09/93

SUPREME COURT OF VICTORIA

LEARY v HASSELL and ANOR

Harper J

28, 29 January 1993

CRIMINAL LAW – COMMITTAL PROCEEDINGS – ACCUSED DISCHARGED WHEN NO EVIDENCE LED – FRESH CHARGES LAID – NATURE OF COMMITTAL PROCEEDINGS – WHETHER ISSUE ESTOPPEL ARISES – ABUSE OF PROCESS – WHETHER MAGISTRATE MAY DECLINE TO PROCEED – WHETHER PRIOR DISCHARGE MAKES SUBSEQUENT PROCEEDINGS AN ABUSE OF PROCESS.

A magistrate conducting committal proceedings refused an application by the Prosecution for an adjournment and when no evidence was led, discharged the defendant. When fresh charges were subsequently laid and came on for committal, a magistrate declined to proceed with the hearing and discharged the accused because of the circumstances surrounding the accused's discharge on the first hearing. Upon originating motion—

HELD: Order discharging accused set aside. Remitted to the magistrate for further determination.
(1) As committal proceedings are essentially executive rather than judicial in nature, the question of issue estoppel does not arise.

(2) A magistrate has a duty to hear committal proceedings which are before the court. The power of a magistrate to decline to proceed is limited to cases where an abuse of process might occur. In the present case, there was no question of abuse of process; accordingly, the magistrate was in error in declining to proceed.

HARPER J: [1] The first defendant to the Originating Motion presently before me has twice successfully defended committal proceedings. Each proceeding arose out of the same set of circumstances. It is alleged against him that on 11 February, 1990 he assaulted three men. The present plaintiff was and is the informant. He seeks to persuade me that the second defendant, the Magistrate before whom the second committal proceeding commenced on 6 February, 1992 but who struck out the charges without a hearing on the merits, should be required pursuant to Order 56 of the Rules of the Supreme Court to do what, so the plaintiff alleges, has not yet been done: conduct a committal proceeding according to law. It is certainly true that neither of the committal proceedings in which the first defendant has thus far been involved has amounted to a hearing on the merits. On the first occasion, on 22 July, 1991, the first defendant was discharged after none of the three persons allegedly the victims of the first defendant's assault appeared to give evidence.

In an affidavit sworn on 2 April 1992 in support of the Originating Motion, the plaintiff deposes on the basis of information and belief that during the evening of 21 July, 1991, the night before the first committal was due to begin, one of the alleged victims contacted the Frankston police where the plaintiff was then stationed. This person, a man named Brian Howell, was the father of the other two alleged victims. He was informed that the plaintiff was on sick leave and that the prosecutor would the next day apply for an adjournment. Mr Howell was **[2]** told that he and his sons should nevertheless remain on standby to attend court if required. Each of the sons was under subpoena. As for their father, the plaintiff says that he, the plaintiff, "had arranged for him to return earlier than anticipated from a trip to the United Kingdom, in order to be in attendance that day". At 8.30 a.m. on 22 July, 1991, the plaintiff telephoned Brian Howell. He informed Mr Howell that he and his sons were required to be present at court that day. Mr Howell replied that work commitments prevented his attendance until 2.00 p.m. but that one of his sons would be present at 10.00 a.m. while the other might be out of contact. In fact, none of the three alleged victims was present at the time appointed for the committal to begin. The matter was put down until shortly before noon. All three still being absent at noon, the prosecutor applied for warrants to be issued for their apprehension. He also applied for orders that the first defendant be further remanded on bail. One must assume from this, although the material before me does not say so explicitly, that this application was made in the context of an application for an adjournment.

The Magistrate was not impressed. She said that in the absence of any valid explanation for the failure of the principal witnesses to attend, she would not accede to the prosecutor's applications. She discharged the first defendant in respect of all the charges against him. In adopting the position, the Magistrate was doubtless influenced by the consideration that if none of the alleged victims were in court, then their allegations **[3]** against the first defendant must lack substance. In the circumstances, however, such a conclusion was not necessarily justified.

In the Magistrate's defence, I should point out that she might not have been aware of all the circumstances. It is not put in the material before me that the Magistrate was told about Brian Howell's early return from the United Kingdom, or about his being informed that an adjournment would be sought in the light of the plaintiff's then illness or, indeed, of the fact that the plaintiff was ill and would not himself be in attendance. These, however, are the unchallenged facts; whether the Magistrate knew about them or not, they amounted to impeccable grounds upon which to grant an adjournment. Having failed so comprehensively to put before the Magistrate on 22 July, 1991 any evidence about the alleged assaults, the plaintiff determined to try again. Fresh charges were laid. These made the same allegations as before. A fresh hand-up brief was prepared. This came on before the second defendant (who was not the same Magistrate as the Magistrate who discharged the first defendant on 22 July, 1991) for hearing on 6 February, 1992. What then occurred is recounted in the following terms in an affidavit sworn on 15 April, 1992 in the present proceedings by Senior Constable Sarah Bunney, the then prosecutor:

> "I advised the Magistrate that charges in respect of the same offences had come before his colleague at the Magistrates' Court, Melbourne, sitting at Camberwell on 22 July, 1991 and that on that occasion, due to the non-attendance of the central prosecution witnesses, no evidence was led and his colleague had ordered that the defendant be discharged in respect of those charges The Magistrate stated that in view of the fact that prior to 22 July, 1991 the defendant had been served **[4]** with a hand-up brief, the committal proceedings were before the Court on that day, the prosecution chose to lead no evidence and his colleague had discharged the defendant in respect of those charges, that the defendant had been discharged at the committal. He stated that in these circumstances, he could not proceed with a further committal hearing and that the matter would have to proceed by way of a direct presentment by the Director of Public Prosecutions, failing which the charges against the defendant would be at an end."

His Worship then ordered that each of the charges be struck out. If this is an accurate record of his Worship's remarks, then in my opinion, he was mistaken. In the first place, his Worship appears to have formed the belief that the earlier hearing had, in effect, been determined on the merits, given his assumption that the prosecution had "chosen" to lead no evidence. On the unchallenged account before me of what happened on 22 July 1991, the plaintiff did not "choose" to call no evidence; on the contrary, he had done all he reasonably could have done to ensure that the relevant witnesses were present. But even if one were to concede, for the purposes of the argument, the correctness of his Worship's assumption, nevertheless, his decision was in my opinion wrong.

Committal proceedings are essentially executive rather than judicial in nature: See *Ex parte Cousens, Re Blackett & Anor* (1946) 47 SR (NSW) 145 at 146; 63 WN (NSW) 228. The authority of this case, long recognised as one of the starting points for any discussion for the juridical foundation for committal proceedings, has in recent times been reduced: (See, for example, *Sankey v Whitlam* [1978] HCA 43; (1978) 142 CLR 1; 21 ALR 505; 53 ALJR 11; 37 ALT 122; *Wentworth v Rogers* [1984] 2 NSWLR 422; (1984) 15 A Crim R). But the proposition that committal proceedings are not judicial as much as executive or ministerial does, I **[5]** think, remain good. It is certainly true that no plea of *autrefois acquit* can arise out of discharge at the committal stage, because whatever other function it may perform, the committal process does not result in either a conviction or an acquittal. For like reasons, and because in any event the doctrine has no place in English criminal law, questions of issue estoppel cannot rise out of the committal process: (*R v Humphries* [1977] AC 1; [1976] 2 All ER 497; (1976) 63 Cr App R 95; [1976] 2 WLR 857).

It follows that subject to this Court's inherent jurisdiction to prevent an abuse of process, and subject, also, to the probability that Magistrates sitting to hear committals have the like power, the authorities may invoke the committal process even after the accused has been discharged by another Magistrate on the same charges: (*R v Manchester City Stipendiary Magistrate, ex parte Snelson* (1977) 66 Cr App R 44 at 46; [1978] 2 All ER 62). In that case, the accused had been

charged with a number of offences relating to theft. He first appeared before the City Magistrates' Court at Manchester on November 24, 1976. He was then put to his election and remanded on bail to 8 December, 1976, when it was intended that committal proceedings should start. The prosecution was not ready by 8 December, however, because the witness statements were not complete. They had a total of seven witnesses from whom statements were required and there were other difficulties. Accordingly, both the applicant, Snelson, and his co-defendant were remanded on bail until 13 January, 1977, the remand being at the request of the prosecution. On 13 January, 1977, however, the prosecution was **[6]** still not in a position to go ahead. The Magistrate, perhaps not surprisingly getting a little tired of this procedure, concluded that he would not give a further adjournment; and it followed that when the parties were before the Court on that day there was nothing the prosecution could do except to offer no evidence.

Accordingly, under s7 of the *Magistrates' Courts Act* 1952 (United Kingdom), the applicant and his co-defendant were discharged. The similarity between *R v Manchester City Stipendiary Magistrate* and the present case is obvious. The difference is only that in the English case the Magistrate was prepared to hear the fresh charges, whereas in the present case the second defendant was not. The applicant in the English case applied to the Divisional Court for prohibition. He was unsuccessful. The Court held that although there was doubtless power in the Court and probably in the Magistrate to prohibit proceedings which would amount to an abuse of process, nevertheless that was not this case. At p46 of the report, Lord Parker, LCJ said this:

> "As far as I am concerned, I have no doubt that Mr Brennan's argument [that is, the argument for the applicant] is without substance. It may be true that in nine cases out of ten when this situation arises a voluntary bill [that is, a bill for direct presentment] is the convenient course to be taken. But in order to succeed before us, Mr Brennan has to show that the justices have no power to hear the second committal proceedings and consequently, that the prosecution are inviting the justices to go beyond their jurisdiction. This seems to me to be quite wrong and the only aspect of the whole case which has troubled me is the feeling that if the prosecution are right in their argument, there seems to be a risk that a defendant might be prejudiced by repeated committal proceedings all failing, resulting in a committal being repeated time after time by further similar attempts. I am satisfied that that particular difficulty is overcome by saying that this Court has a discretionary power to **[7]** see that the use of repeated committal proceedings is not allowed to become vexatious or an abuse of the process of the Court. If that point is reached (and whether or not it is reached is a matter of degree) then I have no doubt that it would be right for us to step in by prohibition to prevent the repeated use of this procedure. We have not come to that point by a long way."

In another English case, *R v Telford Justices, Ex parte Badhan* [1991] 2 QB 78; [1991] 2 All ER 854; (1991) 93 Cr App R 171; [1991] 2 WLR 866, the Divisional Court examined with some care the question whether committing justices have power to refuse to proceed on the ground that otherwise an abuse of process might occur. At Cr App R p178 of that report, Mann LJ said this:

> "We [speaking for his colleagues] for our part can see no reason why examining justices should not be able to decide that an initiation of the process of committal is an abuse of that process. The question of abuse is one which is within the ability of justices to decide and it is one that they admittedly have power to determine on summary trial. If complaint is made of their decision, then the complainant can come to this Court and seek judicial review. Mr Collins suggested that abuse of process should be left to the supervisory jurisdiction of this Court and to the power of the Crown Court to decide a plea in bar, and against whose decision a defendant can appeal to the Court of Appeal, Criminal Division. We disagree. We think that a plea of abuse should be open to the accused subject at the earliest opportunity. Our conclusion upon the argument which we have heard is that justices sitting to enquire into an offence as examining justices do have, as part of their inherent jurisdiction, the power to refuse to undertake the inquiry on the ground that it would be an abuse of process to do so. It is desirable that justices should have the power and previous observations in and decisions of this Court are not inconsistent with the decision in *Atkinson v United States of America Government*. We emphasise that the power which the justices have is one to prevent an abuse of process. They have no power to refuse to embark on an inquiry because they think that a prosecution should not have been brought because it is, for example, mean-minded, petty or animated by personal hostility. It is for this reason that the powers of the justices are said to be very strictly confined."

The power to decline to proceed is therefore a very limited one. In my opinion, it did not raise here. In **[8]** this case, there can be no question of abuse of process. The next question is whether I have power to grant relief in the nature of mandamus. In my opinion, I have such power. It is a power which was exercised in somewhat different circumstances by JD Phillips J in *Brygel*

v Stewart-Thornton [1992] VicRp 70; [1992] 2 VR 387; (1992) 67 A Crim R 243 and it is a power which was referred to in an illuminating passage from *R v Humphries* [1977] AC 1; [1976] 2 All ER 497; (1976) 63 Cr App R 95; [1976] 2 WLR 857. At AC p46, Lord Salmon says this:

> "I respectfully agree with my noble and learned friend, Viscount Dilhorne, that a judge has not, and should not appear to have, any responsibility for the institution of prosecutions, nor has he any power to refuse to allow a prosecution to proceed merely because he considers that as a matter of policy it ought not to have been brought. It is only if the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious that the judge has the power to intervene. Fortunately, such prosecutions are hardly ever brought but the power of the court to prevent them is in my view of great constitutional importance and should be jealously preserved. For a man to be harrassed and put to the expense of perhaps a long trial and then given an absolute discharge is hardly, from any point of view, an effective substitute for the exercise by the Court of the power to which I have referred. I express no concluded view as to whether courts of inferior jurisdiction possess similar powers, but if they do and exercise them mistakenly, their error can be corrected by mandamus".

In my view, the Magistrate here did commit an error and it should be corrected by mandamus. There was no proper basis in my view for either Magistrate to make the orders which were made. The committal proceedings have never been dealt with on their merits. There is a clear duty in magistrates to hear committal proceedings which are properly before them. In my opinion, such proceedings were properly before his Worship on 6 February, last. I therefore think that they should be remitted to him now and that they should thereafter be dealt with according to law.

APPEARANCES: For the plaintiff Leary: Mr SP Gebhardt, counsel. Victorian Government Solicitor. For the defendants: Mr I McIvor, counsel. Legal Aid Commission of Victoria.
