

60/77

## SUPREME COURT OF VICTORIA

***R v MELBOURNE MAGISTRATES' COURT; ex parte HISCOCK***

Lush J

23 June 1977 — [1977] VicRp 63; [1977] VR 569

**COSTS – IN COMMITTAL PROCEEDINGS – COSTS ORDER MADE ON DISCHARGE OF DEFENDANT – ABSENCE OF POWER TO AWARD SUCH COSTS – WHETHER MAGISTRATE IN ERROR IN MAKING ORDER FOR COSTS: *MAGISTRATES (SUMMARY PROCEEDINGS) ACT 1975, s97(b)*.**

The Magistrate, at the end of a committal proceeding, discharged the defendant from a number of informations including a conspiracy charge, stating "that there was no evidence upon which this particular defendant could be properly convicted". After hearing submissions as to costs, the Magistrate used the conspiracy information and the direction for discharge given in relation to it as a vehicle for making an order for the payment by the informant of costs. Upon an application to quash—

**HELD: Application granted. Order for costs quashed.**

1. The order for costs in the present case was made in a purported exercise of the power given by s97(b) of the *Magistrates (Summary Proceedings) Act 1975*, and for that paragraph to be available one of two conditions precedent expressed in it must have been fulfilled. Either the court must have dismissed the relevant information or have made an order in favour of the defendant.

2. As the Magistrate in this case was not trying the information, he did not dismiss it and the certificate of summary conviction properly recorded the order as an order of discharge. Accordingly the power must have rested on the proposition that an order was made in favour of the defendant, that order being the direction for discharge.

3. It has long been an established doctrine that in one respect a limitation is to be imposed upon the scope of the definition (that is, the definition of "order") namely that it is to be construed as applying only to decisions which are judicial and not merely ministerial. The cases upon which this doctrine rests have established also that in proceedings before the Magistrates' Court with respect to an indictable offence, a committal for trial and a dismissal of the information are ministerial not judicial orders.

4. Those authorities are decisive of the question that within the meaning of s97 of the *Magistrates (Summary Proceedings) Act* there was here no order made in favour of the defendant which could supply the condition precedent to the making of an order for costs.

**LUSH J:** It is necessary to refer to various sections in the *Magistrates' Court Act* and in the *Magistrates (Summary Proceedings) Act*. By the former Act, under s22(a), a Justice has power to direct that an accused person be tried and to commit an accused person to prison for trial. By s17 of the same Act, every Stipendiary Magistrate is, by virtue of his office, a Justice. By s52 a Magistrates' Court is authorised to "do any act or exercise any power which a Justice is authorised by any Act of Parliament to do". Reference, I think, should also be made to s50(1)(a) of that Act, which gives the Magistrates' Court jurisdiction to commit a person for trial or to discharge him. That para, however, relates to cases in which the Magistrates' Court has a summary jurisdiction in relation to the relevant offence itself and is concerned to decide whether to exercise that jurisdiction or to commit the defendant for trial.

Turning to the *Magistrates (Summary Proceedings) Act*, there is a series of sections, beginning at s43 and the most conspicuous example perhaps of which is s59(7), the terminology of which indicates that the function of committing for trial for indictable offences is primarily a function of Justices. Section 97 of the Act sets out the power of Magistrates' Courts as to costs. It is to be observed that there is no corresponding section relating to Justices. Paragraph (b) of that Section reads:

"Where the court dismisses the information or complaint or makes an order in favour of the defendant, the court may order the informant or the complainant to pay to the defendant such costs as the court thinks just and reasonable."

It may, I think, be fairly assumed that the order for costs in the present case was made in a purported exercise of the power given by s97(b), and for that paragraph to be available one of two conditions precedent expressed in it must be fulfilled. Either the court must have dismissed the relevant information or, as it was put – and I shall say a word about the implied construction later – have made an order in favour of the defendant. As the Magistrate in this case was not trying the information, he did not dismiss it and the certificate of summary conviction properly records the order as an order of discharge. Accordingly the power must rest on the proposition that an order was made in favour of the defendant, that order being the direction for discharge.

The term "order" is defined in s3 of the *Magistrates (Summary Proceedings) Act* and is in fact defined in the same terms in the *Magistrates' Court Act*, and was defined in substantially the same terms in the *Justices Act* 1958.

The first question then is whether the direction for discharge was an order in favour of the defendant. It has been held that the direction for committal or discharge given in committal proceedings is an administrative act and not an act of adjudication, and that the orders referred to in the definition are all to be regarded as orders of adjudication, that is, orders in some form making, for the time being at least, a final determination of the rights of the parties.

The authorities to which my attention was drawn are *Kennedy v Purser* [1898] VicLawRp 113; (1898) 23 VLR 530) at p535-8, where it was held that committal proceedings were not proceedings of adjudication; *Byrne v Baker* [1964] VicRp 57; (1964) VR p443 at p464; and *Phelan v Allen* [1970] VicRp 28; (1970) VR p219, a case in which the passage in *Byrne v Baker* was cited and again adopted by the Full Court. That passage is as follows:

"It has long been established doctrine that in one respect a limitation is to be imposed upon the scope of the definition" (that is, the definition of "order") "namely that it is to be construed as applying only to decisions which are judicial and not merely ministerial. The cases upon which this doctrine rests have established also that in proceedings before Justices with respect to an indictable offence, a committal for trial and a dismissal of the information are ministerial not judicial orders."

Those authorities are decisive of the question that within the meaning of s97 of the *Magistrates (Summary Proceedings) Act* there was here no order made in favour of the defendant which could supply the condition precedent to the making of an order for costs.

There are, however, some further observations to be made on s97. I have drawn attention to the fact that it gives power to courts and not to Justices. As a matter of practicality it will frequently be difficult to know whether a Stipendiary Magistrate is sitting as a Justice or as a court.

The committal function, as I have said, is treated in the Act as a function of Justices and although the court can perform that function I am not satisfied that – and I would leave open – the question whether if a court performs the Justices' function it can, in the performance of that function, add to the Justices' powers the power of the court itself given by s97. The other comment to be made on that section is that though the submission before me concentrated on establishing that the order of discharge in this case was not an order within the meaning of para (b) – and, as I have said I have accepted that argument – I would leave open the question whether the word "order" in either para (a) or para (b) of s97 includes orders, whether of adjudication or otherwise, made upon informations. Paragraph (a) deals with a case where there is a conviction order in favour of an informant or complainant. It may be that the words should be read distributively so that there is a conviction in favour of an informant or an order in favour of a complainant. In that case, a power is given to the court to order the defendant to pay the informant or the complainant costs.

Paragraph (b) deals with a converse situation where the court dismisses the information or complaint or makes an order in favour of the defendant, words which are appropriate to describe the success of a defendant on a counter-claim, and possibly in respect of some other procedural steps. It is not necessary in view of what I have already said for me to decide the question to which I am now referring. But I would not wish it to be thought that this decision stood as a ruling that in s97(a) and (b) the word order was, apart from the definition in s3, capable of referring to decisions given in informations within the description of the word "order" in those paragraphs.

My decision produces the result that the condition of the power of the court to award costs was not satisfied. The result is that that order was made in a relevant sense without jurisdiction.