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SUPREME COURT OF NEW SOUTH WALES

SANKEY v WHITLAM and ORS

Moffitt P, Reynolds and Hutley JJ A

13-15 April, 9 May 1977

(1977) 1 NSWLR 333; [1978] 29 FLR 346; (1977) 21 ALR 457

COURTS AND JUDGES – MAGISTRATE PART-HEARD IN COMMITTAL PROCEEDINGS ON INFORMATIONS ALLEGING CONSPIRACY AT COMMON LAW AND IN CONTRAVENTION OF A COMMONWEALTH STATUTE – MAGISTRATE DISQUALIFIED HIMSELF FROM FURTHER HEARING PROCEEDINGS ON ADVICE OF UNNAMED GOVERNMENT OFFICIAL, AND ON GROUND OF POSSIBLE BIAS – NO EVIDENCE AND NO POSSIBILITY OF BIAS – ORDER IN NATURE OF MANDAMUS THAT MAGISTRATE CONTINUE HEARING: *JUSTICES ACT* 1902 (NSW) S134; *JUDICIARY ACT* 1903-1973 S38(e); *CRIMES ACT* 1914-1973, S85E(5)

A Magistrate, who for more than one year had been hearing committal proceedings for conspiracy alleged against four former Ministers of the Crown in the Commonwealth government, disqualified himself from continuing to hear those proceedings on advice received from an unnamed officer of an unidentified government department, on the ground that, because he had commenced an action for defamation which he alleged to have been published in a newspaper, being a summary of a speech in the Commonwealth Parliament commenting on the conduct by him of those proceedings, it might be considered by members of the public who had no expert or other particular knowledge of the matter that he had a vested, or financial, or political interest in the outcome of the proceedings, or was, or might be, biased in his conduct thereof. There was no complaint by any party of bias or interest in the magistrate, much less any evidence of the same. At the time when the magistrate disqualified himself, the hearing so far had been devoted to legal argument; no evidence in support of the charges had been given, and the accused had not personally appeared.

During the hearing, the magistrate had heard challenges to his jurisdiction, including submissions that the offences charged were not known to the law, and had held that he had jurisdiction to proceed. An application to the Supreme Court for an order prohibiting the magistrate from proceeding further had been refused: see *Connor v Sankey* (1976) FLR 267. Later the magistrate embarked on contested proceedings relating to claims of Crown privilege in relation to subpoenaed documents. In giving reasons for his decision to disqualify himself, the magistrate stated that, before he was otherwise advised, he had not thought it appropriate or necessary to do so. On the application of the informant, Lee J made certain declarations and orders, including an order that the magistrate continue to hear the committal proceedings according to law. On appeal—

HELD: (1) By Moffitt P and Reynolds JA: It was clear that the magistrate, at the time when he disqualified himself, had embarked upon the exercise of jurisdiction in the committal proceedings; and that those proceedings were part heard.

(2) By the whole court: The question whether a magistrate is, or should be, disqualified from hearing, or continuing to hear proceedings, by reason of bias, or possible bias, is one going to jurisdiction; and so is ultimately to be determined by a superior tribunal, by proceedings in the nature of mandamus pursuant to s65(1) of the *Supreme Court Act* 1970, or, preferably, where it is available, s134(1) of the *Justices Act*, 1902 and not by the magistrate.

***Colonial Bank of Australasia v Willan* (1874) LR 5 PC 417, at pp443, 444; 43 LJPC 39; and *Ex parte Mullen; Re Hood* (1935) 35 SR (NSW) 289, at p299; 52 WN (NSW) 84; (affirmed *Mullen v Hood* [1935] HCA 67; (1935) 54 CLR 35) applied.**

(3) In such a case, the superior tribunal, in the exercise of its prerogative powers, will decide the question itself, and will make an appropriate order. It will not refer it back to the magistrate to decide the question according to law.

***Ex parte Qantas Airways Ltd; Re Horsington* (1969) 14 FLR 414; (1969) 71 SR (NSW) 291; [1969] 1 NSWR 788; (1969) 90 WN (NSW) 55, followed.**

(4) By Moffitt P and Reynolds JA: It is just as much an error of law, of a kind such as to attract the prerogative power of a superior court, if a magistrate disqualifies himself, for bias or otherwise, when he should not, as if he does not disqualify himself, when he should. Such a disqualification may produce injustice not only due to the financial burden placed on the parties, and to the delay involved in recommencing the hearing, but also in other ways. Elements of injustice somewhat similar to those

inherent in a new trial after a complete trial may be found in a new trial after a partial hearing.

(5) By the whole court: The power of a court under s134 of the *Justices Act* is no less than the prerogative power of mandamus; and s134 provided ample authority for the order appealed from and for a superior court to make that order in a proper case.

***Caly v Hardy* [1794] EngR 418; (1704) 6 Mod 164; 87 ER 921, followed.**

(6) By Moffitt P and Reynolds JA: In the present case, it was the duty of Lee J himself to decide whether the circumstances disqualified the magistrate from further sitting; and for the court, on appeal, to decide whether the judge had erred in his conclusion.

***Caledonian Collieries Ltd v Australasian Coal and Shale Employees' Federation (No 1)* [1930] HCA 1; (1930) 42 CLR 527 at pp547, 548; and**

***Ex parte Mullen; re Hood* (1935) 35 SR (NSW) 289 at p301; 52 WN (NSW) 84 (affirmed [1935] HCA 67; (1935) 54 CLR 35), followed.**

(7) By the whole court: No such error had been shown. *Per contra*, the decision of Lee J was correct. Not only was it proper for the magistrate to continue with the proceedings, but it was necessary that this be done in the interests of justice.

***Re Watson; Ex parte Armstrong* [1976] HCA 39; (1976) 136 CLR 248; [1976] FLC 90-059; 9 ALR 551; (1976) 1 Fam LR 11 (1976) 60 ALJR 778, at pp784, 785; and**

***R v Camborne Justices; ex parte Pearce* [1955] 1 QB 41 at pp51, 52; [1954] 2 All ER 850; (1954) 3 WLR 415, referred to.**

(8) By Moffitt P and Reynolds JA: In determining the appeal, little consideration should be given to the magistrate's decision to disqualify himself on the ground of possible bias (a) because his own view, before he was placed under the pressure of the advice, opinion or argument of some unnamed government official, was that he should not do so; (b) because such advice was, in any case, improper as being an unwarranted intrusion into a matter in which the magistrate was bound to act judicially; and (c) because such advice was in any case, bad, in that it led the magistrate to consider not what fairminded persons knowing the facts might think, but what persons not knowing the facts might illogically and unreasonably think.

(9) An argument in support of disqualification for possible bias, namely, that well informed persons might think that the magistrate, if not disqualified, would be motivated to conduct the further proceedings in a way calculated to secure him damages, or the greatest amount of damages, necessarily involved a *non sequitur*, because the only type of conduct of the magistrate in the further hearing of the committal proceedings which might be said to aid his case in this way would be such conduct as would demonstrate lack of bias.

(10) By the whole court: An argument in support of disqualification for possible bias, namely, that because counsel for the informant might be called as a witness for the magistrate in the defamation action, therefore the magistrate might favour the informant in the committal proceedings was speculative and fanciful. Therefore, no reasonable person could suspect possible bias on this basis.

***Stollery v Greyhound Racing Control Board* [1972] HCA 53; (1972) 128 CLR 509 at p519; [1972-73] ALR 645; 46 ALJR 602, referred to.**

(11) By Moffitt P. and Reynolds JA: There was no basis upon which a reasonable person could suspect that the magistrate had a political, or vested, or financial interest in the outcome of the committal proceedings.

(12) By the whole court: The provision of s38(3) of the *Judiciary Act* 1903-1973, that the jurisdiction of the High Court shall be exclusive in any matter in which a writ of mandamus is sought against an officer of the Commonwealth, is excluded by the express terms of s85E(5) of the *Crimes Act* 1914-1973, a provision which should be broadly construed, so as to permit the Supreme Court to apply its powers under s134 of the *Justices Act* to a magistrate hearing committal proceedings for an alleged offence against the *Crimes Act*.

***Peel v R* [1971] HCA 59; (1971) 125 CLR 447 at p468; [1972] ALR 231; 45 ALJR 645, applied.**

***Seaegg v R* [1932] HCA 47; (1932) 48 CLR 251, distinguished.**

(13) By Hutley JA: An argument in favour of disqualification for possible bias, namely, that the magistrate, by reason of having commenced a defamation action, had a vested interest in the conduct of the committal proceedings, could not be sustained, because the only conclusion which a reasonable man could reach was that the only vested interest which, in the circumstances, the magistrate could have in the committal proceedings would be to conduct them as well and as fairly as he could.

(14) In the same way, an argument in favour of disqualification for possible bias, namely, that the magistrate, with his defamation action in mind, might be tempted to over-compensate and to exhibit bias in favour of the accused, could not be sustained, because, even if this were so, the appellants were not entitled to rely on it. They were entitled to complain against bias, or a suspicion of bias, against themselves, but not against bias, or a suspicion of bias, in their favour.

(15) The only inference which a reasonable man with knowledge of the relevant facts would draw, in relation to bias or possible bias, was that the commencement of defamation proceedings by the magistrate could not possibly rebound to the disadvantage of the appellants. Therefore neither bias, nor a reasonable suspicion of bias, had been shown to exist.

(16) In any case, a magistrate inquiring into an offence under the *Crimes Act* is not an officer of the Commonwealth within s38(e) of the *Judiciary Act*.

***R v Murray and Cormie; Ex parte Commonwealth* [1916] HCA 58; (1916) 22 CLR 437; 22 ALR 413, applied.**
