

07/01; [2000] VSC 430

**SUPREME COURT OF VICTORIA**

**R v RAY & ANOR**

**Beach J**

**30 August, 24 October 2000**

**CRIMINAL LAW – JURISDICTION – OFFENCE OF INDECENT ASSAULT ON MALE – WHETHER MAGISTRATES' COURT HAS JURISDICTION TO HEAR AND DETERMINE SUCH OFFENCE SUMMARILY: *CRIMES ACT 1958, S68(3)*.**

**A Magistrates' Court has no jurisdiction to hear and determine summarily the offence of committing an indecent assault upon a male person contrary to the provisions of s68(3) of the *Crimes Act 1958*.**

**BEACH J:**

1. On 30 August 2000 I ordered that the order of the Magistrates' Court at Melbourne made on 24 January 2000 in respect of 18 charges of indecent assault upon a male person brought against Darrell Vivienne Ray be brought up into this court and quashed. I then ordered that the charges be referred back to the Magistrates' Court at Melbourne to be further dealt with according to law.

2. I made the orders I did at that time because, in my opinion the Magistrates' Court had no jurisdiction to hear and determine the charges summarily.

3. I now state my reasons for arriving at that conclusion.

4. I should say at the outset that neither the defendant Ray or the Magistrates' Court was represented at the hearing before me on 30 August and I did not have the benefit therefore of any submissions in opposition to those of counsel for the Crown.

5. On 2 September 1999 the defendant Ray was charged with 18 counts of committing an indecent assault upon a male person contrary to s 68(3) of the *Crimes Act 1958* as amended by s3(b) of the *Crimes (Amendment) Act 1967*. The offences were alleged to have been committed upon 13 male primary school students between 1 January 1969 and 31 December 1975 whilst Ray was employed as a school library assistant.

6. On 24 January Ray consented to the charges being heard summarily and entered a plea of guilty to all charges. It is clear that the Magistrate, the prosecutor and counsel for Ray were under the impression that the Magistrates' Court had the jurisdiction to hear and determine the charges as that aspect was never adverted to during the course of the hearing that day.

7. At the conclusion of the hearing on 24 January the Magistrate convicted Ray of each of the charges and sentenced him to a term of six months imprisonment on each count.

8. The Magistrate ordered that five months of the sentence imposed in respect of each of counts 2 to 18 inclusive be served concurrently with the six month sentence imposed in respect of count 1 and fixed a non-parole period of 12 months.

9. The Magistrate then ordered that the sentences be wholly suspended pursuant to s27 of the *Sentencing Act 1991* for twenty four months.

10. Section 68(3A) of the *Crimes Act* reads:–

"68(3A) whosoever unlawfully and indecently assaults any male person shall be guilty of a misdemeanour and shall be liable to imprisonment for a term of not more than five years."

11. It remained in the *Crimes Act* in that form until 1980 when it was repealed by the *Crimes (Sexual Offences) Act 1980*.
12. During the existence of s68(3A) the offence could not be determined summarily. In that regard see s102A of the *Justices Act 1958* and s69 of the *Magistrates' Court Act 1971*.
13. Section 25 of the *Magistrates' Court Act 1989* gives that court jurisdiction to hear, and determine, *inter alia*, all indictable offences which may be heard and determined summarily.
14. Section 53 of the *Magistrates' Court Act* so far as is relevant provides:-
- "(1) If a defendant is charged before the Court with any offence referred to in Schedule 4 or with any other indictable offence to which this sub-section applies, the Court may hear and determine the charge summarily if—
- (a) the Court is of the opinion that the charge is appropriate to be determined summarily; and
- (b) the defendant consents to a summary hearing
- (1A) In addition to the offences referred to in Schedule 4, sub-section (1) applies to an indictable offence under an Act if the Act describes the offence as being level 5 or 6 or as being punishable by level 5 or 6 imprisonment or by level 5, 6, 7 or 8 fine or both."
15. Schedule 4 contains no reference to the offence of committing an indecent assault upon a male person contrary to the provisions of s68(3) of the *Crimes Act 1958* and s68(3) of the *Crimes Act* does not describe the offence of indecent assault upon a male person as being level 5 or 6 or as being punishable by level 5 or 6 imprisonment or by level 5,6,7 or 8 fine or both.
16. It follows therefore that the Magistrates' Court has no jurisdiction to hear and determine the charges summarily.

**APPEARANCES:** For the plaintiff (The Queen): Mr JD McArdle QC, counsel. Solicitor for Public Prosecutions. For the defendants: No appearance.

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