01/01; [2000] VSCA 242

SUPREME COURT OF VICTORIA — COURT OF APPEAL

HERALD & WEEKLY TIMES LTD & Ors v MAGISTRATES' COURT of VICTORIA & Ors

Tadgell, Charles and Chernov, JJA

19 October, 20 December 2000 — [2001] 2 VR 346; (2000) 117 A Crim R 122

PRACTICE AND PROCEDURE – COMMITTAL PROCEEDING – HAND-UP BRIEF PROCEDURE – REGISTER OF MAGISTRATES' COURT – WHETHER HAND-UP BRIEF AND WITNESS STATEMENTS ARE TO BE ENTERED IN THE COURT'S REGISTER – STATUTORY POWER OF MAGISTRATE TO GRANT OR LIMIT ACCESS TO THE HAND-UP BRIEF, WITNESS STATEMENTS AND EXHIBITS – WHETHER MEDIA OR MEMBERS OF THE PUBLIC HAVE A RIGHT TO COPIES OF THE CHARGE-SHEET AND WITNESS STATEMENTS – PRACTICE DIRECTION ISSUED BY THE PRINCIPAL REGISTRAR IN RELATION TO INFORMATION PROVIDED TO MEDIA IN COMMITTAL PROCEEDINGS – INDICATION IN DIRECTION THAT CHIEF MAGISTRATE GAVE DIRECTION – WHETHER PRACTICE DIRECTION WAS DIRECTED TO MAGISTRATES – WHETHER DECLARATION SHOULD BE MADE THAT PRACTICE DIRECTION BEYOND POWER OF THE CHIEF MAGISTRATE: *MAGISTRATES' COURT ACT* 1989, SS18, 20, 125(1), 126, 136.

The Principal Registrar of the Magistrates' Court issued a Practice Direction to Registrars of the Magistrates' Court concerning the supply of information to be provided to the media in relation to committal proceedings. The Direction indicated that the Chief Magistrate had "directed that members of the media who request access to briefs, statements and exhibits in respect to committal proceedings are to be informed to direct requests to the Director of Public Prosecutions." During the conduct of committal proceedings, two magistrates refused to grant the media access to witness statements. Subsequently, upon an originating motion to quash these decisions, a judge dismissed the motion. Upon appeal seeking a declaration that the Practice Direction was beyond the power of the Chief Magistrate—

HELD: Appeal dismissed.

1. The Practice Direction was neither issued by the Chief Magistrate nor directed to magistrates. It did not require magistrates to refuse access to interested parties to the charge-sheet or witness statements. If the Practice Direction had been directed to magistrates with the intent of requiring them to refuse requests for access and to refer members of the media seeking access to the Director of Public Prosecutions the Practice Direction would probably have been beyond power. The control magistrates are entitled to and must exercise over committals, and over documents and exhibits tendered in or made available for or during such proceedings permits them to make such documents available upon request to interested members of the public or the media. In this case, the Practice Direction had no bearing on the magistrates' power to do so.

2. *Obiter*. Section 18 of the *Magistrates' Court Act* 1989 ('Act') requires the Principal Registrar to keep a register of all Court orders. The register conveys the notion of a continuous record of all final orders made by the court. However, there is no provision which requires the hand-up brief or witness statements in a committal to be entered in the register.

3. *Obiter*. The open court requirement contained in s125(1) of the Act does not extend to obliging the court to provide, upon request, reasonable access to copies of the charge-sheet and witness statements. The section gives the members of the media no right to such access in a committal. However, if the media is entitled to report on committal proceedings, it would seem desirable that reasonable access be afforded to enable a fair and accurate report to be made.

TADGELL JA:

1. I agree for the reasons that Charles JA has prepared, which I have had the opportunity to study in draft, that this appeal should be dismissed.

CHARLES JA:

2. The appellants seek a declaration, refused by the judge at first instance, that Practice Direction 41/98 dated 13 November 1998 issued by the Principal Registrar of the Magistrates' Court of Victoria is beyond the power of the Chief Magistrate of that court.

3. The Practice Direction was in the following form -

> "13 November, 1998
> PRACTICE DIRECTION 41/98
> REGISTRARS OF MAGISTRATES' COURT
> INFORMATION PROVIDED TO MEDIA IN COMMITTAL PROCEEDINGS
> The Chief Magistrate has directed that members of the media who request access to briefs, statements and exhibits in respect to committal proceedings are to be informed to direct requests to the Director of Public Prosecutions. The court will no longer supply this information to the media. This Practice Direction takes precedent (sic) over any prior instructions that are inconsistent with this direction.
>
> GRAEME J. HORSBURGH
> PRINCIPAL REGISTRAR MAGISTRATES' COURT OF VICTORIA"

4. The historical background to the making of this Practice Direction is relevant and must now be set out. Committal proceedings in Victoria are now usually conducted using what is called a 'hand-up brief procedure', prescribed by Schedule 5 of the *Magistrates' Court Act* 1989 ("the Act"), as directed by s56 of the Act. Schedule 5 enables the informant to serve on the defendant a hand-up brief which contains, *inter alia*, copies of the statements of all witnesses the informant intends to call at the committal and copies of any document the informant proposes to use as evidence. If the defendant requires the attendance of any such person at the committal, notice must given, and the witness may then be required to give evidence and be cross-examined. After the prosecution's evidence is concluded, the court must form an opinion as to whether the evidence is of sufficient weight to support a conviction for any indictable offence. If in the court's opinion the evidence is not of such weight, the defendant must be discharged. At the close of the prosecution's evidence the defendant will be either discharged or committed for trial. Clause 11(3) of Schedule 5 then provides that—

> "(3) If a defendant is committed for trial, the Registrar at the venue of the Court at which the committal proceedings was held must forward to the Director of Public Prosecutions—
> (a) the depositions; and
>
> (b) all exhibits which have remained in the custody of the Court; and
>
> (c) copies of all process filed in the Court in the proceeding; and
>
> (d) copies of all bail undertakings in the proceeding."

5. The hand-up brief procedure was introduced in 1972 by ss42B and 42C of the *Justices Act* 1972. In the Second Reading Speech introducing the Bill the Minister stated[1] that the purposes of committal proceedings were to determine whether the evidence was sufficient to put a person charged with an indictable offence on trial and so that the accused may know something of the case against him; the Bill, "if passed will provide the means in appropriate cases of reducing the time spent in the conduct of committal proceedings" and sought "to avoid the undue waste of time and the expense it involves to all parties by avoiding the necessity for the attendance of witnesses in uncontested matters."

6. It was well-established before 1989, when the Act was introduced, that the general rule that judicial proceedings should be conducted in public applied also to committal proceedings; *Moularas v Nankervis*[2]. Committal proceedings often involve charges in which great interest will be shown by the public and, of course, those concerned with reporting such events in the media. But there is a tension between the conduct of committal proceedings in public, and press reporting of these events, on the one hand, as against the interests of the accused and, indeed, the administration of justice itself. As Beach J said in *David Syme & Co Ltd v Hill*[3] –

> "The matters which will be ventilated by counsel for Mercuri during the course of the committal cannot but attract wide media coverage, coverage which in my view can only be prejudicial to the officers concerned. In my opinion the risk of that prejudice outweighs the public need to know what is happening at the committal. As the learned magistrate pointed out, the court remains open to the public throughout the committal. Any person interested in the proceeding is free to attend the hearing. The prohibition simply relates to the publication of the evidence by the media. One final point I wish to make is that this is a committal, not a trial. It is an administrative step, albeit an important one, in the criminal process. The need of the public to know what is happening at a committal is of

> less significance than its need to know what is happening at a trial. Indeed, I consider it is strongly arguable that the less publicity attaching to a committal the better. I say that for the reason that often at a committal only one side of the case is fully presented to the magistrate, namely the case for the Crown. In such a situation the publicity attaching to the committal tends to over-emphasize the case for the Crown and often is highly prejudicial to the accused."

7. A further aspect of the hand-up brief procedure is that ordinarily there will not be an opening statement, since prosecutors will assume that the magistrate has read the papers in the hand-up brief.[4] The prosecutor will frequently only give the magistrate some idea of what the case is about in the form of a short address. But while this procedure naturally supports the principal aim of reducing the time and expense of committal proceedings, it necessarily has serious consequences for representatives of the media who are present. Publication of a report of committal proceedings carries with it the risk both of defamation and contempt of court. It is almost invariably a prerequisite to the establishment of a defence by a reporter (and the medium by which a report is published) to proceedings whether for defamation or in contempt, that the report be fair and accurate. Unless access to the hand-up brief is made available, a reporter will frequently find it impossible both to understand what is taking place during a committal hearing and thus also to produce a report which is fair and accurate.

8. In April 1995 the then Chief Magistrate issued a document entitled *Guidelines on Media Access to Statements and Exhibits in Committal Proceedings at Melbourne Magistrates' Court* (the "Papas guidelines"). These guidelines had been arrived at following consultation with representatives of the media, the Office of Public Prosecutions, the Law Institute of Victoria and the Criminal Bar Association. The document emphasized that its contents were only guidelines and could in no way be binding on magistrates who might make rulings which did not accord with them. The document then continued—

> "HAND UP BRIEF COMMITTALS
> In cases where a defendant is committed by way of the straight hand up brief procedure, that is on the papers and without any evidence being called, the hand up brief document, which is tendered to the court as the evidence of the proceedings, is available for perusal by the media, for a short period of time following conclusion of the proceedings. Media reporters who wish to view the hand up brief should contact the Committals Co-ordinator Mr George Adgemis (telephone 628 7730) who will make arrangements for a copy of the brief to be provided for perusal. It should be noted, that hand up briefs contain information which if published would be seriously prejudicial and could be a contempt of court. When hand up briefs are being perused, reporters should:- i) Not use details of any kind indicating prior convictions or any kind of criminal history. ii) Not publish details of confessions or admissions.
>
> STATEMENTS IN CONTESTED COMMITTALS A statement in the form in which it is finally tendered in the course of evidence in the course of a contested committal proceeding, can subject to any contrary ruling of the Magistrate, be disseminated to the media. Reporters should approach the Committals Co-ordinator Mr George Adgemis, who will arrange for one copy of the relevant statement to be made for the media, at his earliest convenience.
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> EXHIBITS IN HAND UP BRIEFS AND CONTESTED COMMITTALS Access to Exhibits in hand up brief or contested committals will be determined on a case by case basis. Reporters can contact the prosecution and defence lawyers and appropriate arguments may be addressed to the court. Reporters' enquiries otherwise should be directed to the Courts Information Officer Ms. Prue Innes on telephone 603 6158. In the event that the media is permitted access to an exhibit, such access should also be arranged with Mr Adgemis who will make one copy available at his earliest convenience. Sometimes an exhibit will not be capable of being photocopied, or will be voluminous in which case he will arrange access in his office.
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> INADMISSIBLE AND/OR PREJUDICIAL MATERIAL It should be emphasised, that it is the responsibility of the media to ensure that nothing is published that could prejudice future proceedings. Simply because documents or exhibits are tendered in the course of committal proceedings does not mean they are admissible and indeed large parts of the material may subsequently be ruled inadmissible at trial. Reporters must exercise judgment and caution and should seek legal advice if in doubt.
> NICHOLAS PAPAS CHIEF MAGISTRATE"

9. The Papas guidelines remained in operation until Practice Direction 41/98 was issued in November 1998, supposedly pursuant to s16A of the Act which had been inserted in 1996. The section provided that the Chief Magistrate might from time to time issue Practice Directions, statements or notes for the Court in relation to civil or criminal proceedings or any class of civil or criminal proceedings, but not inconsistently with any provision made by or under that Act. Then, on 24 November 1998, the Office of Public Prosecutions issued a document entitled "*Media Access to Statements and Materials in Magistrates' Court Proceedings*". This document noted that

Practice Direction 41/98 appeared to change court policy in relation to access to such materials. The Practice Direction was then set out, and the document continued –

> "Media access is a delicate area. On the one hand, you have the media representing the public interest in the processes of the Court and the details of the cases coming before it. On the other, you have the interests of the defendant and the legal restrictions upon publication of certain material whether related to the nature of the offences e.g. sexual offences or an Order of the Court. Moreover, the Director is anxious that there not be any allegations that the Crown has selectively released material or taken other steps which might prejudice the prospects of a fair trial. From the date of this Direction, OPP staff are authorised to give access to statements and other material, including agreed summaries, tendered during proceedings only where the following conditions have been met: 1. The materials in question must have been tendered to the Court. 2. The prosecutor considers that it is appropriate to grant access in the individual circumstances of the case. 3. The defence agree to the media being granted access to the materials. 4. The Press are not to be given copies of the material but may be allowed to peruse that material. ... The media have the right to go before the Court and argue the question of access to these materials. It is the preferred position of the Director that access be granted through the Court, or at the very least, by agreement between the parties involved. Where neither of those conditions can be achieved, then it is for the media to look to their own remedies."

10. In response to certain submissions that were then made to him, the Chief Magistrate by letter to the solicitor for the first appellant dated 18 December 1998 replied –

> "I refer to your correspondence of 26 November 1998 and your fax of 16 December 1998, regarding access to committal documentation. Practice Direction 41/98 was not introduced to hinder the media, or any other person, from access to briefs, statements or exhibits tendered in committal proceedings. The intention of the direction is the exact opposite. It is to ensure that access to relevant documents, etc. produced to the Court are available. The Director of Public Prosecutions, when providing access to documents for the Court, can advise that statements from sexual offence victims cannot be reported, nor should details of confessions or admissions be published."

11. At a committal hearing on 29 January 1999 McLennan M refused to release to the press written statements in a hand-up brief. The primary judge in the course of his reasons for judgment[5] which I have found of great assistance, summarised McLennan M's reasons for refusing access as follows[6]:

> * the practice direction was not beyond power and would not be disregarded - normally that would be the end of the matter but in deference to other arguments put forward, he would set out his further conclusions;
>
> * the press were free to report on all matters disclosed in court (with one irrelevant exception) and were not restricted in regard to other material which they might obtain, including statements from the DPP brief, if made available — the real issue which arose was the release by the court of exhibits, namely witness statements tendered to the court;
>
> * the principles as to the desirability of public and open hearings applied as a general rule to committal proceedings (see *Moularas v Nankervis* ...);
>
> * however, those principles did not extend so as to create 'rights' which would interfere with the proper workings of the court – the press had no special rights and, in the absence of authority, he considered that the press was not, any more than the public, entitled 'to stand up in court and demand to see an exhibit in a case';
>
> * for reasons relating to the nature of committal proceedings, and the nature of the witness statements tendered and the role of the magistrate in those proceedings, it was inappropriate that the press should be entitled to unfettered access to exhibits, including witness statements, and likewise inappropriate that the magistrate should become required to perform the new and additional task of adjudicating upon what, if any portions, of witness statements should be released (having regard to admissibility and the like);
>
> * the policy of openness did not require the court to relinquish its control over and responsibility for exhibits.

12. McLennan M then stated the following conclusions[7] –

> "First, I intend to act in accordance with the Practice Direction issued at the direction of the Chief Magistrate. Secondly, there is no absolute requirement that a presiding magistrate is required to make available witness statements for scrutiny by the media for reporting purposes. The interests of the public are best served in the maintenance of the openness of the processes of the court by public hearings and reportage on those proceedings. There are dangers to the public interest in allowing too deep a scrutiny of documents lodged with the Court if there is no firm control kept over such a procedure. Thirdly, I am of the opinion that in the present case that the fair trial of the defendants, if there is to be one, will be unfairly prejudiced by the release of the statements to be tendered, especially those statements made by various of the civilian witnesses. It is interesting to note that the coverage given, at least, in *The Age* for this day does not indicate that the reporter responsible was under any particular difficulties in understanding the evidence and reporting on elements of the cross-examination."

13. A further committal hearing in relation to charges of fraud against the third respondent commenced before Fleming M in the Melbourne Magistrates' Court on 25 January 1999. A reporter for the first appellant was present in court on Monday 25 and Wednesday 27 January but was unable to understand the proceedings sufficiently to compile a news report, not having access to the statements of the witnesses tendered in court or the charge sheet. When the reporter approached the bench clerk for a copy of the charge sheet she was told that the magistrate had been instructed "not to grant the media access to anything". The reporter also made a request to the Office of Public Prosecutions for access to the witness statements and charge sheet but this was refused because the defence did not agree to the media having access to them. On 28 January the solicitor for the first appellant applied to Fleming M for access to the witness statements tendered in open court in the committal proceeding and filed written submissions with the court. On 29 January the magistrate heard submissions from Mr Hicks, a senior Crown prosecutor, who submitted that the legislative scheme of the Act required that the court determine the question of access to witness statements tendered in open court and that the power to determine access to statements tendered in open court rested in only one office: the court. Mr Hicks submitted that it was "nonsensical" that the media be entitled to report upon committal proceedings but be denied access to the statements of witnesses tendered in court unless a statutory exception applied.

14. After hearing submissions for the appellants, Fleming M ruled on Tuesday 2 February that she agreed with the findings of McLennan M and pointed to what was said to be a clear distinction between access to material that may be tendered during a trial and the unique situation that applies in criminal proceedings conducted with hand-up briefs. Fleming M continued[8] –

> "Most, if not all of the authorities referred to me, relate to the position that applies at a trial and not a committal. This distinction, in my view, is vital. In these proceedings I am performing an administrative function ..."

The magistrate referred to certain of the comments of McLennan M as being appropriate and also referred with approval to the judgment of Beach J in *David Syme & Co Ltd v Hill*, and in particular the second paragraph previously quoted in this judgment. Fleming M finally declined to make the order sought on behalf of the appellants saying that "It would be an entirely different matter if this was a trial".

15. Section 125(1) of the Act provides that "all proceedings in the court are to be conducted in open court, except where otherwise provided ..." In s3 of the Act the word "proceeding" is defined to include a committal proceeding. Accordingly, Mr Houghton for the appellants put to us that the only issue in the appeal was the correct construction and operation of s125(1) and that the Court was solely concerned with the proper meaning of the term "open court". The application was supported before the primary judge by a number of affidavits sworn by experienced journalists whose evidence established[9] that it was very difficult to understand the cross-examination of witnesses without being granted access to witness statements; that without such access it was difficult, if not impossible, to produce an accurate and balanced report; and that it was difficult to obtain such access from prosecutors and on many occasions defence lawyers refused to consent to prosecutors allowing such access. It followed that there was now a strong deterrent to the reporting of committal proceedings.

16. Mr Houghton submitted that it has long been recognized in a democratic society that court proceedings should be transparent and open to the public; see, e.g. *The Herald & Weekly Times*

Ltd v Medical Practitioners Board of Victoria[10]. Reliance was placed on *Russell v Russell*[11], where Gibbs J said –

> "It is the ordinary rule of the Supreme Court, as of the other courts of the nation, that their proceedings shall be conducted 'publicly and in open view' (*Scott v Scott* ...). 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 hall-mark of judicial as distinct from administrative procedure.' (*McPherson v McPherson*...). To require a court invariably to sit in a closed court is to alter the nature of the court."

17. We were referred to various cases bearing on the meaning of the expression "open court". For example in *Daubney v Cooper*[12], Bailey J speaking for the Court of Kings Bench said –

> "We are all of opinion, that it is one of the essential qualities of a Court of Justice that its proceeding should be public, and that all parties who may be desirous of hearing what is going on, if there be room in the place for that purpose, — provided they do not interrupt the proceedings, and provided there is no specific reason why they should be removed, — have a right to be present for the purpose of hearing what is going on."

In *Dando v Anastassiou*[13], Dean J said –

> "The words 'open Court' mean a Court to which the public has a right to admission. The essential thing is the existence of this right. It is not material that in fact no person sought to gain admission, nor is the fact that there has been a long practice to hold the Court in that manner material unless such practice is sufficiently well known to the public so that all persons interested will be likely to know that they had a free right of access. In *McPherson v McPherson* ... a judge held his Court in a library adjoining Judges' Chambers access to which might be had through double doors on one of which the word 'Private' was painted. The other door was open and the public might, had they chosen, have entered. It was held that the Court was not an open Court as the word 'Private' would deter them from seeking to gain entrance."

18. Mr Houghton relied, in regard to the position of the media, on what was said by Lord Widgery CJ in *R v Denbigh Justices; ex parte Williams*[14] –

> "Today, as everybody knows, the great body of the British public get their news of how justice is administered through the press or other mass media, and the presence or absence of the press is a vital factor in deciding whether a particular hearing was or was not in open court. I find it difficult to imagine a case which can be said to be held publicly if the press have been actively excluded. On the other hand, the fact that the press is present is not conclusive the other way, because one must not overlook the other factor of an open and public proceeding, namely, one to which individual members of the public can come if they have sufficient interest in the proceedings to make it worth their while to do so."

Reliance was also placed on *R v Felixstowe Justices; ex parte Leigh*[15] per Watkins LJ (with whom Russell and Mann JJ agreed), and in particular the statement that —

> "It is particularly to be noted from those observations that not only must nothing be done to discourage the fair and accurate reporting of proceedings in court, but that no exercise of the inherent power of the court to control the conduct of proceedings must depart from the general rule of open justice to any greater extent than the court reasonably believes it necessary in order to serve the ends of justice."

19. The appellants did not claim to have any interest above members of the public, nor was it submitted that the press should be in any better position than the public were in having access to documents or witness statements in the hand-up brief. The submission was that the public and the press should have the same right to claim access to tendered written statements. Mr Houghton submitted that if the public are precluded absolutely from obtaining access to the charge sheet and witness statements proffered as part of the hand-up brief pursuant to clause 5(5) of Schedule 5 of the Act and have no other means of learning of their contents, then the criteria essential for a matter to be conducted in open court have not been met. The argument ran that it was not necessary that there be an express provision providing for access to the hand-up brief. If a proceeding was being conducted in open court, then once the hand-up brief became

part of the evidence before the court, the court was required to provide reasonable access to the public in a manner which was convenient and practicable to the due process of the proceeding. Otherwise, so the argument ran, it could not be said that the proceeding was fully exposed for all to see.

20. Next it was submitted that the effect of the Practice Direction and the order of Fleming M, by denying access to the evidence-in-chief, was to deny the public its right of free access to the case as effectively as if the doors were locked because the public was unable to be informed about the case through the media. Practice Direction 41/98 impermissibly delegated, so it was said, the question of access to the Office of Public Prosecutions, as a result of which access to all these documents was effectively denied, because the defence invariably refused consent to the documents being made available to the media. Accordingly, it was submitted, the effect of s125 of the Act was that a procedure must be put in place by which the media were entitled to obtain access to documents in the hand-up brief. Such a mechanism had been prescribed by the Papas guidelines. In the absence of such a mechanism, when a representative of the press made an application for access to the hand-up brief and was refused, then the court became a closed court.

21. Particular reliance was placed on what was said by Mason CJ in *Hinch v Attorney-General*[16]. After noting that a report of committal proceedings has a special capacity to influence the minds of potential jurors because the evidence is directed to the very issues which will arise at the trial and the evidence led may include evidence not admissible at the subsequent trial, Mason CJ said–

> "The reporting of committal proceedings is an example of the reporting of public affairs, notwithstanding that the publication of the report may cause prejudice to the accused at his trial by prejudicing the mind of potential jurors in relation to the issues to be determined at the trial. Reports of court proceedings are not a true example of the public interest in the administration of justice yielding to the public interest in freedom of discussion. Rather it is a case where on balance the wider interests of the administration of justice are thought, as the law currently stands, to be better served by allowing publicity."

See also *Harman v Secretary of State for the Home Department*[17].

22. In the course of very full submissions, Mr Houghton took us to a number of United States and Canadian cases in which there has been developed a series of rules relating to the right of the public to inspect and copy judicial records, and in which it has been said that it is for the court to develop a plan for the release of materials to which access is sought. For example in *US v Mitchell*[18], access was sought by a television station to portions of President Nixon's White House tapes that were played before the jury in a criminal trial. Access was granted, it being said that the common law right to inspect and copy judicial records extends to exhibits and that–

> "the parties and the court will have to attempt to develop a plan for release of the tapes. ... Distribution should be prompt, and on an equal basis to all persons desiring copies. The court cannot be expected to assume the cost of distribution, nor should the court's time or personnel be unduly imposed upon."[19]

In *US v Myers*[20] the question was whether television networks could copy and televise video-tapes entered into evidence in a criminal trial. The court reasoned that what transpires in the courtroom is public property, and once materials had become evidence at a public session of the trial, then access should be permitted for both inspection and copying. The court said that provided that there was no significant risk of impairing the integrity of the evidence or interfering with the orderly conduct of the trial, only the most compelling circumstances could prevent contemporaneous public access to it. In *US v Criden*[21], access was granted to video and audio tapes admitted into evidence and played to a jury in open court during a criminal trial. See also *Valley Broadcasting Company v US*[22]; *Federal Trade Commission v Standard Financial Management Corp*[23]; *Vickery v Nova Scotia Supreme Court*[24].

23. Mr Houghton recognized that in considering these American and Canadian authorities, we should bear in mind the warning about the use of authorities from other jurisdictions sounded by Ormiston J in *Hercules v Phease*[25]. As I followed his argument however, what was being put

to us was that these cases showed that procedures can be devised to enable the media and the public to have access to exhibits and documents used in court proceedings; they demonstrated that in other jurisdictions the principle of open justice was not confined to allowing the public to walk through the door of the court to be present, but carried with it the implication that if the public was to have full access to the proceedings, the public must be properly informed.

24. Mr Houghton on several occasions made it clear in answer to questioning by the presiding judge that the only relief the appellants sought was a declaration that Practice Direction 41/98 was beyond the power of the Chief Magistrate of the Court. The first questions therefore for this Court are by whom the Practice Direction was issued, to whom it was directed and what was its effect. I note that McLennan M appears to have taken the view that it was directed to magistrates and that he was either bound to or should act in accordance with it, and that Fleming M agreed with McLennan M's reasoning. Both magistrates took the view that the Practice Direction was not beyond power.

25. Before this Court Mr Costigan made submissions on behalf of the Attorney-General. Mr Costigan submitted that s125(1) of the Act was not breached by the failure of the Court to grant the access sought by the appellants. He submitted that the Court had no power to grant the access sought, and that a non-party, such as a member of the media, has no right to such access. It was submitted that there was also no justiciable dispute in respect of Practice Direction 41/98 in any event. The submission continued that the open court principle is primarily concerned with the administration of justice. The fundamental purpose of the open court rule was not the provision of information to the public at large, or the facilitation of public discussion, or even to satisfy public curiosity about the private affairs of individuals who have resource to the courts, but rather to ensure the due administration of justice; see *Harman's Case*[26]. Mr Costigan submitted that there were limitations imposed on access to material produced in court proceedings. For this purpose he relied on *R v Waterfield*[27], where Lawton J said –

> "When evidence is given orally, all in court hear what is said. When written evidence is produced it may or may not be read out. In most cases part of what is written is read out, but not the whole. When a piece of real evidence is produced a witness has to say from where it came. This having been done, the jury looks at the exhibit. Usually the judge does too and counsel in the case may do so. The exhibit, however, is not shown to other persons who may be in court. ... The members of the public in court have no right to claim to be allowed to look at the exhibits."

26. Mr Costigan submitted that in the present case the court had taken no step to discourage the fair and accurate reporting of proceedings in court. It simply conducted a committal in accordance with the requirements of the Act. The committal was held in public, the door of the court was open, the media and the public were able to attend, no suppression order was made and no member of the public or the press was excluded. It did not cease to be an open court at the moment an application by a non-party for access to documents was refused. The submission continued that it could not sensibly be suggested that the media has a right to interrupt committal proceedings at its convenience in order to demand the release of a document or the court file. The conduct of proceedings would then, it was said, become unworkable (particularly if the same right extended to any member of the public who happened to be in the courtroom). It was suggested that this is where the appellants' submissions would inevitably lead.

27. In argument before the primary judge the Solicitor-General for Victoria had submitted that the Practice Direction was not issued by the Chief Magistrate pursuant to s16A of the Act and was not directed to magistrates, but rather to registrars of the Magistrates' Court. He submitted that it would have been "very probably" beyond the power of the Chief Magistrate to give a Practice Direction which bound a magistrate to act in a particular way in given circumstances. It was submitted that Practice Directions ordinarily cover directions as to matters of practice, and are frequently not observed without fatal consequences for the parties. These submissions were expanded in this Court by Mr Costigan, who submitted that Practice Direction 41/98 was not issued by the Chief Magistrate pursuant to s16A of the Act, and did not have the status of a Practice Direction made pursuant to that provision. Being directed to registrars, it did not purport to bind any magistrate.

28. The primary judge dealt only briefly with these submissions, saying that if the magistrate had power in court to grant access to the charge sheet or the witness statements, he doubted

that this power could be countermanded by a Practice Direction. This raises the further question whether the magistrate did have power to grant such access.

29. The Magistrates' Court is an inferior court with limited jurisdiction. As Dawson J said in *R v Grassby*[28], in the course of discussing the history and nature of committal proceedings, the Magistrates' Court has no "inherent power", but rather only the implied power necessary for the exercise of its limited jurisdiction. Dawson J said that a magistrates' court –

> "...is unable to draw upon the well of undefined powers which is available to the Supreme Court. However, notwithstanding that its powers may be defined, every court undoubtedly possesses jurisdiction arising by implication upon the principle that the grant of power carries with it everything necessary for its exercise (*ubi aliquid conceditur, conceditur et id sine quo res ipsa esse non potest*). Those implied powers may in many instances serve a function similar to that served by the inherent powers exercised by a Supreme Court but they are derived from a different source and are limited in their extent. The distinction between inherent jurisdiction and jurisdiction by implication is not always made explicit, but it is ... fundamental. ... The fact that in the conduct of committal proceedings a magistrate is performing a ministerial or administrative function is, of course, no bar to the existence of implied powers, if such are necessary for the effective exercise of the powers which are expressly conferred upon him."

30. Section 136 of the Act gives a magistrates' court express power, at any stage of a proceeding, to give any direction for the conduct of the proceeding which is thought conducive to its effective, complete, prompt and economical determination. By s126, the court is also given power to close proceedings to the public, in a variety of circumstances including, by sub-s(1)(b) "if in its opinion it is necessary to do so in order not ... to prejudice the administration of justice". In the circumstances mentioned in sub-s(1), the court may then by sub-s(2) –

> "(a) order that the whole or any part of a proceeding be heard in closed court; or (b) order that only persons or classes of persons specified by it may be present during the whole or any part of a proceeding; or (c) make an order prohibiting the publication of a report of the whole or any part of a proceeding or of any information derived from a proceeding; or (d) make an order prohibiting the publication of any specified material, or any material of a specified kind, relevant to a proceeding that is pending in the court."

31. Schedule 5, in regulating the procedure at a committal hearing, gives the court further powers appropriate to the conduct of committals.

32. It is well-established that "magistrates' courts, guided where necessary by higher courts, are entitled to develop their own practice and procedure and to adapt it to contemporary needs;" *Chief Constable of Norfolk v Clayton*[29]; *M v M*[30]; *Guss v Magistrates' Court*[31]. In *Stefanovski v Murphy*[32], Tadgell J said –

> "It is an obvious and elementary necessity of our legal system that those presiding in courts of law should have full authority to exercise procedural control. Without a proper and effective exercise of the authority the system would be unworkable. The power to control procedure exists for the benefit alike of courts, litigants and the community as a whole; and it is of course exercisable with the object of achieving justice according to law. The exercise of procedural control will therefore be neither capricious nor haphazard, but will be undertaken in a spirit of co-operation by all those for whose benefit it is exercisable.

33. If the hand-up brief procedure is to be used, then before a committal proceeding takes place, the hand-up brief will be served on the defendant.[33] The informant is then required to file with the registrar a copy of the hand-up brief.[34] The defendant is entitled to inspect the exhibits at a time and place agreed.[35] The proceedings plainly must be under the control of the magistrate, who retains the right under s126 of the Act to close proceedings and to make any of the orders permitted by s126(2). The hand-up brief will, of course, be in the hands of the magistrate, the informant, the defendant and counsel. If the defendant is committed for trial, the registrar must then forward to the Director of Public Prosecutions all documents specified by clause 11(3) of Schedule 5. At various times before or during the hearing, the public and the press would therefore be in a position to seek access to the contents of the hand-up brief or witness statements, by making an appropriate request to the court, or to the informant or the defendant or their representatives. The practice of counsel providing information in civil trials (as to documents actually read out in court) to reporters for the purpose of enabling the reporter

to produce an accurate report of what was said in court proceedings was acknowledged by Lord Diplock in *Harman*[36]. Subject to any restriction on the court's power Part 3 of the Act might impose, I should have thought that access by the public and the press to contents of the hand-up brief, the charge sheet and witness statements was necessarily a matter within the control of the presiding magistrate, at least until the termination of the committal. But shortly after the magistrate has formed the opinion referred to in clause 11(2) of Schedule 5, and determined to commit the defendant for trial, most of the documents in the hand-up brief will be removed from the magistrate's control, since they must be forwarded by the registrar to the Director of Public Prosecutions.

34. The Solicitor-General submitted to the primary judge that the only express power a magistrate had to allow access to entities, other than the parties to a proceeding, to inspect documents was to be found in s18(3) of the Act, and that that right was limited to inspection of that part of the register containing the final orders of the court. In support of that submission reliance was placed on *Smith v Harris*[37] where Byrne J said –

> "Unlike the Supreme Court, the Magistrates' Court maintains a register of all orders of the court and certain other matters: *Magistrates' Court Act* 1989 section 18(1). The registrar, in addition, keeps a file containing the original process issued out of the court and of other documents filed: section 20. The Act gives to a party to a proceeding the right to inspect that part of the register which relates to that proceeding: section 18(4). The right of access of the public is contained in section 18(3): ... There is no other right conferred by statute or rule to inspect documents filed in the Magistrates' Court or any record of its proceeding."

Mr Costigan made a like submission to this Court.

35. Part 3 of the Act deals with officers of the court. Section 18 states as to the register that

> "(1) The principal registrar must cause a register to be kept of all the orders of the Court and of such other matters as are directed by this Act or the Rules to be entered in the register. (2) An order made by the Court must be authenticated by the person who constituted the Court. (3) Any person may, subject to any order made under section 126 and on payment of the prescribed fee, inspect that part of the register that contains the final orders of the Court. (4) A party to a proceeding may inspect without charge that part of the register that relates to that proceeding. (5) A document purporting to be an extract from the register and purporting to be signed by a registrar who certifies that in his or her opinion the extract is a true extract from the register is admissible in evidence in any proceedings and, in the absence of evidence to the contrary, is proof of the matters appearing in the extract."

Section 20 provides that process may only be issued out of the court by a registrar, except where otherwise provided. Section 20(2) states that the principal registrar must, subject to the regulations, keep the original of all process issued out of the court and must issue or cause to be issued as many copies as are necessary. In s3, "process" is defined as including –

> "witness summons, charge-sheet, summons to answer to a charge, complaint, warrant to arrest, remand warrant, search warrant, warrant to seize property, penalty enforcement warrant, warrant to imprison, warrant to detain in a youth training centre, warrant of delivery and any other process by which a proceeding in the court is commenced."

36. The learned primary judge said of the Solicitor-General's submission that he thought[38]–

> "there is much to be said for the view advanced by Mr Graham that the court has no power to grant access to the charge sheet or the witness statements. It has no express power to do so and it would not seem to be a power that needs to be implied to enable the court to effectively exercise its statutory jurisdiction (see *Grassby v R* [1989] HCA 45; (1989) 168 CLR 1; 87 ALR 618; (1989) 63 ALJR 630; (1989) 41 A Crim R 183, per Dawson J). If that is so, Practice Direction 41/98 is superfluous both in court and also out of court. Out of court, s18(3) of the Act does not permit a non-party to inspect the register, except for the final orders, and 'the register' in this context, I would think, must include all the documents kept by or filed or lodged with the court under the sections which I have earlier referred to."

This passage of the judgment involves the only matter of substance on which I differ from the reasoning of the learned judge. His Honour has thus treated the "register" as including all documents kept by or filed or lodged with the court, the sections "earlier referred to" no doubt being those mentioned in par 16 of his Honour's reasons. The documents comprising the register

thus would include a wide variety of documents including an affidavit or declaration of service (s35(3)), a defendant's election to stand trial without a committal (s56(1)(b)) and notices of intention to apply for re-hearing lodged under s94(1), together with any other document which might be thought appropriate or necessary to file with the court.

37. Now in *Smith v Harris* the document with which Byrne J was concerned[39] was a complaint issued out of the Magistrates' Court, the original of which clearly was within the definition of "process", and which was therefore required by s20(2) to be kept by the principal registrar. I have some doubt, in the light of the wording of s18, whether the originals of "process" kept by the registrar under s20(2) are themselves any part of the register which is required to be kept in s18(1). I note that such process is required to be *kept* by the registrar, not, under these sections, "entered in the register". The register in this respect conveys rather the notion of a continuous record of all final orders made by the court, and other matters which the Act contemplates shall be entered in the register. These final orders are to be available for inspection with a view no doubt to extracts from the register being obtained and being made admissible in other proceedings under s18(5) of the Act[40]. But even if such "process" is properly to be described as entered in or part of the register, it does not follow that the whole of the hand-up brief is a "process" required to be *entered* in the register.

38. In my view there is no provision in Part 3 of the Act which requires the hand-up brief or witness statements in a committal to be entered in or otherwise made part of the register of the court. On this view, the fact that s18(3) permits a non-party to inspect the register only in respect of final orders has no relevance to the magistrate's supervisory control of the hand-up brief, or to the magistrate's power to grant or limit access to the hand-up brief, witness statements or exhibits in a committal sought by interested members of the public or the press. It follows that I think that s126 is the only provision in the Act affecting the power of a magistrate to grant or limit access to the hand-up brief, witness statements or exhibits in a committal, when such access is requested by an interested member of the public or the press. The fact that the magistrate is given no express power to permit such access does not, I think, necessitate the conclusion that the magistrate has no power to do so. It can only have been on the assumption that the magistrate's control of proceedings at a committal included a power to permit such access that the Papas guidelines were able to function at all. For my part I think that assumption was clearly correct.

39. Furthermore it would be surprising if s18(3) had the effect which the primary judge was persuaded to accept. If the magistrate had no power to permit the public and reporters to see parts of the hand-up brief, or witness statements, the effect would be, as was submitted in reliance on the appellants' affidavits, that reporting of committal proceedings would in many cases be in practical terms impossible. This would be a serious invasion of the principle of open justice. As Lord Diplock said in *AG v Leveller Magazine Ltd*[41] –

> "If the way that courts behave cannot be hidden from the public ear and eye this provides a safeguard against judicial arbitrariness or idiosyncrasy and maintains the public confidence in the administration of justice. The application of this principle of open justice has two aspects: as respects proceedings in the court itself it requires that they should be held in open court to which the press and public are admitted and that, in criminal cases at any rate, all evidence communicated to the court is communicated publicly. As respects the publication to a wider public of fair and accurate reports of proceedings that have taken place in court the principle requires that nothing should be done to discourage this."

40. There remains the question whether the Magistrates' Court, by denying access to the documents sought by the appellants, was acting in breach of s125(1) of the Act. The learned judge gave comprehensive and compelling reasons for his conclusions that s125(1) does not extend to obliging the court to provide, upon request, reasonable access to copies of the charge sheet and witness statements. His Honour considered that a proceeding is properly conducted in open court if the public has a right of admission to that court which is reasonably and conveniently exercisable and did not think that an open court becomes 'closed' if a request by a member of the public or the press for such access were refused in a committal proceeding. For my own part, I agree with each of his Honour's conclusions in this regard, and with the reasons given. In my view s125(1) gives the appellants no *right* to such access in a committal. Mr Houghton was unable to cite any Australian or English authority in which any such right has been accepted, indeed I think the cases to which reference has already been made in this judgment show that

the "open court" rule in these jurisdictions has not yet been extended to acknowledge any such right. But I do not think it is necessary for this Court to decide these questions for the purposes of this appeal.

41. The judge refused to grant the application because, having rejected the construction of s125 contended for by the appellants, the case failed because the appellants had disavowed any argument that the Magistrates' Court had any obligation to provide access to the documents independently of the statutory provision. In my opinion the appeal fails on a somewhat different basis. The submission that Practice Direction 41/98 was neither issued by the Chief Magistrate nor directed to magistrates is, I think, clearly correct; and it certainly did not require magistrates to refuse access to interested parties to the charge-sheet or witness statements. If and in so far as McLennan M or Fleming M took a contrary view, I think they were, with respect, in error. If the Practice Direction had been directed to magistrates with the intent of requiring them to refuse requests for access and to refer members of the media seeking access to the Director of Public Prosecutions, I agree with the primary judge that the Practice Direction would probably have been beyond power, for a variety of reasons. The control magistrates are entitled to and must exercise over committals, and over documents and exhibits tendered in or made available for or during such proceedings, permits them to make such documents available upon request to interested members of the public, or the media, and the Practice Direction has no bearing upon their power to do so. Furthermore the appellants were not parties to the committal proceedings in question, nor is the Principal Registrar a party to this appeal. In the circumstances I think it is not necessary to grant the declaration sought by the appellant, nor is there in any event a justiciable dispute in respect of the Practice Direction.

42. I should add that I entirely agree with the concluding paragraph of the primary judge's reasons, echoing the submission[42] made by Mr Hicks, as senior Crown prosecutor to Fleming M on 29 January 1999. If the press is entitled to report upon committal proceedings, it would seem desirable that reasonable access be afforded to enable a fair and accurate report to be made, unless considerations contemplated by s126 of the Act or referred to by Beach J in *David Syme & Ltd v Hill*, dictate otherwise. The Papas guidelines issued after consultation with all apparently interested parties were said by Mr Houghton to have provided a mechanism which gave satisfactory access to the media. No suggestion was made by any party in argument that those guidelines had proved unsatisfactory in practice. It remains only to say that the presiding magistrate and counsel in any committal will obviously read the hand-up brief and all other statements or documents used during the committal. They should therefore be well-placed to deal with a request for access to any such document and the relevant considerations bearing upon the question whether access should be denied or limited, or publication of any material prohibited.

43. I would dismiss the appeal.

CHERNOV JA:

44. I have had the benefit of reading in draft the judgment of Charles JA and agree that, for the reasons given by his Honour, this appeal should be dismissed.

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[1] *Hansard, Victorian Legislative Council* 18 April 1972, 5008-5011.
[2] [1985] VicRp 40; [1985] VR 369 per Ormiston J at 377-378.
[3] Supreme Court of Victoria, [1995] VSC 59; [1995] VICSC 59, unreported, 10 March 1995, at 6.
[4] Evidence quoted in the Report of the Statute Law Revision Committee upon s44 of the *Magistrates (Summary Proceedings) Act* 1975, 10 May 1978, par 22.
[5] [1999] VSC 136; [1999] 3 VR 231.
[6] At 235-236.
[7] Quoted at [1999] 3 VR 236.
[8] Quoted at [1999] 3 VR 235.
[9] [1999] 3 VR 236-237.
[10] [1999] 1 VR 267 at 278-280 and the cases there cited.
[11] [1976] HCA 23; (1976) 134 CLR 495 at 520; [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.
[12] [1829] EngR 48; (1829) 10 B & C 237 at 240; 109 ER 438 at 440.
[13] [1951] VicLawRp 30; [1951] VLR 235 at 237.
[14] [1974] QB 759, at 764-5.
[15] [1987] QB 582 at 591-593; [1987] 1 All ER 551; [1987] 2 WLR 380.
[16] [1987] HCA 56; (1987) 164 CLR 15 at 25-26; 74 ALR 353; 28 A Crim R 155; 61 ALJR 556.

[17] [1983] 1 AC 281 at 303 per Lord Diplock.
[18] (1976) 551 F2d 1252; 2 Media LRep 1097; 179 USApp DC 29.
[19] At 1265.
[20] (1980) 635 F2d 945; 6 Media LRep 1961.
[21] (1991) 648 F2d 814; 7 Media LRep 1153.
[22] (1986) 798 F2d 1289; 13 Media LRep 1347; 55 USLW 2191.
[23] [1987] USCA1 428; (1987) 830 F2d 404.
[24] [1991] 1 SCR 671, especially for its summary of American case law at 687-700
[25] [1994] VicRp 68; [1994] 2 VR 411 at 441-443; [1994] Aust Torts Reports 81-263. See also *Stefanovski v Murphy* [1996] 2 VR 422 at 445-449.
[26] [1983] 1 AC 280 at 302-303.
[27] (1975) 1 WLR 711, at 714.
[28] [1989] HCA 45; (1989) 168 CLR 1 at 15-17; 87 ALR 618; (1989) 63 ALJR 630; (1989) 41 A Crim R 183.
[29] [1983] 2 AC 473 at 488-489; [1983] 1 All ER 984; [1983] 2 WLR 555.
[30] [1993] VicRp 29; [1993] 1 VR 391 at 395 per Brooking J.
[31] [1998] 2 VR 113.
[32] [1996] 2 VR 442, at 443.
[33] Schedule 5, cl.1 and 2.
[34] Clause 2(3).
[35] Clause 4.
[36] [1983] 1 AC 280 at 306-307; [1982] 1 All ER 532; [1982] 2 WLR 338.
[37] [1996] VicRp 70; [1996] 2 VR 335 at 350; [1996] A Def R 52-065.
[38] [1999] VSC 136; [1999] 3 VR 231 at 249.
[39] [1996] VicRp 70; [1996] 2 VR 335 at 350; [1996] A Def R 52-065.
[40] Cf. *Paroukas v Katsaris* [1987] VicRp 4; [1987] VR 39, at 53.
[41] [1979] AC 440 at 450; [1979] 1 All ER 745; [1979] 2 WLR 247; (1979) 68 Cr App R 342.
[42] See par [13] above.

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