

32/83

SUPREME COURT OF VICTORIA

R v COLLINS & ORS; ex parte DAVID SYME & CO LIMITED

Marks J

22 July 1983

PROCEDURE – COMMITTAL FOR TRIAL – ORDER SUPPRESSING PUBLICATION OF PROCEEDINGS – PRE-CONDITION FOR MAKING ORDER: MAGISTRATES (SUMMARY PROCEEDINGS) ACT 1975, S44(4).

A Magistrate only has power to make an order suppressing publication of committal proceedings, if first he is satisfied that the circumstances are such that the publishing of a report of the proceeding or any part thereof or of any evidence adduced would be likely to prejudice the fair trial of any person. If satisfied that an order should be made, a Magistrate should consider whether the order should apply to the whole or part, and whether it should be of limited or indefinite duration.

MARKS J: *[After setting out the Magistrate's order and the grounds or the order nisi, His Honour continued]:*
... [9] It is important to have regard to the words of s44(4) of the *Magistrates (Summary Proceedings) Act*, which are as follows:

[10] "Where a justice is sitting to take a preliminary examination or statement in a proceeding for an indictable offence, if he is satisfied that the circumstances are such that the publishing of a report of the proceeding or any part thereof or of any evidence adduced would likely to prejudice the fair trial of any person the justice may make an order prohibiting the publication of a report of the proceeding or part thereof or of any evidence adduced".

There has been no suggestion that a Stipendiary Magistrate is other than a justice within the meaning of that sub-section, and indeed, there are provisions in the statute that so provide. In my view, this sub-section on its proper interpretation means that the learned Stipendiary Magistrate only has power to make an order if first he is satisfied that the circumstances referred to in the sub-section are such that the publishing of a report of the proceeding or any part thereof or any evidence adduced would be likely to prejudice the fair trial of any person. Neither in the submissions made to the learned Stipendiary Magistrate nor in his reasons has this preliminary question in terms been adverted to. The learned Stipendiary Magistrate stated that he based the making of his order on what he referred to as "the nature of the allegations" and that they were "somewhat out of the ordinary". To my mind the nature of the allegations are by themselves irrelevant. It may be that they are a "circumstance" to be taken into account in conjunction with other circumstances, particularly the evidence or some part of it which in the view of the learned Stipendiary Magistrate "would be likely to prejudice the fair trial of any person."

[11] The essence of this provision is to protect the fair trial of persons. The sub-section recognises the danger to an accused person of publication of material which would be likely to prejudice his fair trial. It must be emphasised that in a discrete philosophical sense the publication of any material tending to show that a person has committed a crime might be said to prejudice his fair trial, but it is apparent that the sub-section refers to a publication which is different and above the mere report of what ordinarily takes place in committal proceedings. If it was to be held that all publication or every publication of the evidence given at a committal proceeding was likely to prejudice the fair trial of a person then no discretion could be seen as of any value – there would be an automatic prohibition in every committal case. It seems to me that the legislature has assumed that the publication of committal proceedings in the ordinary case does not of itself constitute sufficient ground for a Stipendiary Magistrate taking preliminary examination to be satisfied within the meaning of the sub-section. Accordingly, there has to be something about the circumstances of the preliminary examination or some part of it which would enable a magistrate to consider that they constitute something different and or above what ordinarily takes place in a preliminary examination and what ordinarily might be thought to flow from publication of the proceedings. It is not difficult to consider what circumstances might be above such an ordinary case. There may be evidence which is arguably inadmissible but which the magistrate may allow

to be adduced before him for the purpose of his task. In those circumstances he would be entitled to consider whether **[12/13]** he should make an order in relation to that evidence. Similarly, there may be evidence which is above the ordinary in its inflammatory potential, or there may be evidence adduced which could fan prejudicial speculation of a kind that could harm a fair trial. In considering an application under s44(4) a justice or Stipendiary Magistrate should apply his mind to a number of matters, which, although not necessarily the only ones, include:

(a) whether there are circumstances, for example, an unfinished trial of the accused or an associate on other charges, which would be likely to prejudice the fair trial of a person if the preliminary examination or some part was published;

(b) whether publication of the evidence to be adduced or some part is any more likely to prejudice the fair trial of a person than in the ordinary case of any other preliminary examinations, and, if so, how much more likely and the reason or reasons;

(c) whether, if satisfied an order should be made, it should apply to the whole or part, and whether it should be of limited or indefinite duration.

[14] To my mind the learned Stipendiary Magistrate failed to ask himself those questions which he ought to have in the proper exercise of his discretion. However I am satisfied that in saying as he did that he had regard particularly to the nature of the allegations that he misdirected himself, as in my view the nature of the allegations alone were not capable of dictating the exercise of the discretion. In applying his mind to the relevant considerations the learned Stipendiary Magistrate was, of course, obliged to have regard to the charges or, in his language, the "nature of the allegations", but the mere fact they are allegations which are "somewhat out of the ordinary" is to my mind, without more, diversionary and not a determining factor.

The learned Stipendiary Magistrate also referred to the possibility that there would be evidence of tape recordings, or of the contents of tape recordings. The learned Stipendiary Magistrate did not say in what way or for what reason publication of the contents of those recordings should be suppressed. The mere fact that there is to be adduced at a preliminary examination evidence of the contents of tapes, to my mind is not of itself of sufficient moment to dictate the making of an order under s44(4). If, however, there was to be an argument as to the admissibility of those tape recordings that is another matter. There is nothing in the material before me to suggest that that was the basis of the learned Stipendiary Magistrate's order. Otherwise the learned Stipendiary Magistrate does not give reasons.

[15] It follows from what I have said in my view the learned Stipendiary Magistrate failed to exercise his discretion according to the law in that he either failed to take into account and give consideration to relevant matters or that he considered matters which were irrelevant. In my view therefore ground (b) of the order nisi to review has been made out.