

MEDIUM  
PRIORITY

NZLR.

IN THE COURT OF APPEAL OF NEW ZEALAND

5/3

C.A.341/92

135  
ORDER PROHIBITING  
PUBLICATION OF NAME OR  
PARTICULARS IDENTIFYING  
RESPONDENT & COMPLAINANT  
UNTIL TRIAL

THE NEW ZEALAND POLICE

v

D

First Respondent

THE DISTRICT COURT  
AT AUCKLAND

Second Respondent

Coram: Cooke P  
Gault J  
Thomas J

Hearing: 23 November 1992

Counsel: M J Ruffin for Appellant  
C L Harder and D Cardinal for First Respondent  
Miss Brenda Heather for Second Respondent (leave to withdraw)

Judgment: 1 March 1993

---

**JUDGMENT OF THE COURT DELIVERED BY GAULT J**

---

This appeal relates to the jurisdiction of a District Court Judge or Justices to order a stay of proceedings on the ground of abuse of process in the course of a preliminary hearing of a charge of an indictable offence under Part V of the Summary Proceedings Act 1957.

The first respondent faced two charges of counselling murder. A preliminary hearing before a District Court Judge began on 9 March 1992. It was expected to take two days. After cross-examination of some of the Crown witnesses

counsel for the first respondent informed the Judge that an application would be made in due course to stay the proceeding as an abuse of process and that the defence would be calling evidence in the course of the preliminary hearing. The Judge was persuaded to allow the hearing to continue for some six weeks during which witnesses were called and recalled and, in effect, there took place an inquiry on oath before the Judge as to the conduct of police and Crown witnesses. At the end of that time the Judge ruled:

The type of abuse alleged here is entwined with matters of evidence, credibility and trial issues. I cannot say that the committal process itself is of necessity so tainted by abuse that the Court should invoke a very limited jurisdiction in this area and intervene to dismiss or stay the proceedings. There are undoubtedly serious questions that may have to be determined and I do not comment on the merits of the same as I think they are properly left for the trial Judge.

The jurisdiction is one arising from necessity. Here the disputed issues can properly be left to s 347 application under the Crimes Act 1961 or the trial Judge. Bearing in mind the limited nature of committal proceedings and the alternative methods of resolution open to the defendant, I cannot say that having regard to the nature of the abuse alleged that necessity confers upon me the jurisdiction to decide that issue. I cannot say that the process of the committal proceedings have been abused, without the necessity of deciding heavily contested issues of credibility and what may well be evidence and other matters related to the trial process. For the foregoing reasons I therefore rule that I should not determine the abuse allegations in the confine of these committal proceedings.

The first respondent applied to the High Court for judicial review. The matter was dealt with urgently by Temm J because a fixture had been arranged for the preliminary hearing to continue in the District Court. A further three weeks had been allocated. Temm J allowed the application and made a declaration that the District Court Judge had the authority to find the necessary facts and reach proper conclusions on the law as to whether or not the plea of abuse of process had been made out.

The present appeal is against that decision. It should be mentioned however that after Temm J's decision and before the hearing in this Court the District Court Judge delivered a reserved decision in which for reasons set out in 63 pages he made an order staying the proceeding for proved abuse of process.

The process upon which the District Court is engaged in a committal hearing appears from ss 167 and 168 of the Summary Proceedings Act. The Court is required to determine after all the evidence has been given (including any evidence the defendant elects to give - s 165) whether the evidence adduced by the informant is or is not sufficient to put the defendant on his or her trial for an indictable offence.

In the view of the majority of the High Court of Australia in *Grassby v R* (1989) 87 ALR 618 a magistrate has no inherent power to stay a committal hearing on the ground of abuse of process. That view was reached in part by reference to English authorities and in particular the decision of the House of Lords in *Atkinson v USA Government* [1971] AC 197 and, a fortiori, by reference to the administrative rather than judicial character of committal proceedings in New South Wales. Inherent powers of magistrates' courts were confined to those arising by implication as necessary for the exercise of the statutory jurisdiction conferred upon them. A power to order a stay for abuse of process was regarded as unnecessary to the exercise of the function the magistrate is required to perform in a committal hearing. It is apparent that this was the approach taken by the District Court Judge in initially declining jurisdiction in the present case.

Deane J in *Grassby* approached the matter differently as appears from the following passage in his judgment (p 620):

If, in the course of committal proceedings, a serious question emerges about whether a prosecution of the accused in the Supreme Court would be stayed by that court as an abuse of its process, the magistrate hearing the committal proceedings is, in my view, neither obliged nor entitled to disregard that question in determining whether a committal order should be made. If the magistrate is of the view that, having regard to all the evidence, a prosecution in the Supreme Court would be permanently stayed as an abuse of the process of that court, he or she would, in my view, necessarily be of the opinion that a jury would not be likely to convict the defendant of an indictable offence if a committal order were made.

The *Atkinson* case in England was an extradition case. In the course of his speech (with which Lord MacDermott agreed) Lord Reid said (p 232):

Whatever may be the proper interpretation of the speeches in *Connelly's* case [1964] A.C. 1254 with regard to the extent of the power of a trial judge to stop a case, I cannot regard this case as any authority for the proposition that magistrates have power to refuse to commit an accused for trial on the ground that it would be unjust or oppressive to require him to be tried. And that proposition has no support in practice or in principle. In my view once a magistrate decides that there is sufficient evidence to justify committal he must commit the accused for trial. And there is no provision in the 1870 Act giving a magistrate any wider power in extradition proceedings than he has when he is committing for trial in England.

That clear statement (albeit obiter) in relation to the powers of a magistrate in committal proceedings notwithstanding, later decisions up to Court of Appeal level have differed. The relevant cases are summarised in the judgment of the Divisional Court in *R v Telford Justices Ex Parte Badhan* [1991] 2 WLR 866. After referring to the authorities the judgment of the Court delivered by Mann LJ said (p 875):

The law has developed in the 21 years which elapsed since the speeches in *Atkinson's* case were delivered on 5 November 1969. We do not find that development to be inconsistent with the decision in *Atkinson's* case, and we would have thought it unfortunate if we had so to find. In our judgment, the way in which the law has developed is a beneficial one.



...

We, for our part, can see no reason why examining justices (even one examining magistrate: see the Act of 1980, section 4(1)) should not be able to decide that an initiation of the process of committal is an abuse of that process. A question of abuse is one which is within the ability of justices to decide, and it is one which they admittedly have power to determine on summary trial. If complaint is made of their decision, then the complainant can come to this court and seek judicial review. Mr Collins suggested that abuse of process should be left to the supervisory jurisdiction of this court and to the power of the Crown Court to decide a plea in bar and against whose decision a defendant can appeal to the Court of Appeal, Criminal Division. We disagree. We think that a plea of abuse should be open to the accused subject at the earliest opportunity.

Our conclusion upon the argument which we have heard is that justices sitting to inquire into an offence as examining justices do have, as part of their inherent jurisdiction, the power to refuse to undertake the inquiry on the ground that it would be an abuse of process to do so. It is desirable that justices should have the power, and previous observations in and decisions of this court are not inconsistent with the decision in *Atkinson v United States of America Government* [1971] A.C.197.

We emphasise that the power which the justices have is one to prevent an abuse of process. They have no power to refuse to embark on an inquiry because they think that a prosecution should not have been brought because it is, for example, mean-minded, petty or animated by personal hostility. It is for this reason that the powers of the justices are said to be "very strictly confined:" *Reg v Oxford City Justices, Ex parte Smith*, 75 Cr.App.R. 200, 204 per Lord Lane C.J. That being said, there is here a point of constitutional importance. It is the duty of any court, be that court superior or inferior, to protect its process from abuse. We believe that the number of cases in which examining justices are called upon to perform that duty is and will remain, small.

It is to be noted that in *Sinclair v Director of Public Prosecutions* [1991] 2 All ER 366, another extradition case in which the decision in the *Atkinson* case was applied, Lord Ackner with whom the other members of the House of Lords agreed said (p 375):

My Lords, the view expressed by Lord Reid as to whether a magistrate in *domestic litigation* has power to refuse to commit on the

grounds there has been an abuse of the process of the court was obiter. Since the decision in *Atkinson's* case, there has been a substantial line of cases to the effect that when exercising their domestic jurisdiction magistrates do have power to stay those proceedings where there has been an abuse of the process of the court. Your Lordships have yet to pronounce upon the validity of those decisions.

In the present case Temm J relied upon *R v Telford Justices ex parte Badhan*.

In the course of argument it was accepted that there is no basis for distinguishing Australian and English decisions by reference to the statutory functions of committing or examining magistrates. The statutory provisions in substance are those contained in our ss 167 and 168.

It is not a determinative jurisdiction. The Court does not hear and determine the charge against the defendant. Other than for the purpose of focussing on relevant evidence no rulings are made as to admissibility. That is for the trial Judge. Findings of fact are not made so as to usurp the function of the jury. A discharge upon a finding of insufficient evidence does not constitute an acquittal. A further charge may be brought. *Heremaia v Police* (1983) 1 CRNZ 15, 16, *Bosch v Ministry of Transport* [1979] 1 NZLR 502, 508, *R v Jeffs* [1978] 1 NZLR 441, 443.

In the past the committal procedure may have been partly investigative but that is not its function now. It is to determine whether or not the informant has sufficient evidence to put the defendant to trial.

The jurisdiction is the same whether exercised by justices or by a District Court Judge (with or without a jury warrant).

Even if a defendant has been discharged because of insufficient evidence an indictment may be presented under s 345(3) of the Crimes Act 1961 by the Attorney-General or by anyone with the consent of a Judge of the High Court. In this case we were told that an application for such consent has been filed by the Crown Solicitor.

The granting of a stay, in contrast with a discharge, in effect is the exercise of a determinative function. The proceedings cannot continue. There is no appeal and there would arise issues of abuse of process and double jeopardy in connection with any new information or an application for leave to present an indictment under s 345.

The committal jurisdiction is statutory. The powers exercisable in such a jurisdiction are those expressly conferred and those implied having regard to the nature and purpose of the jurisdiction. There are inherent in the statutorily conferred jurisdiction those powers necessary to enable the Court to carry out its statutory function effectively. Authorities in this area are helpfully reviewed in the judgment of Wylie J in *Department of Social Welfare v Stewart* (1988) 3 CRNZ 648. It is to be noted however that that case was directed to the jurisdiction of the District Court in its summary jurisdiction not its committal jurisdiction.

Many matters which might be characterised as abuse of process will be capable of being dealt with in the manner described by Deane J in *Grassby*. They will be relevant to the issue of whether a committal order should be made. There is no difficulty in those cases. They can be accommodated within the powers to commit or discharge. No question of stay arises.

Where however it appears that although the informant has sufficient evidence to warrant committal the procedure is so flawed that it would be an abuse of process

to conduct even a preliminary hearing we consider that there would be necessarily implicit in the jurisdiction the power to stay. An obvious example would be where the defendant already has been convicted and punished for the offence charged. In such exceptional cases it would be appropriate not to embark upon or continue a preliminary hearing. To do so would be an abuse of the committal process. We distinguish between the committal process and the trial process because we consider that issues of abuse of the process of the trial court should be matters for that court or perhaps for the supervisory jurisdiction of the High Court.

We see no reason to treat cases of delay in bringing or prosecuting criminal charges in any special category. There will, of course, be cases in which because of lapse of time the sufficiency of the evidence to justify committal will be affected as with unreliable recollections of witnesses but they do not necessarily give rise to questions of abuse of process.

We did not understand Mr Ruffin for the Crown to argue that in no circumstances could justices or a judge rule on abuse of process. Rather he contended for a jurisdiction tested by necessity as adopted by the majority of the High Court of Australia in *Grassby*. That is the same view as was adopted by the District Court Judge when initially declining to rule. It was submitted that there was no need to rule on any of the allegations of abuse of process in this case in order properly to carry out the function of ruling on committal.

For the respondent Mr Harder submitted that in light of the recent decision of this Court in *W v Attorney-General* (1992) 8 CRNZ 42 the scope in jurisdiction of committal proceedings in New Zealand has widened beyond the narrow question of whether or not there is a sufficient prima facie case to justify committing the defendant for trial.

We do not read the judgment in that case as widening the scope of committal hearings. The case was directed primarily to the issue of leave to cross-examine complainants in sexual cases at preliminary hearings as required by s 185C of the Summary Proceedings Act. However in the course of the judgment it was said:

As was perhaps more explicitly recognised on the appeal in that case, *Daemar v Gilliland* [1981] a NZLR 61, 64-65, the quality of the evidence is not to be totally ignored by the Court conducting the preliminary hearing, and in extreme cases which are far from frequent, that Court may conclude on assessing all the evidence that it has heard that the likelihood of a jury bringing in a guilty verdict is so light that the defendant ought not to be committed for trial.

...

It must surely follow that a defendant who does not bear an onus of proof can go into the witness box and persuade the Court that he should not be committed for trial because comparing the complainant's evidence with his own, no reasonable jury would convict. As already indicated we do not regard ss 167 and 168 of the Summary Proceedings Act as excluding that possibility in New Zealand.

It would require an unusually strong defence case; for reluctance to usurp the jury's function is appropriate; but the right to endeavour to make out such a case is a valuable one.

We do not consider those passages can be taken as authority for departing from the nature of committal proceedings as an examination of whether the informant's evidence, considered with any evidence given by the defence, is sufficient to require the defendant to stand trial. We find nothing in the judgment amounting to a charter for an extensive inquiry on oath into collateral matters.

Mr Harder submitted that in the interests of allowing justice to be done at the first available opportunity the Court should, in exceptional cases only, hear evidence that so strongly attacks the credibility of the Crown case that to allow the proceedings to continue would bring the administration of justice into disrepute.

That submission tends to confuse two matters. The first, which is entirely consistent with *W v Attorney-General* is that the defendant may give or call evidence and invite the judge or justices to conclude that the informant's evidence is insufficient to justify committal. The second, which is not supported by *W v Attorney-General*, contends that the judge or justices should be prepared to investigate and determine a collateral question whether the proceeding is an abuse of process - in this case being tainted by misconduct by those responsible for bringing the prosecution.

The distinction is drawn clearly in what occurred in this case. The background to it is a custody dispute between the first respondent and one of the alleged intended victims, Mr W. It is the case for the prosecution that the first respondent counselled an undercover police constable to murder Mr W

and his fiancée. The police constable made contact with her as a result of her alleged intentions being made known by one Prince. Prince informed W

that the respondent was seeking to have him murdered. W immediately informed the police. The police proposed initially that Prince would seek to obtain evidence by recorded discussion with the first respondent but after becoming concerned as to Prince's reliability the constable was substituted. It is said that the constable then obtained the evidence that he was counselled by the respondent to murder both W and his fiancée.

In the course of evidence at the preliminary hearing there emerged a series of matters said to constitute abuse of process. These were broadly described by the District Court Judge as:

Allegations have been made against Mr W. He is a complainant named in one of the informations. The allegation is that the prosecution has been engineered to enable him to obtain an advantage in a child access dispute with the defendant and to put pressure on the defendant in regard to pending civil proceedings

brought by her against him in the High Court. This allegation and motive has been denied by W . Further it is alleged that a witness Prince and W conspired to suppress existence or details of financial advantage that Prince was demanding from W

Allegations of entrapment are made in respect to the intercepted conversation between a police undercover officer and the defendant. Further in respect to such conversation an issue of authority and legality concerning such evidence is raised.

An allegation is levelled against Detective Sergeant Thomson, the senior police officer, who appears to have controlled the prosecution. The allegation is that he attempted to influence the judicial process regarding a pending decision concerning access and custody in the Family Court against the defendant. Further claims of partiality and police misconduct are alleged in regard to the bringing of the prosecution and the granting of bail to the defendant.

An allegation is made against Prince that he sought to use the situation offered to obtain financial advantage in circumstances amounting to extortion from W . There are other allegations of witness misconduct, and in not detailing the same, I have in no way attempted to minimise the force of such allegations. It is the overall combined factual allegations that the defence relies upon.

Having carefully considered these allegations and the context in which they arise, and having the benefit of the lengthy further judgment of the District Court Judge in which he sets out fully his views of the evidence, we do not see how these matters bear upon the evidence of the elements of the offences charged. They may be entirely reprehensible and may call for action elsewhere but the present focus must be on the function of the committal proceeding.

There is no evidence before this Court to suggest that the respondent did not voluntarily make the alleged incriminating statements to the police constable. The District Court Judge found specifically:

Certainly it cannot be said that the constable was tainted by any subjective ulterior motive.

...

The prima facie fact is that the defendant does appear to have arranged the murder of W and that fact should not be lightly overlooked. The defendant is in her present predicament as the result of her actions. They are grave and serious charges that she faces.

As to motivation, the police received the complaint from W as soon as he learned from Prince that he might be a target. All the relevant improper conduct said to have been engaged in by W followed his complaint to the police. There is no criticism of his motivation for his complaint. Prince is alleged to have taken advantage of his position to extort money from W

That does not bear upon the alleged offence. The police are said to have acted improperly in dealing with a staff member of the Family Court and with the matter of bail for the respondent after her arrest. They do not bear upon the offence. Reference has been made also to certain unsatisfactory aspects in the apparent non-availability of Telecom records but that too is beside the point.

Questions surrounding admissibility of evidence including the legality of the recording of the conversation and entrapment are matters for the trial Judge.

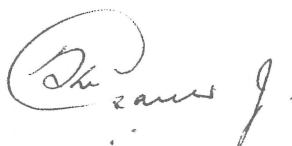
Accordingly we consider that to venture into the allegations of conduct beyond that bearing upon the matter at hand was to go beyond the jurisdiction of the Court in conducting a preliminary hearing.

In this case the District Court Judge in his judgment that was before Temm J determined that he could deal with the committal without it being necessary to make findings on the allegations of abuse of process and he declined to do so. He no doubt had authority to rule whether the allegations had any bearing on the question of committal for trial. His ruling was subject to judicial review. But assuming that they were substantially true, the allegations were not such that there was any



likelihood that an indictment would not be allowed to go to a jury. Therefore his decision was correct. Further the District Court Judge should not have embarked on the hearing into the truth or otherwise of the allegations.

The appeal is allowed and the matter is remitted to the District Court to rule whether or not the first respondent is to be committed for trial.

A handwritten signature in cursive script, appearing to read "D. J. Jones", is written in dark ink.

Solicitors

Crown Solicitor, Auckland, for Appellant

Stephen Mitchell, Auckland, for First Respondent

Crown Law Office, Wellington, for Second Respondent