R v Plummer [2012] NTSC 30

PARTIES:	THE QUEEN
	v
	PLUMMER, Vincent
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	21004292
DELIVERED:	17 APRIL 2012
HEARING DATE:	17 APRIL 2012
JUDGMENT OF:	REEVES J

CATCHWORDS:

CRIMINAL LAW AND PRACTICE (NT) – committal proceedings – investigation after committal proceedings under s 43N *Criminal Code* found defendant not fit to stand trial and unlikely to be fit to stand trial within twelve months – whether defendant was able to comprehend the nature of the committal proceedings – stipendiary magistrate's statement under 110 *Justices Act*– whether committal proceedings conducted in 'good faith' is immaterial to validity – committal proceedings a nullity – indictment permanently stayed

Criminal Code ss 43J, 43M, 43N, 43R, 43T, 298
Criminal Procedure Act 1986 (NSW)
Justices Act ss 106, 110, 111
Police Administration Act s 140

Ebatarinja v Deland (1998) 194 CLR 444; [1998] HCA 62
R v Halmi (2005) 62 NSWLR 263; [2005] NSWCCA 2
R v Janceski (2005) 64 NSWLR 10; [2005] NSWCCA 281
R v Mungaribi (1988) 92 FLR 264

REPRESENTATION:

Counsel:

Plaintiff:	Mr S Geary
Defence:	Ms T Collins

Solicitors:

Plaintiff:	Office of the Director of Public Prosecutions
Defence:	Central Australian Aboriginal Legal Aid Services

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

R v Plummer [2012] NTSC 30
No. 21004292

BETWEEN:

The Queen
Plaintiff

AND:

Vincent Plummer
Defendant

CORAM: REEVES J

EX TEMPORE REASONS FOR JUDGMENT

(Delivered 17 APRIL 2012)

INTRODUCTION

[1] The defendant is charged with a number of offences of unlawful assault with circumstances of aggravation involving three young children. The offences are alleged to have occurred in Tennant Creek on or about 15 January 2010.

[2] On 23 September 2010 a committal hearing was conducted in Tennant Creek before a stipendiary magistrate. The defendant appeared at the committal hearing and he was represented by a lawyer from the Central Australian Aboriginal Legal Aid Service (CAALAS).

[3] The stipendiary magistrate received as an exhibit, (marked P1), comprising three child forensic interviews and "statutory declaration of David Ellis and Transcript of s 140 conversation between Constable Ellis and [the defendant]…".

[4] I will return to that last document a little later in these reasons. The stipendiary magistrate then heard evidence from two witnesses. At the conclusion of the evidence, his Honour said (page 22 of the transcript):

> Well I am satisfied, pursuant to s. 109, based on those interviews and the further evidence of the witnesses that there is sufficient evidence to place the defendant upon his trial in respect of the indictable offences set out in counts 1 through to 3 on the information.

[5] Then he said: "I have to say some words to you, [the defendant], and I am happy for Mr Pyne to speak to me on your behalf."

[6] Following this, his Honour read out the words of s 110 of the *Justices Act*; and addressed the lawyer appearing for the defendant: "Does your client wish to say anything, Mr Pyne?" In response, Mr Pyne said "No, your Honour". His Honour then said, "I'll mark the s 110 document 'No comment'. Does your client wish to give or call any evidence on his behalf today?" Mr Pyne, "No, your Honour".

[7] His Honour then committed the defendant for trial at the next criminal sittings in Alice Springs commencing 11 October 2010. In the Supreme Court, the matter was fixed for a pre-recording hearing of certain evidence before Mildren J on 9 December 2010.

[8] On that date Ms Collins appeared for the defendant and applied for an investigation to be conducted under s 43N of the *Criminal Code* as to the defendant's fitness to stand trial.

[9] In support of the application, Ms Collins provided two medical reports to Mildren J. By way of explanation for the late application, Ms Collins said:

> --- the first time I've met [the defendant] in person was yesterday because he resides in Tennant Creek. His family travelled with him to come here. I've previously tried to speak with him on the phone, members of my office more junior practitioners had conducted the matter in Tennant Creek and seemed to be of the impression that he was able to despite clearly there's evidence of problems in his past with schizophrenia, able to instruct. I'm not sure unfortunately how detailed their investigation of that issue was. When I spoke with [the defendant] yesterday to see if I could confirm the information that I'd been previously given by previous lawyers from my office, it became apparent that he wasn't able to tell me his name, where he was, who I was, he wasn't able to identify photographs of Tennant Creek that I showed him in relation to the alleged incident. He wasn't able to give me any information about what occurred or any recollection of anything at all. The extent of his answers to me were 'I don't know', I said "Do you know why you're here?"-'I don't know', "Do you know who I am" 'I don't know'. He was able to tell me he had to go to Court today I said "Well, what's that about" 'You tell me' was his response to that. Basic information I was not able to glean from him and I obviously have a duty to this Court and to him and I did feel that it would (sic – not) be able to proceed given the fact that he wasn't able to in my opinion comprehend really what was going on in any meaningful way.

[10] It is important to note that these statements by Ms Collins were made about two and a half months after the committal proceedings were conducted in Tennant Creek.

[11] As a result of Ms Collins' application, Mildren J ordered a report be obtained from a consultant psychiatrist.

[12] On 1 March 2011, Dr Elaine Kermode submitted her report to his Honour. Among other things, that report contained a statement in the terms of s 43J of the *Criminal Code*. After setting out the provisions of that section, it concluded with the following opinion: "In my opinion, as a Consultant Psychiatrist, [the defendant] is not fit to stand trial and I believe that [the defendant's] mental state will not improve over time."

[13] I am unable to find any record of a finding in accordance with s 43T of the *Criminal Code* that the defendant was indeed unable to stand trial. Despite this, the matter was listed to proceed as a special hearing, presumably under s 43R of the *Criminal Code*, in the March 2012 sittings of the Supreme Court at Alice Springs.

[14] I have been informed by Blokland J, who presided at those sittings, that at the outset of the hearing of the defendant's matter, she made an enquiry of counsel and was told that the finding of his unfitness to stand trial had in fact been made, or words to that effect. Accordingly, she proceeded with the special hearing.

[15] That hearing was aborted as a result of some problem with one of the jury members late on the final day. That may have been fortuitous, given the conclusions I have reached.

[16] Last week, the matter was listed to proceed as a special hearing before me.

[17] Prior to the commencement of the special hearing today, I raised a number of concerns with counsel. They included concerns about whether the committal proceedings could have been validly conducted in view of the defendant's apparent inability to understand the facts and circumstances alleged against him; and if the committal proceedings were not validly conducted, whether the indictment presented on the basis that the defendant was validly committed for trial, was similarly affected.

[18] After a short adjournment, counsel submitted that the matter should proceed on the basis of the present indictment. That is, the indictment that was presented before Blokland J. In support of that course, Mr Geary, for the Crown, submitted that the committal proceedings had proceeded in, what he described as, "good faith" and that they should be treated as valid.

[19] Ms Collins, for the defendant, submitted that the notes made by the CAALAS lawyer who had conducted the committal proceedings suggested that the lawyer concerned had been able to obtain instructions to the effect that he (the defendant) "did not do it". Despite this, Ms Collins told me that she was not now able to obtain instructions from the defendant as to whether he understood the facts and circumstances alleged against him at the committal hearing and what had happened at that hearing.

[20] Both counsel relied upon s 43M of the *Criminal Code*. That section has been amended since the defendant's committal hearing in September 2010. At that time, it provided that:

(1) If the question of an accused person's fitness to stand trial arises at a committal proceeding:

(a) the accused person is not to be discharged only because the question has been raised during the committal proceeding;

(b) the committal proceeding is to be completed in accordance with the *Justices Act* (whether or not sections 106 and 110 of that Act are complied with); and

(c) if the accused person is committed for trial – the question is to be reserved for consideration by the court during the trial of the accused person.

(2) In the event of an inconsistency between Part V of the *Justices Act* and this section, this section prevails to the extent of the inconsistency.

[21] Counsel also pointed out that s 43M was amended after the High Court decision in *Ebatarinja v Deland*[1] (*Ebatarinja*) to address the situation that had arisen in that matter. I will return to *Ebatarinja* in a moment, but it seems to me that, on its face, s 43M does not apply here because, as the history I have just provided demonstrates, the question of the defendant's fitness to stand trial did not arise at his committal proceedings. It first arose about two and a half months later, when Ms Collins raised it before Mildren J. I therefore do not see how s 43M could act to cure any defect that occurred at the defendant's committal hearing in September 2010.

[22] As an aside, I would add these observations. In the time available, I have been able to obtain the second reading speech on the amendment to s 43M to ascertain whether that amendment was made to address the High Court's ruling in *Ebatarinja*. However, even if it was, it would still be a matter for

[1] (1998) 194 CLR 444; [1998] HCA 62

this Court to determine whether the legislature had achieved what it set out to, by that amendment.

[23] While I have not had the benefit of submissions on the issue and I do not need to express any concluded view on it, given the importance of an accused understanding committal proceedings, as outlined by the High Court in *Ebatarinja*, and given the many decisions requiring strict compliance with criminal procedure, my tentative conclusion is that s 43M has not achieved what it was intended to.

[24] Moreover, there appears to me to be an inherent contradiction in the requirements of s 43M that the committal proceedings be completed "in accordance with the *Justices Act*" and the succeeding words "whether or not sections 106 and 110 of that Act are complied with." As I will demonstrate later by reference to *Ebatarinja*, those sections are critical to a committal being conducted in accordance with the *Justices Act*.

[25] I now turn to consider Mr Geary's submission that the Crown and the defence counsel agree that the committal hearing was conducted in "good faith". In my view, that is immaterial to the validity of the committal hearing. A similar submission was made to Martin J (as he then was) in *R v Mungaribi*[2] (*Mungaribi*). That is, that defence counsel could, by his conduct, waive compliance with the requirements of ss 110 and 111 of the *Justices Act*.

[2] (1988) 92 FLR 264

[26] In response to that submission, Martin J said (at 268):

> On a reading of the provisions in question here, they are mandatory and given the purpose for which they are provided, I am not prepared to construe them as directory. They have stood for many years and from a time when legal [representation] may not have been always available to persons in all parts of the Territory where committal proceedings could be conducted. That position may now have changed but the statutory requirements remain, and I do not consider that there is any reason to construe the words in any way other than the plain language employed.
>
> The object of the provisions is one of general policy relating to all persons charged with indictable offences and for their benefit. Public interests are involved. The requirements are indispensable. The duties imposed are imposed upon the Justice conducting the examination and a failure to observe them cannot be rectified or made good by acquiescence, even by experienced legal practitioners.

[27] This decision in *Mungaribi* was expressly approved by the High Court in *Ebatarinja* at [29].

[28] That brings me to the *Ebatarinja* decision and its effect on the validity of the defendant's committal hearing. Mr Ebatarinja was a deaf mute. He was only able to communicate through sign language. He was charged with a number of indictable offences. The question arose at his Committal hearing whether he could understand the nature of the proceedings against him.

[29] Sections 106, 110 and 111 of the *Justices Act* were in the same form at the time of the *Ebatarinja* decision, at the time of the *Mungaribi* decision (in 1998) and at the time of the defendant's committal hearing in September

2010. For completeness, I note that they have since been amended, but those amendments do not affect this matter.

[30] In relation to s 106, the High Court in *Ebatarinja* said (at [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.

[31] Then, at [25], the High Court went on to observe:

> 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 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.

[32] The words of s 110 are quoted by the High Court at that point. They are the same words that were read out by the stipendiary magistrate to the defendant at the conclusion of his committal hearing.

[33] The Court went on:

> 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.

[34] Of course in this case, unlike in *Ebatarinja*, the defendant was able to hear what was put against him, but the question here is whether he was able to comprehend those matters.

[35] In relation to the operation of both ss 106 and 110, the High Court said (at [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 in 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 reasons 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".

[36] A little later (at [31]), the Court made an important distinction between the question whether a person was fit to plead and whether or not that person was in a condition where compliance with the *Justices Act* was possible. The Court said:

> 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*, 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:
>
> 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.
>
> 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.

(Footnotes omitted in original)

[37] In the next paragraph the High Court went on to reject that approach:

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

[38] These observations are the crux of my earlier expressed doubts about whether the amendments to s 43M, if they were made to address the effect of this decision of *Ebatarinja*, have achieved that outcome. The issue is not whether the defendant was fit to plead at the time of the committal proceedings, but whether he was able to sufficiently understand the committal proceedings in the way described above (particularly at [39], quoting *Ebatarinja* at [28]).

[39] The High Court concluded in *Ebatarinja* (at [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.

[40] Of course *Ebatarinja* is a case where the issue arose during the committal proceedings and it proceeded to the High Court while still in that position.

[41] Finally, the High Court suggested (at [34]) that the way to address the situation that had arisen in that case was to have the stay against the ex officio indictment that had apparently already been presented lifted, so that that indictment could be pursued instead of any indictment that would be presented, following the committal proceedings. The meaning of the decision in *Ebatarinj*a is plain: a failure to comply with sections like ss 106, 110 and 111 of the *Justices Act* renders committal proceedings so conducted a nullity.

[42] That brings me back to the critical question in this matter, namely, whether the defendant could understand the facts and circumstances alleged against him at his committal hearing on 23 September 2010.

[43] Ms Collins told me from the bar table that the lawyer involved at the committal hearing, who is apparently no longer employed by CAALAS, had made notes of his discussions with the defendant to the effect that "[the defendant] did not do it". This suggests that the defendant may have had the capacity to at least understand what it was that was alleged against him during the discussions he had with his lawyer.

[44] I have already given the details of what happened at the committal hearing on 23 September 2010 and the stipendiary magistrate's statement at the end of that hearing, in accordance with s 110. There is no indication anywhere in that record, or indeed at that part of the transcript, that the defendant did not understand what was being alleged against him.

[45] Nonetheless, against this evidence there is a body of evidence that I have already described that includes Ms Collins' statements to Mildren J in early December 2010 just two and a half months after the committal proceedings that I recounted. It also includes Dr Kermode's report of 1 March 2011 that I have also already referred to. Finally, it includes Ms Collins' statement to me today that she is presently unable to obtain instructions from the defendant as to whether he had any understanding as to what had happened at his committal proceedings.

[46] There are also two other pieces of significant evidence bearing on this issue. The first is the report of Dr Raeside, a consultant psychiatrist, dated 8 September 2011. That report was apparently obtained for other purposes and it does not appear that Dr Raeside actually interviewed the defendant. Nonetheless, it appears from the report that he reviewed all the relevant materials listed in his report, including the transcript of the interviews between the children involved and the police and various other medical reports, including Dr Kermode's report of 1 March 2011.

[47] Having reviewed all those materials Dr Raeside opined, among other things, that:

> In summary, from the information provided to me there is clear evidence of a well documented diagnosis of Chronic Schizophrenia for nearly ten years, which has produced significant impairment in [the defendant's] social and occupational functioning. He is noted to have long standing chronic negative symptoms of Schizophrenia affecting his social functioning as well as persistent positive symptoms at times, primarily hallucinations. There is a suggestion of possible command hallucinations at the time of his first presentation in 2002 (with voices telling him to harm himself), but no evidence to suggest command hallucinations around the time of the alleged offending associated with his behaviour. He appears to have been relatively stable with prescribed medication and presented quite well on the last occasion of his assessment six months prior to the alleged offending. Subsequently there was evidence of him being quite confused and various treating doctors considered that he would be unfit to plead or stand trial because of the impairments caused by his mental illness.
>
> Without having had the opportunity to interview [the defendant], I would concur that he probably would have been unfit to plead to stand trial because of his mental impairment. It is unlikely that he would have regained his fitness given his chronic symptoms despite relatively optimum treatment.

[48] The second is more telling. It is contained in the committal record and particularly exhibit P1 that I referred to at the outset: the statutory declaration of David Ellis. David Ellis is a police officer who was involved in a part of the investigation of these offences involving the defendant.

[49] In his statutory declaration, he records that on 4 February 2010 he was on duty at the Tennant Creek Police Station. He says:

5. … At 12:59 pm, I was advised that [the defendant] is at the Tennant Creek front counter after hearing Police are looking for him.

6. I attended the front counter and advised [the defendant] that he was under arrest for indecent dealings with a child under the age of 16 years. I escorted him to the Tennant Creek watch house. I conducted a section 140 Police Administration Act caution on him in the watch house with Constable ERICKSON as the corroborating officer. I was not satisfied that [the defendant] understood the caution.

7. I was immediately contacted by Greg BETTS of CAALAS via phone. I had a short conversation with him and he advised me that [the defendant] has an acquired brain injury. I had a discussion with my colleagues and we came to the resolution that the defendant should be conveyed to the Tennant Creek Hospital to be assessed if he is fit for Police custody.

8. At approximately 1:40 pm, I was advised that [the defendant] is fit for Police custody. I then completed the prosecution file.

[50] The more telling information is contained in the s 140 record of the attempt to give a caution under that provisions of the *Police Administration Act*. That record of conversation is also included in the committal hearing papers. It records the following conversation:

ELLIS: Okay mate now do you understand that you are currently under arrest?

[DEFENDANT]: No

ELLIS: Alright. Do you remember when I told you that you are under arrest?

[DEFENDANT]: Yeah.

ELLIS: Okay. Now do you understand that you are now under arrest?

[DEFENDANT]: Yeah.

ELLIS: Do you understand that you are not free to leave?

[DEFENDANT]: Yeah.

ELLIS: You have to stay here.

[DEFENDANT] Yeah.

ELLIS:Do you understand that? Alright.

[DEFENDANT]: Do I have to tell my mum again and sister?

There is some discussion about that, then the interview continues:

ELLIS:Okay. Alright now you need to understand that you're not – you don't have to say anything. You don't have to say or do anything unless you want to. Alright?

[DEFENDANT]: Mm.

ELLIS:So if I ask you a question do you have to answer it?

[DEFENDANT]: Yeah.

ELLIS:No. You don't have to say anything at all. Do you understand that? So whose choice is it to answer a question?

[DEFENDANT]: Yes - um - yours.

ELLIS:No. It's your - your choice.

[DEFENDANT]: My choice.

ELLIS:Okay. you can say nothing at all if you want to.

[DEFENDANT]: Yeah.

ELLIS:Do you understand that?

[DEFENDANT]: Yeah.

ELLIS:Alright so if I ask you a question do you have to answer?

[DEFENDANT]: Yeah.

ELLIS:No mate you don't have to answer.

[DEFENDANT]: I don't have to answer.

ELLIS:I'm telling you now you don't have to answer anything.

[DEFENDANT]: Yeah.

ELLIS:Okay? so whose choice is it to answer?

[DEFENDANT]: Yours.

ELLIS:No it's your choice.

[DEFENDANT]: Mine.

ELLIS:Alright. So long as you understand that you don't have to tell us anything. Do you understand that?

[DEFENDANT]: Yeah. Yes I understand.

ELLIS:You understand? Alright can you say nothing at all?

[DEFENDANT]: Nuh Nuh.

ELLIS: You can - You can remain silent if you want to. Okay? Alright. Do you understand that anything you say may be given in evidence? You know – you know what that means? Do you understand that this – this is recording? Do you understand that as we're talking now this is recording? Do you understand that this is a tape and it's recording?

[DEFENDANT]: No.

Then there is a discussion about that.

[51] A little later, there is a statement recorded under the defendant's name, but it appears to be in fact Constable Ellis. It is to the following effect:

Alright no worries. Okay Vincent now I'm just going to ask you again to make sure that you understand. Do you have to say anything at all if I ask you? If I ask you a question do you have to say anything?

[DEFENDANT]: No.

ELLIS: That's right. Alright. So if - if I ask you a question whose choice is it to answer?

[DEFENDANT]: Yours.

ELLIS: No it is your choice.

[DEFENDANT]: My choice.

ELLIS: Alright. It's up to you if you want to ...

[DEFENDANT]: (inaudible).

ELLIS: Tell me. Alright?

[DEFENDANT]: (inaudible).

ELLIS: Yeah you can say no I don't want to talk or you can talk if you want to its (sic) your choice.

[DEFENDANT]: Yeah.

ELLIS: Alright. Okay do you – now do you want anyone informed that you are here in the watch house?

[DEFENDANT]: My mum and dad.

There is some discussion about that and then:

ELLIS: Were they --- were they --- with you [referring to his mother and sister] when you came through this way?

[DEFENDANT]: Oh they said you just wanted to see me and they brang me here.

ELLIS: Alright well I'm pretty sure that they know that you are with us now because we walked you through.

[DEFENDANT]: Yeah.

ELLIS: Are you happy with that?

[DEFENDANT]: Yeah.

ELLIS: Yeah are you satisfied that they know where you are now?

[DEFENDANT]: Yeah and they want me to speak to you and then go back home with them.

ELLIS: Yeah possibly alright. Okay mate - um - so are you satisfied that your mother and your sister know that you are here?

[DEFENDANT]: Yeah they said to ask you that now.

ELLIS: Alright mate look I don't really understand you but – um, - we'll continue on.. Alright are you - intoxicated at the moment? You drunk?

[DEFENDANT]: Nuh -.

[52] After some discussion about the defendant's medical condition Constable Ellis says: "But it's a mental health problem?' and the defendant says, "Yeah".

[53] Consistent with what Constable Ellis said in the statutory declaration, it is quite apparent from his record of interview that the police officers concerned were not able to conduct a warning under s 140 of the *Police Administration Act* and specifically were not able to convey to the defendant exactly what it was they were doing sufficiently for that purpose.

[54] Based upon all this material, I am forced to conclude that at the time of his committal proceedings, the defendant was most probably not able to properly understand the facts and circumstances alleged against him or the

effect of the committal proceedings being conducted or what it was that the stipendiary magistrate was saying to him when he read out the s 110 statement at the conclusion of the proceedings. That being the position, the stipendiary magistrate had no authority under the *Justices Act* to conduct the committal proceedings.

[55] It follows that those proceedings were a nullity for similar reasons to the committal proceedings in *Mungaribi* and the proposed committal proceedings in *Ebatarinja*. Further, if the defendant was not validly committed for trial under the *Justices Act*, the indictment based on that committal must, in my view, also fail. That indictment is made pursuant to s 298 of the *Criminal Code*.

[56] In this regard it is worth referring to the observations of Howie J in *R v Janceski*[3]. In that case the indictment was signed by a barrister, Ms Traill, who did not have the requisite authority under the *Criminal Procedure Act 1986* (NSW) to sign indictments. A similar issue had been raised in an earlier decision of *R v Halmi*[4].

[57] In both instances the Court of Appeal decided the convictions based on the indictments had to be set aside. At [224] to [225] of his decision, Howie J made these observations:

> 224. However, in my opinion neither the technical nature of the defect in the Traill indictment nor the unhappy consequence of

[3] (2005) 64 NSWLR 10; [2005] NSWCCA 281
[4] (2005) 62 NSWLR 263; [2005] NSWCCA 2

> the error made by the prosecutor can be allowed to influence the determination of whether the Traill indictment was valid. If the conviction is quashed as a result of this defect, it will not be the first or last time that such a result has followed what, on any view, is a highly technical objection raised after what has apparently been a fair trial. Even accepting, as I do, that there has in more recent times been a relaxation of some of the technicalities that plagued the administration of the criminal justice system in past centuries, there is still a rigorous approach taken by this and other courts to the fundamental requirements of a criminal trial regardless of the consequences.
>
> 225. For example, in *R v Brown; R v Tran* (2004) 148 A Crim R 268, a conviction was set aside because of "the entirely innocent intervention", in the words of Mason P, of a person in the jury panel from which the jury for the trial of the appellants was selected. The person had been summoned for the next day and simply made a mistake as to when she was required to attend for jury service. The fact that this was a highly technical breach of the relevant sections of the *Jury Act* 1977 did not save the convictions of the appellants because of what was viewed as "non-compliance with fundamental, mandatory provisions" relating to the composition of the jury. The fact that there had not actually been a miscarriage of justice in any sense was to no avail.

[58] In my view the provisions of ss 106, 110 and 111 of the *Justices Act* were mandatory provisions that had to be complied with in the same strict manner. It would not be in the interests of justice if this matter were to proceed with that defect present and it be left to a Court of Criminal Appeal, much less the High Court to remedy it. The best time to do that is now.

[59] For these reasons I propose to take the same course as Martin J did in *Mungaribi* (see at 268) and declare that the committal proceedings conducted before the stipendiary magistrate on 23 September 2010 were a nullity. On that basis, I order that the indictment presented against the

defendant based on him having been validly committed for trial, that is, the indictment presented pursuant to s 298 of the *Criminal Code*, is permanently stayed.