17/13; [2013] VSCA 81

SUPREME COURT OF VICTORIA — COURT OF APPEAL

McKENZIE & ANOR v MAGISTRATES' COURT of VICTORIA & ANOR

Harper, Tate and Coghlan JJA

8 March, 18 April 2013

PRACTICE AND PROCEDURE – COMMITTAL PROCEEDINGS – WITNESS SUMMONSES AGAINST TWO JOURNALISTS TO ATTEND AND GIVE EVIDENCE DURING COMMITTAL HEARING ISSUED – APPLICATION BY JOURNALISTS TO SET SUMMONSES ASIDE – APPLICATION REFUSED BY MAGISTRATE – APPLICATION BY JOURNALISTS FOR JUDICIAL REVIEW – APPLICATION DISMISSED – APPEAL FROM THAT DECISION – GROUND OF APPEAL BASED UPON A POINT NOT TAKEN BELOW – WHETHER ANY EVIDENCE TO BE ADDUCED WOULD BE RELEVANT TO EXERCISE OF THE JURISDICTION, POWER OR FUNCTION OF A MAGISTRATE PRESIDING AT A COMMITTAL – WHETHER A MAGISTRATE PRESIDING AT A COMMITTAL HAS POWER TO DISMISS CHARGES IN THE INTERESTS OF JUSTICE PURSUANT TO S11.5(6) OF THE *CRIMINAL CODE* (CTH) – NATURE AND PURPOSE OF A COMMITTAL HEARING – *GRASSBY v THE QUEEN* [1989] HCA 45; (1989) 168 CLR 1 FOLLOWED: *CRIMINAL PROCEDURE ACT* 2009 (VIC), SS97 AND 141(4).

HELD: Appeal allowed. Each of the witness summonses set aside.

1. On this appeal hearing, the applicants no longer sought to have the witness summonses directed to them set aside because they were the victims of breaches of natural justice, or upon the basis of errors on the face of the record, or because the magistrate's reasons were insufficient. Rather, they contended that one of the accused had an illegitimate purpose in seeking to adduce the evidence to which each summons referred. He wished to use that evidence in support of an application that, in the interests of justice, the magistrate dismiss the charges against him. But, the applicants (joined by the prosecution) submitted, this was something which a magistrate presiding over a committal proceeding had no power to do. Nothing in the Code conferred such power.

2. Committal proceedings do not constitute a judicial inquiry, but are conducted in the exercise of an administrative or ministerial function. And the power to dismiss is quintessentially a judicial, not an administrative or ministerial, power. A magistrate cannot allow the receipt of evidence the only relevance of which is to make good an application to dismiss charges in the interests of justice which the magistrate has no power to grant.

3. Section 141(4) of the *Criminal Procedure Act* prescribes what a magistrate presiding at a committal hearing must do at the conclusion of the evidence and submissions. He or she is limited by that legislation to one of three courses of action: the presiding magistrate may discharge the accused; or may commit the accused for trial on the charges brought; or may adjourn the committal to enable the informant to lay a further charge for another indictable offence and then commit the accused for that offence.

4. In view of the fact that in no other circumstances did a magistrate have jurisdiction to dismiss a charge in the interests of justice, it followed that, had the accused Leckenby been charged as an accessory he could not, at his committal, properly have raised his present complaints about police malpractice in their investigations, or biased selection of documents, or saturation prejudicial publicity, as a basis for a decision by the magistrate to dismiss in the interests of justice the charge against him.

HARPER JA:

Background

1. The applicants are investigative journalists employed by The Age Company Pty Ltd. They have written extensively about the allegedly corrupt behaviour of the second respondent, Mr John Leckenby, and a number of other officers of two entities associated with the Reserve Bank of Australia. For present purposes, the relevant allegation is that Mr Leckenby and the others conspired to pay excessive commissions to an Indonesian agent, a man named Radius Christanto, in the expectation that Mr Christanto would in turn employ some of the funds thus obtained to bribe Indonesian Central Bank officials. According to the prosecution, the ultimate aim was to win contracts with foreign currency-issuing authorities, including those in Indonesia, to print

banknotes for them. The Crown contends that in these circumstances Mr Leckenby is guilty of an offence against ss11.5(1) and 70.2(1) of the *Criminal Code Act* 1995 (Cth)('the Code'). These sections, together with s70.2(4) of the Code, provide (in effect) that a person who conspires with another to bribe a foreign public official commits a crime punishable on conviction by imprisonment for not more than 10 years or a fine of not more than 10,000 penalty units, or both.

2. Mr Leckenby has been charged accordingly. His committal, and that of his fellow accused, commenced on 13 August 2012. It has not yet run its already arduous course.

3. Investigative journalists have a legitimate interest in uncovering the truth about a story such as this; and they serve an important public interest in having that truth revealed. One mechanism, appropriate in some but not all circumstances, by which journalists elicit the truth is to promise anonymity to those from whom they source their information. This too serves the public interest, an interest advanced not only by the code of ethics of *The Age* but also by that of the Media Entertainment and Arts Alliance (of which the applicants are members). The gravamen of the relevant ethical principle is that whenever the confidentiality of sources has been promised that promise must be honoured.

4. Worthy as that ethical principle is, it too sometimes comes into conflict with other, equally worthy, principles – or even its own rationale. Sometimes, for example, an individual or the body politic may suffer because the anonymity of the journalistic source conceals or obscures, rather than reveals, the truth. Or the promise of anonymity may encourage the source to disseminate falsehood. Sometimes, too, the timing or the nature of the publication may interfere with another important public interest – the due course of justice.

5. It may for present purposes be accepted that Mr Leckenby's interest in receiving a fair trial clashes with that of the applicants in honouring their ethical obligation to protect their sources. The solution, Mr Leckenby argues, is for the law to allow his interest to trump that of the journalists. The applicants contend to the contrary. It is that dispute which now comes to this Court on an application for leave (if leave be necessary) to appeal against a judgment which dismissed the applicants' claim that certain witness summonses requiring them to attend Mr Leckenby's committal hearing and give evidence and produce documents should be set aside.

6. The accused have long maintained that the prosecution's conduct in the committal has been unfair. One, but only one, aspect of this has been its use, or rather misuse, of the media. The wider and more general abuse by the prosecution of its prosecutorial authority and power has, it is claimed, been so extensive that, no matter what the merits of the prosecution case may be (and the accused maintain that there are none) it should be dismissed in the interests of justice. They contend that the magistrate hearing the committal has power to do this. Alternatively, his Honour has power to compel the applicants to give evidence about the source or sources of an article written by them. That article, according to Mr Leckenby, is woven into the pattern of the unfairness generated by the prosecution against him, an innocent man. Indeed, the evidence which the applicants could give about their sources for the article will, Mr Leckenby anticipates, add substance to his and his co-accuseds' contention that the case against them should in the interests of justice be dismissed.

7. The article in question appeared in print (in *The Saturday Age*) and online on Saturday 8 December 2012. It was entitled 'Bagman to tell all in notes scandal'. It asserted that Mr Christanto, an allegedly corrupt Indonesian businessman, had made a deal with the Australian government to give evidence implicating the accused, or some of them, in return for a greatly reduced jail term. The article referred to '[a] senior government source' as having provided the journalists with the information, or at least part of it, upon which the article was based. Of particular relevance to these proceedings are the first seven paragraphs of the article:

> An Indonesian bagman has agreed to turn star witness and testify that several former Reserve Bank of Australia bank note executives used him to pay millions in bribes to officials in Jakarta in return for contracts.
> In a dramatic development in the prosecution of eight allegedly corrupt Australian executives, Radius Christanto has made a deal with the Australian government to plead guilty to bribery and testify in a Victorian court.
> A senior government source said that in return Christanto was likely to get a greatly reduced jail term.

> Christanto will provide the first explicit witness testimony about the way RBA bank note firms Securency and Note Printing Australia (NPA) allegedly used middlemen to funnel multimillion dollar bribes to overseas officials in return for buying Australian polymer bank note technology.
> It is understood the testimony of Christanto – a millionaire businessman who conducts much of his business on exclusive Asian golf courses – may not only implicate several of the already charged Australian bank note executives, but lead to fresh charges in Australia and Britain.
> His testimony also has the potential to implicate four former Indonesian central bank officials who allegedly received huge bribes.
> Prosecutors expect him to verify the authenticity of faxes sent between him and Securency and NPA, containing explicit references to alleged bribes.

8. The timing of the publication of this article may or may not have borne a deliberate relationship to the position then reached in the committal hearing. The fact is, however, that final submissions were due to commence on the following Monday, 10 December. In them, the accused planned a two-pronged attack on the case against them. First, they intended to argue that the evidence was not of sufficient weight to support their convictions. They also intended to submit, as an independent basis for bringing their prosecution to finality, that the interests of justice demanded that the charges against them be dismissed.

9. As I have already noted, the accused included what they claimed was prejudicial and unfair media coverage in their litany of complaints about the conduct of the prosecution in mounting the case against them. In written submissions put before the magistrate, one of the accused, a man named Mitchell Anderson, asserted that:

> ... there has been extensive media publicity directly related to the allegations before the Court. Suppression orders ... have been breached. Further [the] senior investigating officer ... has (it is submitted) engaged in conduct calculated to generate ongoing media publicity and pre-judgment. [That officer's] evidence as to allegations in relation to jurisdictions not before this Court was deliberately inflammatory and designed to grab further headlines. All to the prejudice of the accused.

10. The accused doubtless perceived that the timing of the 8 December article, published on the eve of final submissions, might cause the magistrate to conclude that the prosecution case could well be stronger than the evidence before him would indicate.

11. It was in these circumstances that the article produced a quick response. As I understand it, final submissions were deferred to enable the solicitors for Mr Leckenby to prepare a witness summons directed to Mr Baker, and another directed to Mr McKenzie.

12. Mr Leckenby's solicitors took advantage of the opportunity thus made available to them. Each summons is in relevantly identical terms with its twin. Each was issued on 11 December 2012 by the Registrar of the Magistrates' Court at Melbourne. Each required the addressee to give evidence and produce certain documents at the committal in relation to the article including but not limited to information regarding the source(s) and content for the statements in the 8 December article that:

> (a) Radius Christanto has made a deal with the Australian government to plead guilty to bribery and testify in a Victorian Court.
> (b) A senior government source said that in return Christanto was likely to get a greatly reduced jail term.
> (c) Prosecutors expect [Christanto] to verify the authenticity of faxes sent between him and Securency and Note Printing Australia, containing explicit references to alleged bribes.

13. The applicants contend that each summons should be set aside. On 18 December 2012 an application designed to achieve that end was issued on their behalf. It sought orders setting aside each witness summons, or alternatively, adjourning the return date of each to a date to be fixed after the date on which the Commonwealth Director of Public Prosecutions informed both the Court and the accused whether he intended to call Mr Christanto to give evidence during the committal hearing. The grounds relied upon by each applicant were stated in each application to be that:

> (a) the documents to be produced in answer to the witness summonses; and
> (b) the evidence to be given that could be adduced in court from the applicants,

are not relevant to any issue between the parties to the proceeding; alternatively, are not presently relevant to any issue between the parties to the proceeding.

14. The applicants filed an affidavit in support. It was sworn on 19 December 2012 by their solicitor, Mr Peter Bartlett. Among other things, Mr Bartlett deposed that he had been informed by his clients, and believed, that they 'have multiple sources for the article, including government and non-government sources and overseas sources. None of these sources include officers of the Australian Federal Police.'[1] Moreover, said Mr Bartlett, all those sources had been given assurances by the applicants that their identities would not be disclosed. Nor did the applicants have any documents relating to the first seven paragraphs of the article, other than the article itself together with a draft version of it.[2] Mr Bartlett produced a chain of emails from a person or persons based in Indonesia, one of which had four attachments, which contained information relied upon by his clients in preparing the article. Anything that might identify the author or authors of those emails had been redacted. Mr Bartlett deposed that 'If the identity of the author or authors of the [email] were to be revealed, it could jeopardise their safety.'[3] Mr Bartlett added that the applicants did not have any documents which contained information regarding the source or sources of the statements described in paragraphs (a) to (c) of each witness summons.[4]

15. The magistrate heard the application on 20 December 2012. In an exchange with Dr Matt Collins SC, who appeared for the applicants, the magistrate said:

> You understand the submissions that have already been drafted, though [they] aren't before me in oral fashion, and what is proposed to be argued? That is, that in the interests of justice these charges should be dismissed.
> ...
> And they should be dismissed, in short form, because of the misbehaviour of investigating officials, including the misbehaviour of providing information to the media. And what is really sought, if I understand it correctly, is material that might go to the issue of consideration of the interests of justice. And it does not need great intellectual gymnastics to say that if the source of the article is investigating officials or government, or offices – not officers, but offices – related to government, then that might go to significant consideration of the issue that's raised in relation to the application to dismiss.[5]

16. Later the magistrate said:

> The matter which will be agitated in relation to the [interests] of justice argument relies upon a demonstration of – my word – 'misbehaviour' by various investigation officials, amongst other matters, and what is said in relation to this article is that it might demonstrate – in fact, it probably will demonstrate some evidence which goes to the issue of the in the interests of justice argument.[6]
> ...
> ... the leaking of information, if it comes from relevant people, is a matter to be considered in the overall determination of whether or not in the interests of justice charges, or some charges, or all of the charges, should be dismissed.[7]

17. During the course of argument before the magistrate, Mr Clelland SC, on behalf of Mr Leckenby, reiterated his submission that the material was sought for a legitimate forensic purpose: ... what it does potentially enable us to do, is find the source of that information, albeit that it might be hearsay from Mr Baker and McKenzie, so we can ask, firstly, as your Honour suggested, whether that information is accurate, but secondly, who provided that information and if it is somebody who has that information in circumstances where the prosecution plainly don't, then we can make appropriate inquiries and if necessary, we can obtain that material.[8]

18. His Honour's ruling on the application was brief. In his opinion, there was a legitimate forensic purpose behind the issue of each summons. The accused, his Honour said, had 'raised consistently in this Court ... whether in the interests of justice the charges should be dismissed.'[9] The magistrate did not describe how knowledge of the identity of the sources of the applicants' article would assist in the resolution of that issue, but presumably he accepted Mr Clelland's submission on that point. The application to set aside, or alternatively to adjourn, each witness summons was refused.

19. His Honour then heard Dr Collins on why his Honour should nonetheless exercise his discretion not to require the applicants to attend to give evidence on the basis that the applicants believed that the relevant codes of ethics compelled them to protect their sources. Dr Collins conceded that the provisions introduced by the *Evidence Amendment (Journalistic Privilege) Act* 2012 (Vic) did not apply since they were not to come into force until 1 January 2013. The result was that the applicants had to rely on the common law.[10]

20. In this context, Mr Clelland pointed to the decision of Hollingworth J in *Harvey & Anor v The County Court of Victoria*:

> Although the journalists' code of ethics may preclude them from naming a source, that code has no legal status. The law does not currently recognise any 'journalists' privilege'. If a journalist chooses not to reveal a source and thereby to commit an act of contempt, that is a matter of personal choice.[11]

21. He also pointed to the comments of the High Court in *John Fairfax & Sons Ltd v Cojuangco*:[12]

> The role of the media in collecting and disseminating information to the public does not give rise to a public interest which can be allowed to prevail over the public interest of a litigant in securing a trial of his action on the basis of the relevant and admissible evidence. No doubt the free flow of information is a vital ingredient in the investigative journalism which is such an important feature of our society. Information is more readily supplied to journalists when they undertake to preserve confidentiality in relation to their sources of information. It stands to reason that the free flow of information would be reinforced, to some extent at least, if the courts were to confer absolute protection on that confidentiality. But this would set such a high value on a free press and on freedom of information as to leave the individual without an effective remedy in respect of defamatory imputations published in the media.
>
> That is why the courts have refused to accord absolute protection on the confidentiality of the journalist's source of information, whilst at the same time imposing some restraints on the entitlement of a litigant to compel disclosure of the identity of the source. In effect, the courts have acted according to the principle that disclosure of the source will not be required unless it is necessary in the interests of justice. So, generally speaking, disclosure will not be compelled at an interlocutory stage of a defamation or related action and even at the trial the court will not compel disclosure unless it is necessary to do justice between the parties.

22. His Honour again ruled against the applicants. That ruling is not the subject of challenge and has not been provided to this Court. Dr Collins sought, and was given, time to consider the applicants' position. In the meantime, the committal proceedings have been held in abeyance.

23. The applicants' response to the dismissal of their application to set each summons aside was, however, swift. On 3 January this year they filed an originating motion in the Common Law Division of the Trial Division of this Court. It named as defendants the two respondents to this application for leave to appeal (the Magistrates' Court of Victoria and Mr Leckenby), and sought an order in the nature of *certiorari* quashing the decision by which the magistrate refused to set either summons aside. The originating motion also sought an order in the nature of mandamus that the application of 18 December 2010 be remitted to a differently constituted Magistrates' Court. The applicants relied upon three grounds. They were:

> The magistrate denied the [applicants] natural justice in the proceeding below by refusing to set aside the witness summons issued by the second [respondent] on 11 December 2012 to each of the [applicants] (together 'the witness summonses') in implicitly finding that compelling them to give evidence could adduce evidence which had a legitimate forensic purpose. His Honour held that the legitimate forensic purpose was whether investigating officials investigating the subject matter of the proceedings below had properly executed their obligations (the legitimate forensic purpose). The magistrate did so in circumstances where:
> (a) there was no evidence on which his Honour could have made such a finding; and
> (b) the only evidence before him on the point was that no officer of the Australian Federal Police was a source for the newspaper article of which the plaintiffs were the authors.
> The magistrate erred in giving reasons for the McKenzie decision and the Baker decision which do not display a discernible path of reasoning in that:
> (a) the reasons do not identify the evidence on which his Honour relied in holding that the witness summonses had the legitimate forensic purpose; and
> (b) the reasons do not disclose what, if any, use his Honour made of the only evidence before him on the point that no officer of the AFP was a source for the newspaper article of which the [applicants] were the authors.
> The magistrate erred in making the decisions in taking into account an irrelevant consideration, namely foreshadowing submissions to be made on behalf of the second [respondent] apparently concerning the proper execution of obligations by investigating officials, in circumstances where the only evidence before him in relation to the newspaper article of which the [applicants] were the authors was that no officer of the Australian Federal Police was a source for it, which error is apparent on the face of the record of the decisions.

24. In a judgment delivered on 25 January 2013 Sifris J held none of the grounds were made out and accordingly dismissed the application for judicial review. The questions, his Honour pointed out, were 'whether the magistrate acted properly and within jurisdiction and that in making the decision the law was complied with.'[13] If those questions were answered in the affirmative, 'the fact that the consequence may require the [applicants] to reveal their sources is not to the point. The case is not about the protection of sources by journalists.'[14]

25. The first ground failed because, as his Honour held, the magistrate properly had regard to all the evidence put before him during the entire course of the committal. Much of this evidence went to the means and methods by which the generality of the investigating officers, including those who were not members of the Federal Police, conducted themselves; and the magistrate had clearly formed the view that those means and methods sometimes left notions of prosecutorial justice too far in the background. This was a view to which the magistrate was entitled to come.

26. The second ground also failed. Read with the transcript of the submissions which immediately preceded the impugned ruling, that ruling was one in which 'an adequate basis [is] set out as to why the decision was reached.'[15]

27. The third ground went the way of the other two. The applicants were through their senior counsel aware of the 'existence and general nature, content and basis of the [foreshadowed] submissions', which 'were relevant and fundamental to any assessment of whether there was a legitimate forensic purpose.'[16]

28. The applicants now seek to appeal against the orders made by Sifris J. The grounds upon which they rely, however, are very different from those argued before his Honour. They are as follows:

> The learned primary judge erred in dismissing the appellants' application for judicial review in circumstances where the learned magistrate had erred in failing to set aside the two witness statements issued by the Magistrates' Court on 11 December 2012 to each of the appellants (collectively, 'the witness summonses') on the basis of being beyond the jurisdiction, power or function of that Court. The learned primary judge erred in failing to determine that the learned magistrate erred in failing to set aside the witness summonses in implicitly finding that compelling them to give sworn evidence in the committal proceedings conducted before the magistrate could adduce evidence which had, or related to, a legitimate forensic purpose, namely, whether 'investigating officials' investigating the subject matter of the proceedings had not properly executed their obligations, in circumstances where: (a) the Magistrates' Court, in conducting committal proceedings under Chapter 4 of the *Criminal Procedure Act* 2009 (Vic) and s25 of the *Magistrates' Court Act* 1989 (Vic) ('the committal proceedings provisions') for offences contrary to s11.5(1) of the *Criminal Code Act* 1995 (Cth), does not have the jurisdiction, power or function to receive such evidence;
>
> (b) such evidence did not and could not relate to the jurisdiction exercised, power(s) exercised or function(s) performed by a magistrate in a committal proceedings conducted under the committal proceedings provisions for offences contrary to s11.5(1) of the *Criminal Code*; and
>
> (c) s11.5(6) of the *Criminal Code* does not confer any jurisdiction, power(s) or function(s) upon a magistrate conducting a committal proceeding under the committal proceedings provisions for offences contrary to s11.5(1) of the *Criminal Code*.

29. The first respondent, the Magistrates' Court of Victoria, has not taken an active role in the proceedings and will abide by the decision of this Court.[17]

Leave to appeal

30. Section 17A(4) of the *Supreme Court Act* 1986 provides that, subject to an exception of no present relevance, an appeal does not lie to the Court of Appeal from a judgment or order given by the Trial Division in an interlocutory application unless leave to appeal is given either by the Trial Division or the Court of Appeal. An order made by a judge of the Trial Division which does not 'finally determine the rights of the parties in a principal cause pending between them' is an interlocutory order.[18] It follows that an order by which a judge of the Trial Division refuses to quash an interim decision of a lower court is interlocutory.[19]

31. By contrast, the order made by Sifris J did finally determine the rights of the applicants

in relation to their application to set aside each summons the subject of their application of 18 December 2012. If that is right, leave to appeal is not required in this case. In any event, I am prepared to assume that no leave is required. I will therefore deal with the appeal on its merits. This was the course adopted by Winneke P in *Brygel v O'Keefe*,[20] and in my opinion I should proceed on the same basis. For convenience, however, I shall continue to refer to Messrs McKenzie and Baker as 'the applicants'.

The issues on the appeal

32. A comparison between the grounds put forward in support of the application for *certiorari* and mandamus on the one hand and, on the other, those relied upon by the applicants in this appeal, reveals two different approaches. Mr Leckenby's position has altered in response. It is convenient at this point to summarise the submissions upon which the parties rely.

33. The applicants no longer seek to have the witness summonses directed to them set aside because they are the victims of breaches of natural justice, or upon the basis of errors on the face of the record, or because the magistrate's reasons were insufficient. Rather, they contend that Mr Leckenby has an illegitimate purpose in seeking to adduce the evidence to which each summons refers. He wishes to use that evidence in support of an application that, in the interests of justice, the magistrate dismiss the charges against him. But, the applicants (joined by the prosecution) submit, this is something which a magistrate presiding over a committal proceeding has no power to do. Nothing in the Code confers such power.

34. According to the applicants, s11.5(6) of the Code, although heavily relied upon by Mr Leckenby, does not extend to committal proceedings. True, it provides that a court may dismiss a charge of conspiracy if it thinks that the interests of justice require it to do so. But (so the argument of the applicants continues) it does not follow that the power thus conferred extends as far as it must if Mr Leckenby is to succeed. Committal proceedings do not constitute a judicial inquiry, but are conducted in the exercise of an administrative or ministerial function. And the power to dismiss is quintessentially a judicial, not an administrative or ministerial, power. A magistrate cannot allow the receipt of evidence the only relevance of which is to make good an application (to dismiss charges in the interests of justice) which the magistrate has no power to grant.

35. The applicant's change of position has been challenged by Mr Leckenby. He correctly points out that the arguments upon which the applicants, supported by the prosecution, now put forward were not advanced by them either before the magistrate or before Sifris J. The applicants, according to Mr Leckenby, ought not now be permitted to seek to overturn on appeal a decision which was based upon different considerations. (The prosecution was aware of the contention of the accused that the magistrate did and does have the power to dismiss. That contention had been raised in the committal, albeit before the applicants became involved in those proceedings. The prosecution, however, was not represented during the hearing in the Trial Division)

36. In my opinion the applicants should be permitted to rely upon the contentions which they now seek to advance. The reason is simple. No court may exceed its jurisdiction or power. The magistrate has proceeded on the basis that, if he is of the opinion that it is in the interests of justice to do so, he may lawfully dismiss the charges faced by the accused. But if the applicants are correct, the magistrate has adopted an impermissibly broad view of his power. The Supreme Court has the responsibility to ensure not only that it acts strictly within power itself, but also that inferior courts are likewise constrained. It follows that, no matter that the point was not taken below, this Court cannot allow an appeal if the result might be that a magistrate hearing a committal proceeding dismisses charges he has no power to dismiss.

37. For his part, Mr Leckenby relies upon s11.5(6). It refers to 'a court'. It empowers 'a court' to dismiss a charge of conspiracy if it thinks that the interests of justice require it to do so. The Magistrates' Court is unarguably a court. Nothing in s11.5 gives the expression 'a court' a special meaning. It follows that a magistrate, being a member of the Magistrates' Court and presiding over committal proceedings, has the power conferred by s11.5(6) on 'a court'.

38. There is another string in Mr Leckenby's bow. Section 97 of the *Criminal Procedure Act* 2009 prescribes the purposes of a committal proceeding. Among those purposes is that of 'enabling the accused to adequately prepare and present a case'.[21] Another such purpose is that of 'enabling

the issues to be adequately defined."[22] These purposes would be advanced, according to Mr Leckenby, were the witness summonses to be enforced.

The issues examined

39. It is settled law that, in conducting a committal hearing, the presiding magistrate is exercising an executive or ministerial function.[23] In *Grassby v The Queen*,[24] Dawson J, writing the leading judgment, observed that 'committal proceedings do not constitute a judicial inquiry but are conducted in the exercise of an executive or ministerial function.'[25] And while his Honour pointed out that, even though not required to make a judicial decision, a magistrate was bound to act judicially – that is, justly and fairly:[26]

> ... the ultimate determination whether [an accused] does in fact stand trial does not rest with the magistrate. The power to order a stay where there is an abuse of the process of the trial court is not to be found in the committing magistrate and the considerations which would guide the exercise of that power have little relevance to the function which the magistrate is required to perform.[27]
> ... in committal proceedings a magistrate is performing an administrative or ministerial function which is governed by statute and the terms of the statute afford no basis for the implication of any power to dispose of those proceedings by the imposition of a permanent stay.[28]

40. The relevant legislative context is illustrative. In this case, the presiding magistrate is exercising federal jurisdiction.[29] Nonetheless, the effect of s68 of the *Judiciary Act* 1903 is, relevantly, that Victorian laws governing the commitment for trial on indictment apply to persons – such as Mr Leckenby – who are charged with offences against the laws of the Commonwealth; and the Magistrates' Court of Victoria has jurisdiction to conduct committal proceedings in respect of such offences.

41. Whether acting within Federal or State jurisdiction, however, the presiding magistrate has only the powers given to the Magistrates' Court by statute. He or she has no inherent power to stay or dismiss.[30] That power, it must be stressed, is a judicial, not an administrative or ministerial, power. It therefore has no place in committal proceedings, unless conferred by statute. And given the important distinction between judicial power on the one hand and administrative or ministerial power on the other, the conferral would need to be by plain words or by necessary implication.

42. Section 141(4) of the *Criminal Procedure Act* prescribes what a magistrate presiding at a committal hearing must do at the conclusion of the evidence and submissions. He or she is limited by that legislation to one of three courses of action: the presiding magistrate may discharge the accused; or may commit the accused for trial on the charges brought; or may adjourn the committal to enable the informant to lay a further charge for another indictable offence and then commit the accused for that offence.

43. Section 141(4) begins with the words: 'At the conclusion of all of the evidence and submissions, if any, the Magistrates' Court *must* –' (my emphasis). The section then proceeds to list the three alternatives set out above; and the legislation makes it clear that there are no others. The power to dismiss is not included among the only three options open.

44. Mr Leckenby nevertheless contends that the magistrate may in this case dismiss the charge or charges against him. He points out that s11.5 of the Code is concerned with conspiracy. It is the provision for breach of which Mr Leckenby stands charged. And sub-s(6) provides that a court may dismiss a charge of conspiracy if it thinks that the interests of justice require it to do so.

45. The genesis of that sub-section is to be found in the criticism 'repeatedly voiced by the courts'[31] of the resort by prosecutors to a charge of conspiracy instead of a charge of the substantive offence where there was no good reason not to charge the substantive offence and where a charge of conspiracy might be unfair to the accused (if, for example, it might render admissible evidence which would not be admissible on a joint trial for the complete crime) or where it might unnecessarily add to the length of the trial or introduce the possibility of error by reason of its attendant complexities.

46. The point is emphasised in the Explanatory Memorandum to the *Crimes Amendment Bill* 1994. This was the Bill which, when enacted, introduced the predecessor of s11.5(6). In referring to that predecessor, the Explanatory Memorandum said:

> Because of the concern that the charge of conspiracy has been overused, or may be overused, it was felt that there should also be procedural restrictions on conspiracy charges. The charge should be subject to the consent of the DPP ... .
>
> Additionally, [the] proposed subsection ... allows a court to dismiss the conspiracy count if it considers that the interests of justice require it to do so. The most likely use of this provision will arise when the substantive offence could have been used ... .

47. In written submissions prepared for the purposes of the committal, Mr Leckenby argued that the interests of justice would be better served were he to be charged not with conspiracy but with being an accessory to the substantive offence allegedly committed by Mr Christanto in bribing (that is, paying an improper benefit to) a foreign public official. This is a charge which, he maintains, he could more readily defend.

48. I am not in a position to assess the propriety or efficacy of the Crown's preference in this case for the conspiracy option. It is however clear that Mr Leckenby's contention that the prosecution has thwarted the interests of justice is not limited to the considerations which inspired the enactment of s11.5(6) of the Code. In written submissions prepared for the committal, he charges (i) the Australian Federal Police with malpractice which 'has so contaminated the evidence that it would be unjust for [him] to face trial'; (ii) the prosecution with biased selection of documents; and (iii) *The Age* newspaper with 'saturation prejudicial publicity'. He also relies on the lack of any evidence that he personally benefitted from any of the allegedly wrongful activities.

49. It would be strange were allegations of the kind made by Mr Leckenby in his written submissions to the magistrate to be a permissible basis for a magistrate presiding at a committal proceeding to dismiss a charge of conspiracy but no other charge. And that strangeness would remain even if the allegations were made good. For it is clear on the authority of *Grassby*, which has never been doubted, that in no other circumstances does such a magistrate have jurisdiction to dismiss a charge in the interests of justice. It follows that, had Mr Leckenby been charged as an accessory to the sins of Mr Christanto – the charge he maintains should have been brought, if any were brought against him at all – he could not, at his committal, properly have raised his present complaints about police malpractice in their investigations, or biased selection of documents, or saturation prejudicial publicity, as a basis for a decision by the magistrate to dismiss in the interests of justice the charge against him.

50. Indeed, it is not even clear that a judge could exercise the dismissal power conferred by s11.5(6) if the application to dismiss were based solely upon interests of justice quite unconnected with the fact that the accused had been charged with conspiracy rather than the, or a, substantive offence. So far as my researches reveal, there is no suggestion in any of the explanatory material surrounding the enactment of this provision, save by inference from the lack of reference to the limits of its breadth, that it was intended to do more than ensure that charges of conspiracy only proceeded to trial when there was good reason why they should, and when the interests of justice were not compromised thereby.

51. There is another reason for rejecting the proposition that s11.5(6) confers on magistrates presiding over committal proceedings power (in the interests of justice or otherwise) to dismiss a charge. It is an integral part of our system of criminal justice that the executive branch of government, acting through the Attorney-General or the Director of Public Prosecutions, or someone holding like office, may present an accused for trial despite a magisterial decision not to commit. Equally, the executive branch may decline to indict an accused who has been committed for trial. I note in passing that this accentuates the place of committal proceedings amongst administrative or ministerial functions. More importantly, if Mr Leckenby is correct, executive involvement in that integral element of criminal justice has in cases of conspiracy been swept away by a side wind. That cannot be right.

52. Mr Leckenby relies not only upon s11.5(6) of the Code, but also upon s97(d) of the *Criminal Procedure Act* – in particular, paragraphs (iv) and (v) of that section. It will be remembered that these paragraphs include as among the purposes of a committal proceeding that of 'enabling the accused to adequately prepare and present a case' and 'enabling the issues in contention to be adequately defined.'

53. I do not think that such reliance is well founded. First, the evidence of Mr Bartlett is that the applicants are in a position to do no more in supplying the information to which each summons refers than name their sources. And it is in any event difficult to envisage the applicants advancing any case which Mr Leckenby might wish to pursue other than by opening possible paths of enquiry – in the words of Mr Clelland's submission to the magistrate on 20 December 2012 'to make appropriate enquiries and if necessary … obtain … material.'

54. In other words, Mr Leckenby is in reality embarked upon a fishing expedition in the hope that something might turn up as a result of the applicants' appearance in the witness box. But that is at some considerable distance from Mr Leckenby's desired destination, which is the adequate preparation and presentation of his case for dismissal.

55. In any event, this (it seems to me) is not that about which s97 of the Criminal Procedure Act is concerned. That provision is designed to enable, among other things, the adequate preparation by accused persons of their answer to the prosecution case. The task of the magistrate is to decide whether the evidence tendered by the prosecution is of sufficient weight to support a conviction for an indictable offence.[32] If a conviction is ultimately to result, that case must at trial be proved by the prosecution beyond reasonable doubt. With the exception of those few instances where a 'reverse onus' applies, no accused has to prove anything. If, however, an accused seeks to have the case against him or her dismissed in the interests of justice, the burden of proof falls upon that accused.

56. The heading to s97 is 'Purposes of a committal proceeding'. It seems to me that, with the exception of the 'reverse onus' instances, neither this heading nor the section itself is concerned with a defence case which, if it is to succeed, must be proved by the defence. In other words, and given the 'reverse onus' exception, the provision does not encompass as a purpose the advancement of a case which the accused must prove. That is not what committals are, or ever were, about; and s155 of the Criminal Procedure Act explicitly provides that nothing in the Act 'alters the nature of a committal proceeding from that existing immediately before the commencement of this section.'

57. Consistently with the view expressed above, the only examination of witnesses to which s97 refers is the cross-examination of prosecution witnesses.

58. Section 97 does, however, posit as one of the purposes of a committal that of 'enabling the accused to adequately prepare and present a case'. Another such purpose is that of 'enabling the issues in contention to be adequately defined.' But unless that case and those issues are directed towards assisting the magistrate to determine whether the evidence tendered by the prosecution is of sufficient weight to support a conviction for an indictable offence, they will merely prolong the committal proceeding for no purpose other than the exploration of matters with which only a judge can deal.

59. For these reasons, the appeal should in my opinion be allowed even though on a ground not argued before, let alone decided by, the trial judge. Each of the witness summonses dated 11 December 2012 should be set aside.

TATE JA:

60. For the reasons given by Harper JA, I agree that the appeal should be allowed.

COGHLAN JA:

61. I also agree with Harper JA.

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[1] Affidavit of Peter Llewellyn Bartlett sworn 19 December 2012, [5(d)]. This affidavit is exhibit 'PBL 4' to the affidavit of Mr Bartlett sworn 1 February 2013 for the purposes of the present application for leave to appeal.
[2] Ibid [5(e)].
[3] Ibid [5(g)].
[4] Ibid [5(i)].
[5] Exhibit 'HRR 3' to the affidavit of Howard Roger Rapke sworn 14 February 2013 (T 3361, lines 6-22).
[6] Ibid (T 3375, lines 4-11).
[7] Ibid (T 3376, lines17-21).
[8] Ibid (T 3381, lines 2-29).
[9] Exhibit 'PBL 5' to the affidavit of Peter Llewellyn Bartlett sworn 1 February 2013, (ruling at T 3385-3386).

[10] Since the hearing, the Court has been notified by the Commonwealth Director of Public Prosecutions that while the *Evidence Amendment (Journalists' Privilege) Act* 2011 (Cth) operated from 12 April 2011, the amending legislation is not presently relevant to the matters in issue. No party seeks to make submissions to the contrary.
[11] [2006] VSC 293, [90]; 164 A Crim R 62.
[12] [1988] HCA 54; (1988) 165 CLR 346, 354; 82 ALR 1; 62 ALJR 640; [1988] Aust Torts Reports 80-218.
[13] *McKenzie & Anor v Magistrates' Court of Victoria & Anor* [2013] VSC 2, [16].
[14] Ibid [20].
[15] Ibid [46].
[16] Ibid [51].
[17] *R v Australian Broadcasting Tribunal; ex parte Hardiman & Ors* [1980] HCA 13; (1980) 144 CLR 13, 35; 29 ALR 289; (1980) 54 ALJR 314.
[18] *Hall v Nominal Defendant* [1966] HCA 36; (1966) 117 CLR 423, 443; [1966] ALR 705; (1966) 40 ALJR 102 (Windeyer J).
[19] *Kassionis v The Magistrates' Court of Victoria* [2002] VSCA 73, [3] (Batt JA).
[20] Unreported, Court of Appeal, 17 April 1997 at 7. See *Kassionis v The Magistrates' Court of Victoria* [2002] VSCA 73, [3] (Batt JA).
[21] *Criminal Procedure Act* 2009, s97(d)(iv).
[22] Ibid s 97(d)(v).
[23] *Grassby v R* [1989] HCA 45; (1989) 168 CLR 1, 11; 87 ALR 618; (1989) 63 ALJR 630; (1989) 41 A Crim R 183 (Dawson J) ('*Grassby*').
[24] Ibid.
[25] Ibid 11.
[26] Ibid 15.
[27] Ibid 18.
[28] Ibid 19.
[29] *Judiciary Act* 1903 (Cth), s 68(2)(b).
[30] *Grassby,* 16.
[31] *Report of the Model Criminal Code Officers Committee to the Standing Committee of Attorneys-General,* December 1992, 99. See also *R v Hoar* [1981] HCA 67; (1981) 148 CLR 32; 37 ALR 357; 56 ALJR 43.
[32] *Criminal Procedure Act* 2009, s141(4).

APPEARANCES: For the Applicants McKenzie and Baker: Mr OP Holdenson QC with Mr AM Dinelli and Mr RW O'Neill, counsel. Minter Ellison, solicitors. For the First Respondent Magistrates' Court of Victoria: No appearance. For the Second Respondent Leckenby: Mr NJ Clelland SC with Mr CF Thomson, counsel. For the Commonwealth Director of Public Prosecutions (intervening): Mr NT Robinson SC with Mr KT Armstrong, counsel. Office of the Commonwealth Director of Public Prosecutions.
