**47/91**

## FEDERAL COURT OF AUSTRALIA

# *CURRIE v MOLONEY*

**Jenkinson J**

**27 February 1991**

**PROCEDURE – COMMITTAL PROCEEDINGS – DEFENDANT COMMITTED FOR TRIAL – WORDS USED BY COMMITTING MAGISTRATE – NOT PRECISELY IN STATUTORY FORM – WHETHER MAGISTRATE IN ERROR.**

**Where a magistrate decides to commit a defendant for trial, the magistrate does not make an error by using a form of words which does not follow exactly the terminology of the statutory provisions applicable to committal proceedings.**

**JENKINSON J:** **[1]** Application for an order of review in respect of decisions by a magistrate to commit the applicant for trial on each of nine charges of wilful damage. Each charge alleged wilful damage by the application of poison to a tree. The application as argued has been grounded on two grounds. It is said first that the conclusion may be reached that the learned magistrate in making his decision proposed to himself an erroneous criterion by reference to which the decision was to be governed.

The provisions of s59(7) and s59(7A) of the *Magistrates (Summary Proceedings) Act* 1975 (Vic.) require that if, after hearing all the material placed before him, whether by the informant or by the accused person, the magistrate is "of opinion that the evidence is not of sufficient weight to support a **[2]** conviction for the offence which the accused person is charged" he must order that the accused be discharged, but if he is of opinion that the evidence is of that weight he must direct that the accused person be tried for the offence at the next sittings either of the Supreme Court or of the County Court. These charges were of wilful damage contrary to provisions of Commonwealth law, but the offences were alleged to have occurred in Queenscliff in Victoria and the committal proceeding was dealt with in Victoria so that those provisions are the applicable provisions. It is said that the learned magistrate asked himself whether the evidence would if accepted suffice to support a conviction without considering whether there was such weight in the evidence as would preserve the conviction from attack as unsafe or unsatisfactory. It is said that the precise meaning and denotation of these words has been authoritatively declared, in one instance at least, by a judge of this court.

It is unnecessary for present purposes, in my opinion, to undertake what might still be the difficult task of placing the exactly correct construction on these words. Let it be assumed that the words of sub-sections 59(7) and 59(7A) require an evaluation by the magistrate of the weight or persuasiveness or strength of the evidence, acceptance of which would be necessary to ground conviction. I assume that to be so, without expressing any opinion. I can dispose of this ground on the basis of the opinion which I hold, that unless and until a magistrate exercising this function is **[3]** asked by the accused or his legal representative to state with precision his conclusion, he makes no error at all by using a form of words which does not follow exactly the terminology of the sub-section. It is my belief that the administration of the law has not yet come to the stage where busy magistrates in Magistrates' Courts fall under some obligation to recite a particular form of words, as it were, by way of incantation.

Those who have practised in this State long enough would remember that there was once a magistrate who invariably took care to use the incantatory words of a section of an Act of Parliament in order to protect himself against orders to review his decisions, and nobody thought that the adoption of that practice advanced the cause of justice. This magistrate has used a form of shorthand expression to indicate that he has made a decision, such a decision as the sub-section calls for. He has used only the expression "evidence sufficient to commit" instead of "evidence of sufficient weight to support a conviction", but, in my opinion, nothing turns on that, as it were, abbreviated form of expression.

It was suggested that other statements made by the magistrate before he made that final announcement of his decision tend to strengthen the conclusion that he asked himself the wrong questions. I can't agree. It seems to me that he studiously avoided giving public expression to whatever views he did in fact form about what lawyers would call the strength of the prosecution case. And, in my opinion, unless and until a committing magistrate is asked for **[4]** a full statement of his reasons, it is a sound and sensible practice to say, if possible, nothing at all about the magistrate's own opinion concerning credibility or the weight of the evidence. I don't know whether the evidence indicates whether this committal proceeding was taking place in a public courtroom, but committal proceedings, I take it, still sometimes do, and comments about credibility that might be picked up and published would hardly be helpful in the administration of the criminal law if the accused were going to go before a jury.

The other ground of attack on the decision is that the evidence was simply not of sufficient weight to support conviction. Again it will assume, without expressing an opinion, that the test specified in sub-sections 59(7) and in s59(7A) requires the magistrate, in forming his opinion, to concern himself with the question as to the persuasiveness or weight to his mind of the evidence which it would be necessary for the jury to accept, if they were to find evidence of constituent elements of the offence and were, in the result, to convict. In this particular case, as at any rate the applicant would have it considered, there is a direct conflict between a witness who says that the applicant made an admission that he had committed the offence and the evidence of the applicant that he made no such admission and that he did not in fact commit it. (I have been using the expression "the offence" in the singular, but I should of course be referring to each of the nine offences charged.) It was said **[5]** that for a number of reasons there could not be accorded the evidence of the witness that weight or persuasiveness which would be required to justify satisfaction beyond reasonable doubt in the face of the sworn denials of the applicant.

But even if I entered upon a consideration – and it would have to be a very careful consideration – of the whole of the very substantial evidence given at the committal proceedings, I would eventually, after having considered all that evidence, be left in a position where, in order to determine the strength of the prosecution case in terms of weight and persuasiveness, I would have to be able to make some estimation of the credibility of the two men concerned. Some impression of credibility might emerge from the transcript, but the credibility of witnesses is almost invariably a product not only of what they say but of the way in which they say what they say and of their demeanour, both in the witness box and elsewhere in the courtroom during the course of the proceedings.

I can have no knowledge of those matters at all. In those circumstances, all the considerations which have been emphasised in the High Court and in this court against entering upon a consideration of the correctness of decisions to commit for trial are strengthened enormously. It would be almost certainly a fruitless attempt to resolve the question which Mr Monahan suggests has to be answered before his client can be properly committed for trial. And for those reasons, as a matter of discretion, I decline to go further in the attempt which, from what I have been told by Mr Monahan, would be inevitably an attempt doomed to failure for lack of **[6]** that knowledge which the magistrate had and which I cannot have. Accordingly, the application will be dismissed.

The susceptibility of committal decisions to judicial review under the *Administrative Decisions (Judicial Review) Act* has been recently affirmed by Sir Anthony Mason, who might be thought to have gone out of his way in *Bond's Case* [1990] HCA 33; (1990) 170 CLR 321; (1990) 94 ALR 11; (1990) 64 ALJR 462; 21 ALD 1 to make it clear that he did not question the existence of the jurisdiction, while at the same time reiterating once again the undesirability as a matter of discretion of the court's entering into inquiries of the kind which this particular application requires.

I am not suggesting that it will always be practicable to follow this course, but I take it that the Director of Public Prosecutions, in dealing with these applications, does not omit to consider the possibility that some of them may be dealt with, so far as he is concerned as the solicitor for the respondent, by utilising the provisions of Order 10 Rule 4 of this court's rules, which provides that:

"(1) A party may move for an order under Order 20, rule 2, (which deals with summary disposal of

proceedings) at the directions hearing, if notice of the motion is served on all other parties to the proceeding not less than 3 days before the directions hearing.

(2) The court may dispense with service under sub-rule (1)."

In an appropriate case the Director of Public **[7]** Prosecutions could, if he thought it appropriate, move, as soon as a proceeding of this kind is instituted, for an order of the kind which is afforded by Order 20 Rule 2 of this court's rules in an attempt to diminish, if not to eliminate, the degree of interference with the ordinary processes of the criminal law involved in cases of this kind. At all events, this application will be dismissed and the applicant will be ordered to pay the costs of the second respondent of the proceeding.

---