52/84

SUPREME COURT OF VICTORIA

MOULARAS v NANKERVIS

Ormiston J

24-27, 30 July, 8 October 1984 — [1985] VicRp 40; [1985] VR 369

PROCEDURE – COMMITTAL PROCEEDING – WHETHER OPEN HEARING – EXCEPTIONS TO OPEN HEARING – DEFENDANT CHARGED WITH FALSE REPORT OF RAPE – WHETHER EXCEPTIONS APPLY IN ORDER TO CLOSE COURT: *MAGISTRATES (SUMMARY PROCEEDINGS) ACT* 1975, SS43, 44, 47A, 71, 78; *MAGISTRATES' COURTS ACT* 1971, S70.

Section 43 of the *Magistrates (Summary Proceedings) Act* 1975 provides:

"(1) In all proceedings for indictable offences the place in which ... a Magistrates' Court sits to take a preliminary examination or statement shall not be deemed an open court for that purpose, and a justice shall, if it appears to him desirable to do so in the interests of justice or of public morality or of the reputation of a victim of an alleged sexual assault or offence of extortion order that no person (except ...) shall have access to or be or remain in that place without the consent or permission of the justice ...

(2) Every preliminary examination taken by a justice or justices shall, where it is practicable be taken at a place appointed for the holding of a Magistrates' Court."

M. made a complaint to Police that she had been raped by a man unknown to her. When a man was later interviewed about the matter, he admitted having intercourse with M., but with her consent. When this allegation was put to M., she changed her mind and admitted that her first complaint was false. Subsequently, she made another statement to Police reviving her original allegation of rape. In respect of her first statement, M. was charged with making a false report to Police contrary to s53 of *Summary Offences Act* 1966. When the charge came on for hearing, she objected to summary jurisdiction; accordingly, the matter was adjourned to enable preparation of the "hand-up brief". When the preliminary examination commenced, M.'s counsel sought an order prohibiting publication or part publication of the proceedings on the ground that as M. still claimed she was the victim of a sexual offence, harm could be done to her if publication of the proceedings were allowed. The Magistrate refused to make the order. Upon order nisi to review the Magistrate's ruling—

HELD: Order nisi discharged.
(1) Notwithstanding that committal proceedings are ministerial in their nature, the well-accepted principle of the desirability of open hearings and the open administration of justice, applies as a general rule to them.

(2) Section 43(1) of the *Magistrates (Summary Proceedings) Act* 1975 contains three exceptions to the general rule, namely, the interests of justice, public morality and the reputation of victims of two classes of offence.

(3) In failing to consider the first of the exceptions to the general rule, the Magistrate was technically in error. However, as the interests of justice in the present case could rarely justify the extreme step of closing the court, there was no good reason for the grant of an order interfering with the Magistrate's conduct of the committal proceedings.

ORMISTON J: *[After setting out the facts, relevant provisions of the* Magistrates (Summary Proceedings) Act *1975 and the grounds of the order nisi, His Honour continued]:* ... **[10]** If one was to compare s43(1) and s78(1)(a) of the *Magistrates (Summary Proceedings) Act*, the contrast might at first lead to the conclusion that whereas in the hearing of matters determinable summarily magistrates are obliged to sit in open Court, subject to certain limited exceptions, they are under no such obligation when sitting out of sessions and, in particular, when conducting preliminary examinations for indictable offences.

A careful examination of s43(1) and its history will show, however, that the open administration of justice has been seen by the courts to be of great importance, even in the case of justices or magistrates sitting out of sessions and, in particular, during the hearing of committal proceedings. The curious expression 'shall not he deemed an open court' in the section goes

back to the reforms of Sir John Jervis, known as *Jervis' Acts*, which included both the *Summary Jurisdiction Act* 1848 (UK) 11 and 12 Vict Ch 43 and the *Indictable Offences Act* 1848 (UK) 11 and 12 Vict Ch 42. The latter contained the following **[11]** section, sXIX, which in substance remained in effect in England until 1967 and has been reproduced with minor alterations by all the Australian legislatures.

> "The Room or Building in which such Justice or Justices shall take such Examinations and Statement as aforesaid shall not be deemed an open Court for that Purpose: and it shall be lawful for such Justice or Justices in his or their Discretion, to order that no Person shall have Access to or be or remain in such Room or Building without the Consent or Permission of such Justice or Justices, if it appears to him or them that the ends of Justice are best served by so doing."

Remarkably it appears that, notwithstanding that this was the prior statutory provision explicitly allowing the examining justices to sit in closed session, the practical consequence of this legislation was that within a comparatively short time the practice arose of committal hearings ordinarily taking place in open court: see *Report of the Departmental Committee in Proceedings before Examining Justices* (The Tucker Committee) Cmnd 479 [1958] pp3-5. Probably this occurred because, as Sir James Fitzjames Stephen pointed out in his *History of the Criminal Law in England* [1883] Vol 1 p221, the real difference between the procedure before and after *Jervis' Act* was that, whereas formerly the examining justices acted the part of a public prosecutor and inquisitor, thereafter he occupied the position of a preliminary judge. Previously the accused was often questioned without any right to legal assistance, let alone representation (*Cox v Coleridge* [1822] EngR 19; 107 ER 15; (1822) 1 B & C 37): thereafter witnesses were examined and cross-examined by counsel or solicitor and the accused could be asked no questions, but simply cautioned and invited to make a **[12]** statement: see also *R v Gray* [1865] 10 Cox CC 184 at 194 (quoted below).

The words in question have been on the statute book with relatively little change for many years: cf. s83 of the *Justices of the Peace Act* 1865. The very fact that they point to a discretionary power in justices to control their own proceedings has meant that there is little reported authority on them, for it is not a subject likely to lead to judicial review, for the reasons that they have not led to any final or conclusive determination of the prosecution. Most of the reported cases have been cases of libel or contempt arising out of the publication of reports of committal proceedings.

In the first such case after the passing of the 1848 Act, *Lewis v Levy* [1858] EngR 785; 120 ER 610; [1858] EB & E 537, Lord Campbell CJ, in delivering the judgment of the Court of Queen's Bench, stated at pp558-559:

> "But although a magistrate upon any preliminary inquiry respecting an indictable offence may, if he thinks fit, carry on the inquiry in private, and the publication of any such proceedings before him would undoubtedly be unlawful, we conceive that while he continues to sit *foribus apertis*, admitting into the room where he sits as many of the public as can be conveniently accommodated and thinking that this course is best calculated for the investigation of truth and the satisfactory administration of justice (as in most cases it certainly will be) we think the Court in which he sits is to be considered a public court of justice ... In *R v Wright* ... that great judge, Mr Justice Lawrence ... observed that, though the publication of such proceedings may be to the disadvantage of the particular individual concerned, **[13]** yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings."

The substance of these observations was repeated with approval by Lord Hewart CJ, in a case relating to a charge to a grand jury in *R v The Evening News, Ex parte Hobbs* [1925] 2 KB 158, at pp167-168.

The earlier libel cases were explained seven years after *Lewis v Levy* (*supra*) in the Court of Queen's Bench in Ireland by Fitzgerald J, in *R v Gray* [1865] 10 Cox CC 184 at p194:

> "Proceedings before the magistrates at that time were really *ex parte*. They usually took place in the magistrates' house, there was no right in the public to be admitted, they were, as I have said, really and truly *ex parte* proceedings and liable to great abuse. But in the altered state of the law it is totally different. It is true, as has been observed, that the magistrates may, in the exercise of the discretion which has been entrusted to them, sit with closed doors and exclude the public. But I would say that is a discretion which ought rarely to be exercised. There may be possibly cases of

> such indecency or otherwise as would make it expedient, but the cases must be rare and few indeed which would justify the magistrates at a criminal investigation in sitting with closed doors. And on the other hand, while it gives the magistrate the discretion, it makes the Police Court, unless such an order is made, an open court to which the public have the right to be admitted."

His Lordship forcefully explained the rationale behind the need for open courts in these circumstances, at p193 of his judgment:

> "I have always understood, in common with the Lord Chief Justice (that is Lord Campbell CJ) that one of the many securities for the administration, the pure administration of justice in this country, one which distinguishes it from the administration of justice in most countries, is the great security of **[14]** publicity. That applies as well to this as to other superior courts, but it applies in my mind in a much stronger degree to the proceedings of inferior courts and especially to the proceedings, to the inquiries that take place in what we popularly call the police courts, courts where questions of great importance are under consideration and in which, if not the lives, the liberties and characters of persons are commonly at stake. It appears to me that the security obtained by publicity for the due administration of justice is this, that it brings to bear on that administration at once the pressure and support of public opinion – its judge – to prevent corrupt or improper proceedings, on the contrary, its support where justice is administered in a pure, fair and legitimate manner. It has been said and said truly, that possibly in particular cases there may be inconvenience to individuals from the early publication of evidence or of statements with respect to matters that are subsequently to be tried more solemnly, but it has been well observed, too, that this inconvenience to individuals is infinitesimal in comparison to the great public advantage given by that publicity."

The latter part of this passage was also quoted with approval by Lord Hewart CJ, in *R v The Evening News* (*supra*) at p168. The next direct discussion of the section appears in *Kimber v The Press Association Ltd* [1893] 1 QB 65, where Lord Esher said, at pp68-70:

> "Under certain circumstances ... publication may be very hard upon the person to whom it is made to apply, but public policy requires that some hardship should be suffered by individuals, rather than that judicial proceedings should be held in secret. The common Law, on, the ground of public policy, recognizes that there may be greater danger to the public in allowing judicial proceedings to be held in secret than in suffering persons for a time to rest under an unfounded charge of suggestion ...
> It was said that at a later part of the proceedings when the summons had been issued and was before the court for hearing, s19 provided that the court or room in which the magistrates sat should not 'be deemed to be an open Court', and that it would be ridiculous if the court or room were to be deemed an open court when the application for the issue of the summons was heard. I cannot see that. Nor can I agree with the meaning sought to be given to the section. All that it says is that the room or building in which such justice or justices shall take such examination and statement as aforesaid shall not be deemed to be an open court for that purpose; and it shall be lawful for such justice or justices, in his or their discretion, to order the court to be closed to the public. Having regard to the fair meaning of the enactment, it is obvious from the second part **[15]** that the justices have a discretion whether they will allow the public to be in the Court or not. They may, or they may not, abstain from preventing the public from remaining there. The only meaning of the section is that the court is not to be deemed an open court if the justices exercise their discretion by ordering it to be closed to the public; but if it is not so closed by order of the justices, then it is an open Court."

Kay LJ, said at pp75-76:

> "I also agree that in the present case there is a possible hardship to the plaintiff in the publication of the report. But it is of such extreme importance that publicity should he given to all judicial proceedings, that that consideration seems to me to outweigh what have been pointed out as the possible evils attending a publication of this kind."

I have looked at various editions of Burns' *Justices of the Peace*, Stones' *Justices Manual*, Irvine's *Justices of the Peace*, Quick and Berriman's *The Victorian Magistrate* and Paul's *Justices of the Peace*, and also at the first edition of *Halsbury* Vol. 9, pp311-312 and it appears that the practice hardened in the last part of the 19th century to concluding that a closed hearing was the exception rather than the rule. See also *R v Skates* [1895] 60 JP 11, per Hawkins J at p12, and *re Gibson ex parte Price* unreported, Manning J, Supreme Court of New South Wales) noted (1958) 31 ALJ at p630. In *R v Katz* [1900] 64 JP 807, Darling J held that a deposition taken during a preliminary examination by a hospital bed, though not held in open Court, was admissible in evidence at the trial, but in my opinion he did no more than confirm that the magistrate had a discretion in appropriate circumstances not to sit in open Court.

Moreover, the language of the section, both in *Jervis' Act* and in its present form, points to a requirement that **[16]** the examining magistrate should find specific grounds for excluding the public if the proceedings are not to be held in open court. The ordinary practice in holding committal proceedings for many years has been to conduct them in open court at the ordinary places appointed for the sitting of Magistrates' Courts: cf. *Magistrates (Summary Proceedings) Act* 1975, s43 sub-section (2). No doubt some reason for this procedure includes the provisions contained in s70 of the *Magistrates' Courts Act* and s71(4) of the *Magistrates (Summary Proceedings) Act*, which enable committal proceedings for indictable offences to be converted into final hearings determined summarily by Magistrates' Courts. The election or decision to deal with the charges summarily need to be made at the beginning of the hearing, and it would therefore be undesirable to commence proceedings in closed court which might, in particular circumstances, lead to the final determination of the charges.

Much criticism has been made over the years of the reporting of committal proceedings, and this has led in England to amendments to the law providing that those proceedings are held by law in open court but the reporting of them is restricted to a few formal matters: see the *Criminal Justice Act* 1967 and the *Magistrates' Courts Act* 1980. For that reason, neither *R v Horsham Justices; ex parte Farquharson* [1982] QB 762; [1982] 2 All ER 269; (1981) 76 Cr App R 87; [1982] 2 WLR 430; or *R v Leeds Justices ex parte Sykes* [1983] 1 WLR 132; [1983] 1 All ER 460; 76 Cr App R 129 are of direct relevance to the present case, although each contains some discussion of the meaning of the expression 'in the interests of justice' in the context of that legislation. It is significant that no such reform has been introduced in Victoria, except **[17]** for the matters contained in s44 and s47A of the *Magistrates (Summary Proceedings) Act*. It is not useful to repeat all that has been said in other cases about the virtues of open court hearings, although I consider most of it applicable to committal proceedings. I shall cite only what Gibbs J said in the High Court in *Russell v Russell* [1976] HCA 23; (1976) 134 CLR 495 at p520; [1976] FLC 90-022; (1976) 9 ALR 22; (1976) 24 FLR 399; (1976) 1 Fam LR 11; (1976) 1 Fam LN N4; (1976) 50 ALJR 594[1976] 134 CLR 495:

> "It is the ordinary rule of the Supreme Court, as of other courts of the nation, that their proceedings shall be conducted 'publicly and in open view' (*Scott v Scott* [1913] AC 417 at p441; [1911-1913] All ER 1; 29 TLR 520). This rule has the virtue that the proceedings of every court are fully exposed to public and professional scrutiny and criticism, without which abuses may flourish undetected. Further, the public administration of justice tends to maintain confidence in the integrity and independence of the courts. The fact that courts of law are held openly and not in secret is an essential aspect of their character. It distinguishes their activities from those of administrative officials, for 'publicity is the authentic hallmark of judicial as distinct from administrative procedure' (*McPherson v McPherson* [1936] AC 177, at p200).''

Those observations are relevant, in my opinion, notwithstanding the fact that committal proceedings are characterised as ministerial: cf. *Phelan v Allan* [1970] VicRp 28; [1970] VR 219; *Ammann v Wegener* [1972] HCA 58; (1972) 129 CLR 415 at p435; [1972-73] ALR 675; 46 ALJR 638; *Pearce v Cocchiaro* [1977] HCA 31; (1977) 137 CLR 600 at p606; (1977) 14 ALR 440; 51 ALJR 608, and the cases cited therein. Generally, the justification for open courts has been best explained in *Scott v Scott* [1913] AC 417, at pp441, 463, 477-8; [1911-1913] All ER 1; 29 TLR 520; *Attorney-General v Leveller Magazine Ltd* [1979] AC 440, at pp449-450; [1979] 1 All ER 745; [1979] 2 WLR 247; (1979) 68 Cr App R 342; *R v Kerr (No. 2)* [1951] VicLawRp 31; [1951] VLR 239; [1951] ALR 608; *David Syme & Co Ltd v General Motors-Holden Ltd* ([1984] 2 NSWLR 294 – CA, NSW 7th August 1984); *Broadcasting Corporation of New Zealand v The Attorney-General* [1982] 1 NZLR 120; and *Richmond Newspapers v Virginia* 448 US 555; 65 L Ed 2d 973; 100 SCt 2814].

Bearing in mind the long history of section 43(1) and the practice over many years, and having had the benefit of extensive and careful argument from counsel for both parties, I have reached the conclusion that it is consistent with its proper interpretation that the well accepted principle, as to the desirability of open hearings, is applicable as a general rule to committal proceedings. There remains a discretion, for good reasons, not to hold them in open court and I would not like to lay down finally what are the exceptions to the general rule. The three limbs for exclusion contained in s43(1), namely the interests of justice, public morality, and the reputation of victims of two classes of offence, would appear to cover most, if not all, cases justifying the closing of the court for these proceedings. In particular the "interests of justice" cover a wide range of circumstances, which, however, must all be related to the proper administration of justice,

including the organization of Justices' and Magistrates' Courts and their hearings, and the interests of the informant and the accused to the extent necessary to ensure that all parties obtain a just, efficient and expeditious hearing. See also the *Tucker Committee Report* (*supra*) at p5 and cf. *A-G v Leveller Magazine Ltd* [1979] AC 440, at pp450, 470-1; [1979] 1 All ER 745; [1979] 2 WLR 247; (1979) 68 Cr App R 342. Finally it must be remembered at all times that closing the court to the public is a more serious step than imposing restrictions on the reporting of proceedings.

[19] It is next necessary to see what the magistrate said and did in the present case. In the first place, he held two of the specific limbs of exclusion in s43(1) to be inapplicable. He said that this was not a case in which the interests of public morality required that the Court should be closed. In this, I believe he was correct, as far as I can judge from the material before me. But in any event it was a matter involving his discretion, and I cannot see that it miscarried in any way. No argument was put to the contrary.

Secondly, he said that it was not a case in which the interests of a victim of an alleged sexual assault were in issue. It was strongly argued that the applicant was the victim of an alleged sexual assault, because she had made the original complaint and she was now, again, asserting that she had been raped (Ground 3). In my opinion, looking at the purpose of this section, I am convinced that the discretion is to be exercised for the benefit of complainants, especially when they are witnesses, and not for the benefit of the accused. I consider that the broad ground of "the interests of justice" in the subsection, as well as the related basis for restricting the publication of reports under s44(4), is intended to give the appropriate protection to an accused person. I know of no case where the word 'victim' has been construed, but I consider that in its context it imports that it is the prosecution case which alleges that the person is a victim, and it does not apply to cases where another party, namely the defendant or accused, seeks to maintain she was a victim of such an **[20]** assault. It is primarily intended to protect the feelings and reputation of witnesses who are obliged to give evidence in committal proceedings, so that the magistrate correctly held that this was no basis for closing the Court. However, the first limb for closing the Court contained in the section, namely that it was in the interests of justice to do so, does not appear specifically to have been considered by the magistrate. He separately reached the conclusion that subsection (4) of s44 should not be applied to restrict reporting of the case, and no challenge has been made to that ruling, which was based on the fact that the magistrate did not consider that the fair trial of the applicant would be prejudiced. So it is only if the 'interests of justice' extend beyond the need for a fair trial, that the first head of s43(1) could be of relevance in the present case. It was argued that this head was wider, had not been considered by the magistrate, and should have been applied because the applicant was facing a charge of falsely reporting a sexual assault (grounds 1,2,4 and 5). It was said that the applicant may be discharged or acquitted and her reputation could still be tarnished as a result of the proceedings. No doubt both this third limb and s47A were introduced to protect the reputation of victims of sexual assaults, but neither applies in this case.

[21] In the end, I think the magistrate erred technically in not considering the first limb of s43(1) and he should have done so. In my opinion, however, the interests of justice in cases such as the present could only rarely justify the extreme step of closing the court. I would not like to restrict further the magistrate's discretion in these cases; he is best able to judge what the overall effect of such an order might be. However, if I had to exercise the discretion for myself, I doubt that this would be an appropriate case for shutting the Court. The open administration of justice should be seen to be predominant and, as far as the accused is concerned, the 'interests of justice' could only be involved if the case were one in which it could be seen clearly that there might be some prejudice to the fair hearing of the accused's case.

Technically, therefore, the magistrate was in error. However, assuming that the magistrate's ruling was an 'order' (cf. *McGrath v Dobie* [1890] VicLawRp 133; [1890] 16 VLR 646; *Weppner v Arnold* [1923] VicLawRp 17; [1923] VLR 127; 29 ALR 82; 44 ALT 129; *Phelan v Allan* [1970] VicRp 28; [1970] VR 219, at p223; cf. *Hall v Braybrook* [1956] HCA 30; [1956] 95 CLR 620, at p635; [1956] ALR 587), I consider that this is a case where I have a discretion, whether or not to make the order absolute: see *Byrne v Baker* [1964] VicRp 57; [1964] VR 443, at p465; *Bakker v Stewart; Wilson v Kerr* [1980] VicRp 2; [1980] VR 17. This is a matter relating to the day to day administration by magistrates of their power generally to control proceedings: cf. *O'Toole v Scott* [1965] AC 939; [1965] 2 All ER 240; [1965] 2 WLR 1160. Here, the matter may be considered by

the magistrate **[22]** from time to time. There have been many judicial observations recently as to the undesirability of interfering with committal proceedings: see *Ex parte Cousens: re Blacket* (1946) 47 SR (NSW) 145; 63 WN (NSW) 228; *Sankey v Whitlam* [1978] HCA 43; [1978] 142 CLR 1, at p22 (cf. at p83); 21 ALR 505; 53 ALJR 11; 37 ALT 122; *Summers v Cosgriff* [1979] VicRp 56; [1979] VR 564; *Spautz v Williams* 7 ALR 144; 45 FLR 112; (1983) 2 NSWLR 506 pp515-516; 23 ALT 3*1*, *Lamb v Moss* [1983] FCA 254; 76 FLR 296; (1983) 49 ALR 533 at pp545-546; (1983) 5 ALD 446; and *Seymour v A-G* [1984] FCA 122; 1 FCR 416; (1984) 53 ALR 513 pp531-540; 12 A Crim R 157. Such interference is strongly be deprecated and I see no good reason why any relief, by way of order to review of prerogative writ, should be granted to deal with matters which are procedural at best and are to be determined by the presiding magistrate as he sees the proceedings before him. For those reasons, I shall discharge the order nisi. I do not propose to make any order as to costs. The order, therefore, is that the order nisi be discharged.

Solicitor for the applicant: Legal Aid Commission of Victoria.
Solicitor for the respondent: RJ Lambert, Crown Solicitor.
