far the common law situation is affected by the hand-up brief provisions. It should be noted that those provisions are machinery provisions introduced for the purpose of expediting preliminary hearings and should not be taken as abrogating the common law position unless they do so in the clearest terms. Under s45(2) of the Act, "the informant may" proceed by way of serving the relevant documents on the accused and the provision goes on to talk about the documents he proposes tender, Clearly, at that stage, there is a discretion in the informant whether or not to so proceed.

Under s46(1), the informant at the preliminary examination "may tender in evidence any statement a copy of which has been served ...". Once again there appears to be a discretion resting with the informant as to whether he wishes to continue with the procedure. It would appear however that the discretion disappears at that stage if notice under s45(9) has been given as the, statements would then be inadmissible. A strict reading of ss46(1) and 45(9) leads to the curious conclusion that, if the notice under s45(9) is for cross-examination only, the statements, which constitute the evidence in chief, cannot be tendered.

Where notice is given under s45(9), for all practical purposes, the hearing, in relation to the witnesses who are the subject of the notice, becomes a normal preliminary hearing as the statements become inadmissible and the prosecution is forced to rely on the *viva voce* evidence of the witnesses. The defendant is therefore in no worse position than he would have been had the prosecution not exercised its discretion in the first place. Indeed he is better off because he has the advantage of prior knowledge of the witnesses' statements to the police. With the possible exception of sub-sections (8) & (9) of s45 then, it is difficult to see how the legislation effects any change to the principles laid down by Lord Widgery in *Massaro*.

I turn to those sub-sections. If they are taken out of context, it seems open to say that, where notice is given, the informant must arrange for the witnesses to be present to give evidence. On the other hand, it seems to me equally open to say that the sub-sections have to be interpreted in the overall context of the hand-up brief provisions which clearly give to an informant a discretion as to whether he will so proceed in the first place and, if he does and notice requiring witnesses is not given, a further discretion at the hearing as to whether he will continue the procedure or call witnesses in the normal way. Interpreted in that context, it seems to me open that where an informant serves a hand-up brief and serves notice under s45(9), he might arrange for the required witnesses to be present to give evidence if he wishes to rely on the evidence of those witness. If

being prepared to proceed without their evidence, then he takes all the risks appointed with that course. Given that both interpretations of the legislation are open, it seems to me that I should choose the one which does not conflict with the common law and I find that the prosecution in this case are not obliged to call the witnesses required by notice under s45(9) unless they intend to rely on their evidence. If they do not call them of course, their case stands or falls on the evidence which they do call.
