60/87

SUPREME COURT OF VICTORIA

HIGGINS and ORS v TOBIN and WINN

Nathan J

5 November 1987

PROCEDURE – COMMITTAL PROCEEDINGS – DELAY IN INSTITUTING PROCEEDINGS – APPLICATION TO STAY PROCEEDINGS TO PREVENT ABUSE OF PROCESS – WHETHER COMMITTAL COURT HAS POWER TO STAY PROCEEDINGS.

1. The investiture of magistrates with the authority and responsibility to hear committal proceedings, takes with it the concomitant power to prevent those proceedings being used in a way which abuses the legal process.

2. Accordingly, a magistrate was in error in refusing or declining to exercise his power to stay committal proceedings on the ground that they amounted to an abuse of the court's processes by being instituted after an unreasonable and unconscionable delay.

NATHAN J: *[After holding that he possessed supervisory powers in respect of committal proceedings, His Honour continued]* … **[5]** I turn now to deal with the plaintiff's secondary contention, which is that the Magistrate himself had the power to refrain from continuing as to do so would amount to an abuse of the processes of his jurisdiction. This issue has not been faced by the Full Court of this State, although it has been considered more specifically in New South Wales and South Australia. I shall turn to examine those decisions, but prior to doing so, I observe the English cases are of no assistance here due to the particularities of the English legislation.

It was contended before me that committal proceedings should be regarded *sui generis* with regard to abuse of process applications. Committals when received historically, arise out of and in replacement of the grand jury process. The Magistrate should be seen as a delegate or surrogate of the Supreme Court, deciding the threshold issue of whether there is sufficient evidence to warrant trial. It was put that as the Magistrate does not finally adjudicate upon any triable issue, he is in a separate class. It was put that a Magistrate's jurisdiction in **[6]** respect of indictable offences for which committal proceedings are held, that is either consensual, that is acceded to by the defendant, or ultimately exercised as a deputy of a superior court. It was contended that there are distinguishing features of committal proceedings and as such, the Supreme Court, should not be seen to have divested itself of supervisory functions in favour of the Magistrate himself.

The nature of committal proceedings has been often considered and I need only refer to *Sankey v Whitlam* [1978] HCA 43; (1979) 142 CLR 1; 21 ALR 505; 53 ALJR 11; 37 ALT 122; *Murphy v R* (1985) 59 ALR 682. Both cases confirm the characterisation already referred to by Anderson J in *Summers v Cosgriff* [1979] VicRp 56; (1979) VR 564 that is, issues before a Magistrate are not finally judicially determined; the proceedings should be seen as an exercise of executive or quasi ministerial function. However, as I have already observed, a Magistrate is obliged to act judicially when deciding the threshold issue whether there is sufficient evidence to warrant trial. It is a determinative function with judicial consequences, a function which is specifically invested in the Magistrate by the terms of the *Magistrates (Summary Proceedings) Act*. The determination forms part of the judicial process, possibly leading to trial, although various executive steps may intrude which ensure a trial is not held. Likewise, there are circumstances when the Magistrate may decide not to commit the defendant, yet *ex officio* proceedings ensue. It would be extraordinary to accede to the proposition that a Magistrate, empowered with control over **[7]** the procedures before him, such as to prevent repetitive or scandalous cross-examinations, should not have the power to deal with similar abuses of process. I am persuaded by the New South Wales decisions, specifically *Miller v Ryan* (1980) 1 NSWLR 93 which is on all fours with the situation before me. There, Rath J at single instance, held a Magistrate had the power to entertain an application for the dismissal of proceedings on the basis that the same amounted to an abuse of the legal process.

It is true that His Honour sought support from an English decision of *Mills v Cooper* (1967) 2 QB 459; [1967] 2 All ER 100; [1967] 2 WLR 1343, and a close examination of that authority indicates it did not deal with committal proceedings. However, His Honour was there dealing with a situation identical in legal terms with that before me, and was firm in his view that the Magistrate was invested with power. Similarly, in New South Wales, in *Whitbread & Ors v Cooke (No. 2)* (1986) 5 ACLC 305 the Judge observed that a similar power existed, although it might be said that the finding was not strictly necessary for his conclusion.

Turning to the further New South Wales decision of *Herron v McGregor* (1986) 6 NSWLR 246; 28 A Crim R 79, McHugh JA, considered the authorities to which I have just referred, he appears to have leant in the direction of investing a Magistrate with power, although it cannot be said the case is specific authority for that proposition nor again was it necessary for the decision in that case. But it would be extraordinary if a tribunal, at first instance, were to lack the power to prevent abuses of its own processes.

[8] I turn now to recent Victorian authority. There is no specific reference to a Magistrate's power. In *R v Clarkson*, (unreported) 12th May 1987, the Court itself referred to the concept of judicial review of cases where delay is alleged to have constituted an abuse of process. Their Honours referred to *Herron v McGregor* (1986) 6 NSWLR 246; 28 A Crim R 79, which itself referred to *Miller v Ryan* in terms, although not specifically approving, could not be said to be disapproving. Gobbo J concluded at p18 of the unreported judgment:

> "This is in substance the same principle as that encapsulated in the test, that the Court will restrain its process being used in a harsh or oppressive roamer. In the ultimate the question will be: will the trial be fair?"

He then went on to set out the criteria for establishing fairness but, in canvassing the exercise of jurisdiction, did not restrict that exercise solely to the supervisory functions of a superior court but seemed to extend them to whichever court was exercising the judicial function at first instance. I am satisfied that a Magistrate does have power to hear and determine an assertion of abuse of process on the basis of delay. Whatever way he rules in committal proceedings that decision is subject to judicial review pursuant to the terms of Order 56. In any event, his ruling would amount to a decision reviewable under the terms of the *Administrative Law Act*. Even if the proceedings are not judicial, they certainly amount to **[9]** arriving at a decision which is itself reviewable, and I refer to *Arno v Forsyth & Ors* (1986) 9 FCR 576; (1986) 65 ALR 125, and *Lamb v Moss* [1983] FCA 254; 76 FLR 296; (1983) 49 ALR 533; (1983) 5 ALD 446.

Turning to the South Australian decision of *Clayton v Ralphs & Manos* ((1987) 45 SASR 347; (1987) 26 A Crim R 43, 16th June 1987, it is possible to suggest the majority decision of Olsson J and Jacobs J seem to tend towards the proposition that a Magistrate does not have power to halt proceedings, although the decision of Legoe J, appears to assume that he has such power. The matter was not squarely dealt with although Jacobs J, in dealing with *Whitbread v Cooke* and *Miller v Ryan*, had this to say, again reciting what Maxwell J, has said:

> "There is no doubt that the power to stay is exercisable in relation to committal proceedings."

His Honour went on to say,

> "I have been unable to discover any Australian authority binding upon this Court that extends such jurisdiction to a permanent stay of committal proceedings upon the ground that they are an abuse of process, and there are in my opinion powerful and compelling reasons for declining so to extend the jurisdiction."

In my respectful view this is not a matter of extending jurisdiction. It is a matter merely of permitting those powers which are already in place to be exercised. Investiture of the Magistrate with the authority and responsibility to hear committal proceedings takes with it the concomitant power to prevent those proceedings themselves being used in a way which abuses the entire legal process. It would be curious indeed if a Magistrate were to be invested with all power and responsibility in respect of committal proceedings, but not power at their very source to decide whether the same are abusive or otherwise. Even more so when it is considered a Magistrate has undoubted power to dismiss or halt proceedings on other grounds, should they be abusive or

amount to a mis-use of the Court process. It would be incongruous, and offend commonsense, to bifurcate a Magistrate's discretion and powers in relation to prevention of abuses in such a way.

Accordingly, I am satisfied the Magistrate did have the power which he refused or declined to exercise. It was within his province to decide whether the proceedings against these policemen amounted to an abuse of process by virtue of delay. *[After making further observations about the Court's exercise of its supervisory function, His Honour continued]* ... **[12]** Accordingly, Mr Howard, I now invite you to establish before me your contention that the delay in this case amounts to an abuse of process or that the argument is of sufficient strength as to warrant it being examined by a Magistrate. (Discussion ensued.) I have already decided that a Magistrate does have authority to entertain applications to stay committal proceedings on the basis that the same would amount to an abuse of process of the court.

I have already ruled that the mere assertion that the proceedings amount to an abuse of the process does not transfer to the Crown the responsibility or onus of establishing the propriety of the proceedings. The claimant has an initial obligation, and that is on the basis of credible evidence establishing the contention, has some substance and raises an issue to be properly put before the Magistrate. It is a threshold issue requiring some support.

In my view, the contention must raise in the mind of the adjudicator an immediate, reasonable and **[13]** sustainable apprehension that the court's processes could possibly be abused if the proceedings were to continue. Having raised and satisfied a Magistrate or a Judge of those preliminary matters, the onus will pass to the Crown to establish the propriety of the proceedings and the fact that an abuse of the court's process will not ensue. The Courts have pronounced the factors which may amount to an abuse, and I refer to *Clayton's case*, already referred to, *Clarkson,* already referred to, and the recitation therein with approval of the criteria enunciated by Mason J, as he then was, in *Sankey v Whitlam*. However, those criteria go to establishing abuse once the initial threshold has been passed.

I am satisfied in this case that the application is without merit, that it does not satisfy, even at its lowest and most cursory level, the criteria for establishing an abuse of the court's process. There is, of course, a patent difference between criminal and civil proceedings, that which may amount to an abuse by the mere effluxion of time in civil proceedings is not determinative of the issues in criminal proceedings. To this end, the *ANZ Bank & Ors v Donovan & Anor* is of no assistance to the plaintiffs in this case. That case turned on a civil dispute, there was much documentation and in which relevant statutory limitation periods prevailed.

In the case before me, as is common to most criminal proceedings, there is no statutory limitation period. The reason for that is firmly vested in legal **[14]** history. That which is a criminal offence when first committed remains so. The community does not tolerate an offence when it is first committed, and the mere effluxion of time does not cure it. In those instances where there is a statutory limitation in relation to criminal offences, it is clearly laid out.

Common law has been firmly based upon the proposition that the long arm of the law reaches out everywhere and forever in respect of breaches of it. That proposition is subject only to exclusion where, as a matter of fairness, it could be said that an accused man, if he were to face trial, would be so utterly prejudiced and oppressed, an abuse of the court's process would result. There has been much law, to which I have already referred, along the lines of the American concept of due process, more strongly put in recent years than ever before, but the basic position of the common law has not altered. ...

[His Honour then dealt with the application that the proceedings amounted to an abuse of process, and after hearing argument from counsel, dismissed the application.]
