HIGH COURT OF AUSTRALIA

GAUDRON, McHUGH, GUMMOW, HAYNE AND CALLINAN JJ

ROLAND EBATARINJA	FIRST APPELLANT
CONLEY EBATARINJA	SECOND APPELLANT
AND	
CATHY DELAND SM	FIRST RESPONDENT
LEONARD DAVID PRYCE	SECOND RESPONDENT
REX WILD QC	THIRD RESPONDENT

Ebatarinja v Deland (D8-1998) [1998] HCA 62
30 September 1998

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the order of the Court of Appeal of the Northern Territory of Australia and, in lieu thereof, order that the appeal to that Court be allowed with costs and that prohibition issue directed to the first respondent prohibiting the further hearing of committal proceedings against the first appellant.*

On appeal from the Supreme Court of the Northern Territory

Representation:

D J Ross QC with B Fox for the appellants (instructed by Central Australian Aboriginal Legal Aid Service Incorporated)

R S L Wild QC with A M Fraser for the second respondent (instructed by Director of Public Prosecutions (Northern Territory))

No appearance for the first and third respondents

CATCHWORDS

Ebatarinja v Deland

Criminal procedure – Committal proceedings – Jurisdiction of Magistrate to hear committal proceedings – Proceedings to be conducted "in the presence or hearing of the defendant" – Whether essential that defendant understand and follow the proceedings – Deaf, mute and illiterate defendant – Whether an order for prohibition should be made.

Criminal procedure – Committal proceedings – Requirement in *Justices Act* (NT), ss 110 and 111 that Magistrate address defendant in certain terms – Whether mandatory or directory.

Criminal procedure – Committal proceedings against defendant not possible – Whether Crown may proceed by way of *ex officio* indictment.

Words and phrases – "in the presence or hearing of the defendant".

Justices Act (NT), ss 106, 110, 111.

Kunnath v The State [1993] 1 WLR 1315; [1993] 4 All ER 30, considered.

1 GAUDRON, McHUGH, GUMMOW, HAYNE AND CALLINAN JJ. The question in this appeal is whether committal proceedings pending against the first appellant, Roland Ebatarinja, ("the appellant") should be prohibited from further proceeding on the ground that he does not know with what he is charged, is unable to follow the proceedings before the Magistrate and is unable to communicate with those lawyers representing him.

2 The appellant stands charged with three indictable offences, the chief of which is that on 16 February 1995 he murdered Gregory Jabaltjari Long, contrary to the *Criminal Code* (NT), s 162. The prosecution alleges that, on 16 February 1995, the appellant and two other persons went to a house in an area known as Larapinta Valley Camp where the appellant embraced a female in an affectionate manner. Her husband, Mr Long, became upset and punched the appellant in the head. The appellant left the area but returned shortly after with a pocket-knife with which he attacked Mr Long, stabbing him three times. Mr Long died five days later on 21 February 1995.

3 The appellant is a deaf mute Aborigine who was born on 2 March 1978. He is unable to communicate except by using his hands to ask for simple needs. He does not know that he has been charged with murder or other offences and is unable to communicate with his lawyers. He is unable to follow legal proceedings. It is possible that he could be taught to communicate through sign language but, even if that can be done, it seems unlikely that it would be done in the near future.

The proceedings in the Northern Territory

4 The information alleging the various offences came before the Juvenile Court of the Northern Territory on 22 September 1995 but was then adjourned and heard again on 28 May 1996 before Ms Deland SM. Because of the appellant's inability to comprehend the charges or understand the proceedings, the learned Magistrate stated a Special Case to the Supreme Court of the Northern Territory on 11 September 1996 asking, inter alia, whether she should stay the proceedings if she was unable to be satisfied that the appellant "understands the nature of the proceedings". The Special Case came before Mildren J on 6 February 1997. His Honour held that he had no jurisdiction to entertain it[1]. In the meantime, on 27 June 1996, the Director of Public Prosecutions filed an *ex officio* indictment in the Supreme Court charging the appellant with murder.

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1 *Ebatarinja v Pryce* (1997) 137 FLR 281.

5 On 7 February 1997, the appellant filed in the Supreme Court an originating motion, summons and supporting affidavit seeking a number of orders. For present purposes, reference need only be made to the first of these orders which sought to prohibit the further hearing of the committal proceedings.

6 On 4 April 1997, Mildren J refused the relief sought[2]. His Honour held[3] that the proper course was for the Magistrate to comply with the requirements of the *Justices Act* (NT) so far as she was able to do so. Mildren J said[4]:

> "The fact that compliance with the provisions will prove 'ritualistic', does not prevent completion of the committal proceedings. It is not the magistrate's function to finally decide whether or not the [appellant] is unable to understand the proceedings, or to instruct his counsel. That question will be determined by this Court when the [appellant] is called upon to plead. That being so, the learned Magistrate is unable to assume that fact and must act as if the question whether the plaintiff remains mute deliberately, or because of his severe disabilities, is an open one.
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> As I have already said, the learned Magistrate has a duty to act justly and fairly, and this includes the duty to offer the [appellant] the opportunity to be heard. It is the *opportunity* to be heard which is important. If the [appellant] cannot be heard, so be it. The [appellant] is not called upon to plead and no adverse finding other than a finding that there is a case to answer can be made which is likely to affect the [appellant's] interests. The magistrate should nevertheless ensure that the [appellant's] interests are protected, so far as they can be, by appointing legal counsel to represent him, if need be; and by giving counsel the fullest opportunity to present such case as he or she is able, including the calling of any witnesses counsel desires to call. In these circumstances, having regard to the nature of committal proceedings, and the procedure available under s 357 of the *Criminal Code*, it is my opinion that to so proceed would neither be unfair nor unjust, nor a denial of natural justice to the [appellant]."[5]

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2 *Ebatarinja v Deland & Ors* (1997) 6 NTLR 107; 92 A Crim R 370.

3 (1997) 6 NTLR 107 at 115; 92 A Crim R 370 at 378.

4 (1997) 6 NTLR 107 at 115-116; 92 A Crim R 370 at 378-379.

5 Section 357 of the *Criminal Code* provides:

(Footnote continues on next page)

7 Mildren J dismissed the application but made an order staying the *ex officio* indictment until the conclusion of the committal proceedings.

8 The Court of Appeal of the Northern Territory dismissed the appellant's appeal to that Court. Angel J gave a short judgment agreeing in substance with the conclusions of Mildren J. Bailey and Morling JJ agreed with Angel J. It is from that decision that the matter comes to this Court by special leave.

9 The proceedings in the Supreme Court and in this Court were commenced in the name of the appellant without the appointment of a litigation guardian. Order 15.02 of the Rules of the Supreme Court of the Northern Territory provides that, except where otherwise provided by legislation, "a person under a disability shall commence or defend a proceeding by his litigation guardian". Order 15.01 defines the expression "person under a disability" as meaning "a person who is incapable (by reason of age, injury, disease, senility, illness or physical or mental infirmity) of managing his affairs in relation to the proceeding". Order 15.03 provides for the procedure for the appointment of a litigation guardian.

10 No steps were taken under O 15 in the present case. In the course of the argument on the appeal in this Court, leave was granted to add the appellant's father, Mr Conley Ebatarinja, as second appellant. The order was made on terms

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"WANT OF UNDERSTANDING OF ACCUSED PERSON

(1) If, when the accused person is called upon to plead to the indictment or during the trial, it appears to be uncertain, for any reason, whether he is capable of understanding the proceedings at the trial so as to be able to make a proper response, the court shall inquire into the question of whether he is capable or not.

(2) If the court finds that he is capable of understanding the proceedings the trial is to proceed as in other cases.

(3) If the court finds that he is not so capable it is to say whether he is so found by it for the reason that he is in a state of abnormality of mind or for some other reason that it shall specify and the finding is to be recorded; and the court may order the accused person to be discharged or may order him to be kept in custody in such place and in such manner as the court thinks fit, or admit him to bail, until he can be dealt with according to law.

(4) A person so found to be incapable of understanding the proceedings at the trial may be again indicted and tried for the offence."

that steps be taken to add him as a party to the Supreme Court record. The second appellant has sufficient interest to obtain relief in the nature of prohibition[6].

The jurisdiction of the Magistrate

11 With great respect to Mildren J, the real question in the case is not whether it is unfair or unjust or a denial of natural justice to the appellant to proceed with the committal, important though those questions may be. The fundamental question is whether, having regard to the provisions of the *Justices Act* and the fact that the appellant cannot understand the proceedings, the Magistrate has jurisdiction to continue the proceedings, or alternatively, jurisdiction to commit the appellant for trial or to discharge him after hearing all the evidence.

12 Part V of the *Justices Act* contains the procedure to be followed in committal proceedings in the Northern Territory. Section 101 provides that an information may be laid before a Justice in any case where a person is suspected of having committed a felony within the Northern Territory.

13 Section 106 provides:

> "Subject to section 106A[7], where a person appears or is brought before a Justice charged with an indictable offence and a notice has not been given to that person in accordance with section 105A, the Justice shall, in the presence or hearing of the defendant, and if the defendant so desires, in the presence of hearing of his counsel or solicitor, take the preliminary examination or statement on oath of any persons who know the facts and circumstances of the case, and the defendant or his counsel or solicitor may cross-examine those persons." (footnote added)

14 Sections 105A and 105B provide for committal proceedings to be conducted, in whole or in part, by the tender of written statements. Section 105B(3) provides that a statement shall not be admissible where the defendant, not later than five days before the date set down for the preliminary examination, gives notice in writing to the prosecutor that he requires the attendance at the preliminary

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6 *Worthington v Jeffries* (1875) LR 10 CP 379 at 382; *R v Graziers' Association of NSW; Ex parte Australian Workers' Union* (1956) 96 CLR 317 at 327; *R v Watson; Ex parte Australian Workers' Union* (1972) 128 CLR 77 at 81; *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190 at 201-202.

7 This exception deals with pleas of guilty in respect of minor offences.

examination of the person who made the statement. Notwithstanding that the Justice admits a written statement, the prosecutor may still call the person to give oral evidence[8]. In the event that the prosecutor calls such a person, the witness is to be "examined in the presence or hearing of the defendant and, if the defendant so desires, in the presence or hearing of his counsel or solicitor"[9]. The witness may be cross-examined by the defendant or his counsel or solicitor[10].

15 Section 109 provides:

"(1) When all the evidence offered upon the part of the prosecution has been taken, the Justice then present shall consider whether it is sufficient to put the defendant upon his trial for any indictable offence.

(2) If the Justice is of opinion that the evidence is not so sufficient, he shall forthwith order the defendant, if in custody, to be discharged as to the information then under inquiry.

(3) If the Justice is of opinion that the evidence is so sufficient, the Justice may -

(a) if the charge is one of a minor indictable offence, proceed in the manner directed and under the provisions in that behalf contained in Division 2;

(b) unless the defendant is charged with a capital offence, or with manslaughter, ask the defendant whether he wishes to plead to the charge as provided in Division 3 and proceed as thereby directed; or

(c) proceed with the examination as provided in the next succeeding sections."

16 Section 110 provides:

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8 s 105B(9).

9 s 105B(9)(a).

10 s 105B(9)(b).

"(1) Where the Justice proceeds with the examination, he shall say to the defendant these words, or words to the like effect:

> 'Having heard the evidence for the prosecution, do you wish to be sworn and give evidence on your own behalf, or do you desire to say anything in answer to the charge[?] You are not obliged to be sworn and give evidence, nor are you required to say anything unless you desire to do so; but whatever evidence you may give upon oath, or anything you may say, will be recorded, and may be given in evidence upon your trial.
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> 'You are clearly to understand that you have nothing to hope from any promise or favour, and nothing to fear from any threat, which may have been held out to you to induce you to make any admission or confession of your guilt; but that whatever you now say may be given in evidence upon your trial, notwithstanding any such promise or threat.'"

17 Section 111 provides:

"(1) When the defendant has given evidence or made his statement, or has declined to do so, the Justice, before he commits the defendant for trial or admits him to bail, shall ask the defendant whether he desires to call any witness.

(2) Any witness whom the defendant desires to call shall then be called, and the statement of any such witness who knows anything relating to the facts and circumstances of the case, or any evidence tending to prove the innocence of the defendant, shall be taken."

18 Section 112 directs the Justice, when the examination is completed, to consider whether the evidence is sufficient to put the defendant upon his trial for any indictable offence. If the Justice is of the opinion that the evidence is not so sufficient, he is required to order the defendant, if in custody, to be discharged as to the information under inquiry[11]. If the Justice is of the opinion that the evidence is sufficient, he is to direct the defendant to be tried at the first sitting of the Supreme Court exercising its criminal jurisdiction not earlier than 14 days after a date and at a place specified by the Justice. If the defendant is committed for trial, the Justice may either commit the defendant to prison until he or she appears before

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11 s 112(2).

the Supreme Court for trial or grant bail in accordance with the *Bail Act* (NT)[12]. Subject to any order made by the Supreme Court, a defendant committed for trial must be tried accordingly[13].

19 It is clear from ss 106 and 110 of the *Justices Act* that the authority of the Justice to commit a defendant for trial depends upon two conditions. First, the evidence must be taken "in the presence or hearing of the defendant". Second, the defendant "having heard the evidence for the prosecution" must be given the right to give evidence or to say something "in answer to the charge". Furthermore, as ss 29 and 106 of the Act make clear, a defendant in committal proceedings is entitled to be represented by a legal representative and either personally or through the legal representative to cross-examine witnesses called by the prosecution.

20 Since the *Indictable Offences Act* 1848 (UK), the nature of committal proceedings has changed dramatically. Before that Act, the purpose of committal proceedings was to determine whether there was enough evidence for a grand jury to find a bill of indictment against the accused. The inquiry by the Justice was held in private, the accused was not entitled to be present while the evidence of witnesses was taken and, at least in the early stages of the common law, the accused was obliged to answer questions put to him or her[14]. Committal proceedings were not held for the purpose of enabling the accused to know the case against him or her. Indeed, in the very year that the *Indictable Offences Act* was passed, Cresswell J in *R v Ward*[15] said that counsel for the prisoner was "in error in supposing that the depositions are taken for the purpose of affording information to the prisoner." His Lordship said that depositions were taken so "that if any of the witnesses, whose evidence is given before the magistrates, should be unable to attend at the trial, or die, there should not, by reason of this, be a failure of justice." As a matter of practice, however, the accused person was generally given before trial a copy of the depositions which the magistrates had taken[16].

21 The procedural changes which the *Indictable Offences Act* made are continued in the Northern Territory in the *Justices Act*. Moreover, those changes

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12 s 112(3).

13 s 112(4).

14 Devlin, *The Criminal Prosecution in England*, (1960) at 5-6.

15 (1848) 2 C & K 759 at 760 [175 ER 319 at 319].

16 *R v O'Connor* (1845) 1 Cox Crim Cas 233.

have resulted in a dramatic change in the nature, function and purpose of committal proceedings.

22 The importance of committal proceedings in the modern law in protecting the rights of accused persons was recognised by this Court in *Barton v The Queen*[17] and *Grassby v The Queen*[18]. In *Grassby* Dawson J said[19]:

> "The importance of the committal in the criminal process should not, however, be underrated. It enables the person charged to hear the evidence against him and to cross-examine the prosecution witness. It enables him to put forward his defence if he wishes to do so. It serves to marshal the evidence in deposition form. And, notwithstanding that it is not binding, the decision of a magistrate that a person should or should not stand trial has in practice considerable force so that the preliminary hearing operates effectively to filter out those prosecutions which, because there is insufficient evidence, should not be pursued."[20]

23 As *Grassby* and *Barton* make clear, the nature of committal proceedings has changed both in legal theory and in substance since the early days of the common law. It is true, as s 107 makes clear, that they may still be held in private. But that said, committal proceedings today bear little resemblance to committal proceedings as they were understood by the early common lawyers.

24 When s 106 directs the Justice to take the preliminary examination "in the presence or hearing of the defendant", it lays down a condition precedent to the authority of the Justice to commit for trial. The words "presence or hearing of the defendant" have more than a formal significance. It is hardly to be supposed that the conditions of the section can be complied with by taking the preliminary examination in the presence of a defendant who is in a coma.

25 Whether the examination is conducted in the physical presence or within the actual hearing of the defendant, s 106 will not be complied with unless the defendant is able to understand what has been put against him or her by the "persons who know the facts and circumstances of the case". The necessity for the

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17 (1980) 147 CLR 75.

18 (1989) 168 CLR 1.

19 (1989) 168 CLR 1 at 15.

20 See also *Barton v The Queen* (1980) 147 CLR 75 at 99, 105-106.

defendant to understand what is put against him or her is emphasised by the words which s 110 directs the Justice to say to the defendant:

> "Having heard the evidence for the prosecution, do you wish to be sworn and give evidence ... or do you desire to say anything in answer to the charge[?]"

These words would be a meaningless ritual unless the defendant had not only "heard" the evidence for the prosecution but was able to comprehend what was being put against him or her.

26 On a trial for a criminal offence, it is well established that the defendant should not only be physically present but should also be able to understand the proceedings and the nature of the evidence against him or her. In *Kunnath v The State*[21], the Judicial Committee of the Privy Council said[22]:

> "It is an essential principle of the criminal law that a trial for an indictable offence should be conducted in the presence of the defendant[23]. As their Lordships have already recorded, the basis of this principle is not simply that there should be corporeal presence but that the defendant, by reason of his presence, should be able to understand the proceedings and decide what witnesses he wishes to call, whether or not to give evidence and, if so, upon what matters relevant to the case against him[24]."[25]

27 If the defendant does not speak the language in which the proceedings are being conducted, the absence of an interpreter will result in an unfair trial[26]. In *R v*

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21 [1993] 1 WLR 1315; [1993] 4 All ER 30.

22 [1993] 1 WLR 1315 at 1319; [1993] 4 All ER 30 at 35.

23 *Lawrence v The King* [1933] AC 699 at 708 per Lord Atkin. Exceptionally the trial may continue where the accused fails to appear at his trial after the trial has started: *R v Howson* (1981) 74 Cr App R 172; *R v McHardie and Danielson* [1983] 2 NSWLR 733.

24 *R v Kwok Leung* [1909] 4 HKLR 161 at 173-174 per Gompertz J; *R v Lee Kun* [1916] 1 KB 337 at 341 per Lord Reading CJ.

25 See also *R v Tran* [1994] 2 SCR 951.

26 *R v Lee Kun* [1916] 1 KB 337 at 341, 342; *Johnson* (1987) 25 A Crim R 433 at 435; *Lars* (1994) 73 A Crim R 91 at 115.

Willie[27], Cooper J is reported to have ordered four Aboriginal prisoners to be discharged on a charge of murder when no interpreter could be found competent to communicate the charge to them.

28 Given the modern purpose of committal proceedings, the words "in the presence or hearing of the defendant" should not be treated as having only a formal significance. When regard is had to the purpose of committal proceedings and the context of the *Justices Act*, particularly s 110, those words are to be construed as meaning that the defendant is able to understand what "facts and circumstances" are being alleged against him or her. The text of ss 106 and 110 and the nature of the proceedings indicate that it is insufficient that the evidence is given in the physical presence or hearing of the defendant. Rather it is necessary "that the defendant, by reason of his presence, should be able to understand the proceedings and decide what witnesses he wishes to call, whether or not to give evidence and, if so, upon what matters relevant to the case against him."[28]

29 In *R v Mungaribi*[29], Martin J held, correctly in our opinion, that the provisions of ss 110 and 111 of the *Justices Act* are mandatory provisions and that the failure to comply with them renders a committal for trial a nullity[30]. That being so, any committal of the appellant in the present case would be a nullity.

30 Counsel for the second respondent placed some reliance on the fact that the proceedings were commenced pursuant to s 105A of the *Justices Act* with the intention that the provisions of ss 105B and 106 would also be relied upon. As a result, the prosecution has provided a complete brief of evidence to the appellant together with a list of exhibits as required by s 105A. However, the fact that the proceedings were commenced pursuant to s 105A of the *Justices Act* does not alter the requirement that the appellant should be able to understand "the facts and circumstances" relied on against him. Indeed, his inability to read the written statements merely emphasises his inability to comprehend the nature of the proceedings against him.

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27 (1885) 7 QLJ (NC) 108.

28 *Kunnath v The State* [1993] 1 WLR 1315 at 1319; [1993] 4 All ER 30 at 35.

29 (1988) 55 NTR 12.

30 See also *R v Gee* [1936] 2 KB 442; *R v Phillips* [1939] 1 KB 63; *Ex parte Sloane* (1983) 8 A Crim R 424; *Ngalkin* (1984) 12 A Crim R 29.

31 The issue in the present case is not, as the submissions of the prosecution assumed, whether or not the appellant is fit to plead. In *Pioch v Lauder*[31], Forster J held that, in the absence of a statutory power, a magistrate exercising summary jurisdiction under the *Justices Act* had no authority to determine whether the accused was unfit to plead. There is no reason to doubt the correctness of the decision on this point. However, his Honour went on to say[32]:

> "If this were an indictable offence [the learned stipendiary magistrate] should proceed with the hearing and commit the defendant for trial. I consider that notwithstanding the defendant's disabilities a committal hearing may proceed since no plea is required from him in such proceedings. Upon him being indicted before the Supreme Court a special jury should be empanelled to try the question of the defendant's fitness to plead. If the jury found in accordance with the facts found by the learned stipendiary magistrate and set out in the special case then this court would have no option but to apply the provisions of s 20B of the [*Crimes Act* 1914 (Cth)] ... and commit the defendant to be kept in custody until the pleasure of the Governor-General be known.
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> In the case of simple offence, however, there appears to be neither authority nor statutory provision to deal with the matter of a defendant who is insane, whether properly so called as being a person suffering from a sufficient defect of reason, or disease of the mind, or a person like the defendant here."

32 With great respect, his Honour's statement, so far as it concerns committal proceedings, overlooks the mandatory nature of the provisions of the *Justices Act* and their effect on a Justice's authority to commit for trial.

33 In our view, upon the facts which are common ground in this case, the Magistrate (the first respondent) would have no authority to commit the appellant for trial and has no power to take evidence which is not taken "in the presence or hearing of the defendant". That being so, she has no authority to continue with the proceedings.

34 The fact that committal proceedings cannot be taken against the appellant does not mean that the law is powerless to deal with his case. It is perhaps

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31 (1976) 13 ALR 266.

32 (1976) 13 ALR 266 at 271.

unfortunate that only the Supreme Court has jurisdiction to determine questions of fitness to plead. However, there is no reason why the Crown cannot move to lift the stay on the *ex officio* indictment which has been filed in the Supreme Court. Since committal proceedings against the appellant cannot lawfully take place, nothing in *Barton*[33] would now prevent the Crown proceeding by way of *ex officio* indictment. Upon the lifting of the stay of proceedings on that indictment, the issue of the appellant's fitness to plead could then be determined under the provisions of s 357 of the *Criminal Code*.

35 The appeal should be allowed. The order of the Court of Appeal dated 29 August 1997 should be set aside. In lieu thereof, the appeal to that Court should be allowed and there should be an order for prohibition directed to the first respondent, the Magistrate, in respect of the further hearing of the committal proceedings.

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33 (1980) 147 CLR 75.