PARTIES:	ROLAND EBATERINJA v CATHY DELAND SM & ORS
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	CASE STATED
FILE NO:	8 of 1997
DELIVERED:	4 APRIL 1997
HEARING DATES:	7 FEBRUARY 1997
JUDGMENT OF:	MILDREN J

CATCHWORDS:

Administrative Law - committal proceeding for a deaf and mute Aboriginal juvenile, inability to understand the nature of the proceedings or to communicate to his counsel, - ex officio indictment;
prohibition against further hearing the committal proceedings; ex officio indictment stayed until the conclusion of the committal proceedings.

Cases:

Ebaterinja v Pryce (unreported, 24/2/97) considered
Craig v South Australia (1994-5) considered
Pioch v Lauder (1976) 13 ALR 266 considered
Braun v R; Ebatarintja v R (Court of Criminal Appeal, unreported, 14/3/97) approved
Seears v Oldfield (1985) 36 NTR 65 approved
Grassby v The Queen (1989-90) 168 CLR 1; (1989) 87 ALR 618 followed
Taylor v Territory Insurance Office (1991) 77 NTR 13 approved
Ngatayi v The Queen (1980) 147 CLR 1 approved

Mohammed Ahmed Saraya (1994) to A. Crim R 515 considered
R v Lee Kun [1916] 1 KB 337 considered
Barton v The Queen (1980) 147 CLR 75 followed
R v Munigaribi (1988) 55 NTR 12 considered

Legislation:

Northern Territory Criminal Code 1983
Juvenile Justice Act 1983
Justices Act
Justices of the Peace Act
Magistrate Act

REPRESENTATION:

Counsel:

Plaintiff:	Mr Ross Q.C.
First Defendant:	Mr Stirk
Second Defendant:	Mr Birch
Third Defendant:	Mr Birch

Solicitors:

Plaintiff:	Central Australian Aboriginal Legal Aid Service
First Defendant:	McBride and Stirk
Second Defendant:	Director of Public Prosecutions
Third Defendant:	Director of Public Prosecutions

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. 8 of 1997
(9703091)

BETWEEN:

ROLAND EBATERINJA
Plaintiff

AND:

CATHY HELEN DELAND SM
First Defendant

AND:

LEONARD DAVID PRYCE
Second Defendant

AND:

REX WILD Q.C.
Third Defendant

AND

No. 26 of 1996
(9503690)

BETWEEN:

THE QUEEN

v

ROLAND EBATERINJA

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 4 April 1997)

Introduction

The plaintiff is charged with murder and other offences alleged to have been committed at Alice Springs on the 16th day of February 1995. The information by the second defendant was laid in the Juvenile Court on 21 February 1995.

The plaintiff is a deaf and mute aboriginal youth who was born at Alice Springs Hospital on 2 March 1978. At the time of the alleged offences and at the time the information was laid he was 16 years of age, and therefore a "juvenile" as defined by the *Juvenile Justice Act*. His parents are both Arrernte speakers and usually communicate to each other and to their children in that language. The plaintiff attended schools in Alice Springs until he was 13 years of age and then he returned to live with his parents at Santa Teresa. He is unable to communicate except by using his hands to ask for simple needs, such as food or money. He does not know of what he is charged and is unable to communicate with his lawyers. He is unable to follow court proceedings. His prognosis is poor. Hearing aids would be of limited benefit to him, except possibly to make him aware of loud environmental sounds, such as sirens and car horns, but he would still not be able to hear conversational speech. It may be that through an intensive course of rehabilitation he may learn to communicate through sign language. Because of cultural and environmental factors it is unlikely that this will be successfully attempted in the near future.

On 22 September 1995, the information came before the Juvenile Court. On the application of counsel for the accused, the committal hearing was adjourned to 24 November 1995 for mention to enable the parties to see if someone could be found to act as an interpreter. The matter appears not to have progressed except for the occasional mention, until 28 May 1996 when it came before the Juvenile Court in Alice Springs constituted by a different magistrate. After hearing extensive argument from counsel as to whether or not the committal proceedings could be continued in the circumstances, (no interpreter having been found) the learned Magistrate decided to state a Special Case to this Court, and proceedings were again adjourned. This was not done by the learned Magistrate until 11 September 1996.

On 8 July 1996, the Director of Public Prosecutions presented in this Court an ex officio indictment against the accused for murder. The reason for this was explained in a letter from the Director's office to the accused's solicitor:

> "This is not to be viewed in any way as attempting to defeat the intention of Her Worship Ms Deland SM to state a case to the Supreme Court as to the correct committal procedures to be followed by the Court of Summary Jurisdiction under the *Justices Act* in the case of adults and under the *Juvenile Justice Act* read with the *Justices Act* in the case of juveniles who appear to be unfit to plead.
>
> The Crown considers clarification of the correct procedural course to be followed in this jurisdiction as important and timely. However to await the outcome of such a process in this particular case is to unnecessarily delay serious prosecution unjustifiably. The two procedures are discrete and can both be conducted independently and in parallel in the Supreme Court."

No effort has yet been made to have the question of the accused's fitness to plead determined by this Court in accordance with the procedure provided by s. 357 of the *Criminal Code*.

The Special Case stated was heard by me on 6 February 1997. I ruled on 6 February that there was no jurisdiction to state a Special Case by a magistrate conducting committal proceedings, and that I had no jurisdiction to entertain it: see *Ebaterinja v Pryce*, (unreported, 24/2/97). Later, on 6 February, the learned Magistrate ordered that the committal be listed for further hearing on 12 February 1997.

On 7 February the accused filed the originating motion, summons and supporting affidavit in these proceedings, and sought to have the matter heard forthwith. That was consented to by counsel for the defendants, and I made appropriate orders to facilitate the immediate hearing accordingly. I should mention that the facts in this case were not in dispute.

The relief sought by the accused, the plaintiff in these proceedings, is as follows:

"1. An order prohibiting the first defendant from further hearing committal proceedings wherein the second defendant is the informant and the plaintiff is the defendant, which proceedings were by order of the first

defendant on the 6th day of February 1997 set down for further hearing on the 12th day of February 1997.

2. An Order prohibiting the third defendant from proceeding or further proceeding on any indictment charging the plaintiff with offences alleged to have occurred on the 21st day of February 1995.

3. A Declaration that no criminal proceedings for offences alleged to have occurred on the 21st day of February 1995 be taken against the plaintiff without the provision of an adequate interpreter.

4. A Declaration that no criminal proceedings for offences alleged to have occurred on the 21st day of February 1995 be taken against the Plaintiff until he can be communicated with adequately.

5. Such other Declaration as this Honourable Court may deem fit.

6. An Order that times and formalities reserved under the Supreme Court Rules be abridged and dispensed with."

During argument, the plaintiff also sought a stay of both the committal proceedings as well as the ex officio indictment. No objection was taken to this course by the defendants. This application was made in respect of matter number 26 of 1996, (9503690), in this Court's criminal jurisdiction.

The Plaintiff's Submissions

First, it was submitted that the plaintiff was embarrassed in having to defend two sets of proceedings in relation to the same matter, one being the committal proceedings, the other, the ex officio indictment. As I understood the submission of Mr Ross QC for the plaintiff, the third defendant, the Director of Public Prosecutions, should elect which proceeding be intended to pursue and the other proceeding should be stayed. Alternatively, it was submitted that the ex officio indictment should be stayed until such time as the committal proceedings had been completed.

Secondly, Mr Ross QC submitted that the committal proceedings should be prohibited, or stayed, until such time as an interpreter is able to be provided to the plaintiff. It was submitted that the committal proceedings should not be permitted to proceed because the plaintiff did not understand them, did not understand the charge, and could not instruct his legal advisors; in other words, there could be no fair committal.

Thirdly, Mr Ross QC submitted that the learned Magistrate was required, pursuant to s. 41(1) of the *Juvenile Justice Act* to satisfy herself that the plaintiff understands the nature of the proceedings. It was submitted that this was a mandatory provision, and that the learned Magistrate had not so satisfied herself, and in the circumstances could not so satisfy herself in the immediate future.

Fourthly, it was submitted that if the learned Magistrate were to proceed to the stage of the committal where she is satisfied that the prosecution evidence is sufficient to put the plaintiff upon his trial, the magistrate could not comply with ss. 110 and 111 of the *Justices Act*, which require the magistrate, inter alia, to advise the plaintiff of his right to give evidence on his own behalf and of his right to call witnesses on his own behalf. It was submitted that although the magistrate could ritualistically utter the words required by the Act, as the plaintiff would not understand the words, there would be no real compliance with the sections, the requirements of which were mandatory.

The Submissions of Counsel for the Second and Third Defendants

Mr Birch, counsel for the second and third defendants submitted as follows:

1. As to staying the indictment, the time to consider a stay is when the plaintiff is called upon to plead. At that stage the court can decide whether to proceed to try the question of whether the plaintiff is fit to plead in accordance with the provisions of s. 357 of the *Criminal Code*. That stage has not yet been reached.

2. The ex officio indictment is not embarrassing, because no attempt has as yet been made to call upon the plaintiff to plead, nor is it contemplated that this will occur whilst the committal proceedings are on foot.

3. It is not clear that the *Juvenile Justice Act* still applies to the committal proceedings as the plaintiff is no longer a juvenile. If it does apply, there is no injustice in proceeding, even if s. 41(1) of the *Juvenile Justice Act* cannot be complied with, because the plaintiff is represented by counsel. There is no provision in the *Juvenile Justice Act* entitling the magistrate to determine the plaintiff's fitness to plead. That power is exclusively that of the Supreme Court. The magistrate is not conducting judicial proceedings, but is acting administratively. A committal is not a "proceeding" for the purposes of s. 41; nor is compliance with it a condition precedent to the conduct of a committal. The magistrate's powers and duties arise from s. 106 of the *Justices Act* which require the magistrate to proceed with the committal "in the presence or hearing" of the plaintiff, and it is sufficient if the magistrate proceeds in the plaintiff's presence. The magistrate can comply with ss. 110 and 111 of the *Justices Act*. It is not fatal that the plaintiff will not understand what the magistrate says to the plaintiff , if the plaintiff is legally represented. The magistrate can only discharge the plaintiff once the examination is completed and a decision is made that the evidence is not sufficient to put the plaintiff upon his trial.

The Submissions of Counsel for the First Defendant

Mr Stirk, who appeared for the first defendant, in accordance with *R v Australian Broadcasting Tribunal*; *ex parte Hardiman* (1980) 144 CLR 13 at

35-6, did not seek to adopt the role of a protagonist, but limited his submissions to the powers and procedures of the learned Magistrate.

First, Mr Stirk submitted that s. 164 of the *Justices Act* precluded proceedings in the nature of prohibition against a magistrate conducting committal proceedings, unless the learned Magistrate fell into the kind of jurisdictional error which amounted to an order or decision that it had jurisdiction to proceed when it did not, based upon a mistaken assumption of jurisdiction or a misconception or disregard of the nature or limits of jurisdiction: *Craig v South Australia* (1994-5) 184 CLR 163. He submitted that this also applied to proceedings brought in the Juvenile Court which were not capable of being dealt with summarily. If the learned Magistrate erred, it would be necessary to establish that the error was not an error within jurisdiction. Secondly, in order to grant relief, it would be necessary to consider the utility of the relief sought; this would depend upon whether or not the indictment was ordered to be stayed. Thirdly, my attention was drawn to the possibility that the relief sought was premature, in that there was no sufficient evidence to indicate that the learned Magistrate intended, when the hearing resumed, to act outside of her jurisdiction. Finally, Mr Stirk submitted that on the authority of this Court in *Pioch v Lauder* (1976) 13 ALR 266, the learned Magistrate ought be permitted to proceed, and if necessary, commit the plaintiff for trial.

The Legislation

In *Braun v R; Ebatarintja v R* (Court of Criminal Appeal, unreported, 14/3/97) I held that the provisions of the *Juvenile Justice Act* continued to apply to an accused person who was a juvenile at the time of committing the offence. Although I was in dissent, as the other members of the Court did not decide this question, I consider that it is open to me to adhere to this view. It is clear from *Seears v Oldfield* (1985) 36 NTR 65, that only the Juvenile Court has jurisdiction to try an information brought against a juvenile.

However, the position, when a magistrate is conducting committal proceedings in relation to a juvenile, is not so clear. The procedure for the conduct of committal proceedings is to be found in the *Justices Act*, rather than the *Juvenile Justice Act*, although there are provisions in the latter Act which have a bearing on this question.

S.101 of the *Justices Act* provides that "an information may be laid before a Justice where any person is suspected to have committed an ... indictable offence... within the Territory." Clearly, the offence of murder is an indictable offence. The word "Justice" is not defined in the *Justices Act*, but it is clear from other provisions of the Act that "Justice" means a justice of the peace: see, for example, ss. 43 and 44. By s. 6 of the *Justices of the Peace Act* all magistrates appointed under the *Magistrate Act* are justices of the peace. When an information is laid in relation to a juvenile, that is taken before a magistrate or justice under s. 101, of the *Justices Act*. The precise procedure thereafter is not as clearly laid down by the Act as it might have been, but it appears that the justice, when the information is laid, fixes a date for the

hearing of the preliminary examination and either a warrant for the defendant's arrest or a summons to appear is issued vide ss. 103 or 104 of the Act, unless the defendant is already in custody. S. 20 (2) of the *Juvenile Justice Act* supports the view that these powers of a justice under the provisions of the *Justices Act* referred to above are unaffected by the provisions of the *Juvenile Justice Act*.

If the defendant is a juvenile the next step would appear to require that the juvenile is brought before the Juvenile Court constituted by a magistrate: see ss. 33(1), 35, 36, 37 and 38 of the *Juvenile Justice Act*. As the offences in this case are not triable summarily, s. 36 requires that "*the Court* shall, subject to this Act, deal with the charge in accordance with the provisions of the *Justices Act* relating to indictable offences" (emphasis mine). S. 107 of the *Justices Act* provides that "the room or building in which the examination is taken shall not be deemed to be an open Court for that purpose...." Presumably this does not apply, as s. 22 (1) of the *Juvenile Justices Act* requires "proceedings under this Act against a juvenile" to be held in open court. The magistrate, it would appear, continues to sit as the Juvenile Court, when conducting committal proceedings. S. 41 of the *Juvenile Justices Act* provides that, "in proceedings before the Court, or before the Supreme Court, in pursuance of this Act, the Court or the Supreme Court, as the case may be, shall satisfy itself that the juvenile the subject of the proceedings understands the nature of the proceedings." S. 41(3) provides that "no order or adjudication of the Court is defective on the ground of failure to comply with this section where the Court has substantially complied with this section."

Having attended to this, the prosecutor then presents the evidence against the defendant, which may be oral, partly oral, or by written statements. When all the evidence has been taken, s. 109(1) of the *Justices Act* requires the magistrate to consider whether it is sufficient to put the defendant on his trial for any indictable offence. If the evidence is not so sufficient, the magistrate shall order the defendant, *if in custody*, to be discharged as to the information: s. 109(2). The *Justices Act* is silent as to what happens if the defendant is not in custody; it follows in any event that the defendant cannot be committed either for trial or sentence. If the evidence is sufficient, unless the defendant signifies a desire to plead guilty, the magistrate is then required to proceed with the examination. This requires the magistrate to comply with ss. 110 and 111, referred to previously. At the end of the examination, the magistrate must consider again whether the evidence is sufficient to put the defendant on his trial vide s. 112(1). If it is not, and the defendant is in custody, he is to be discharged. If he is not in custody, the Act is silent, but he cannot be committed for trial unless the magistrate is of the opinion that it is so sufficient: s. 142(3) of the *Justices Act*.

Although it would appear that the functions of a committing justice are performed by the magistrate constituting the Juvenile Court, I do not consider that this affects the principle that the function is an executive or ministerial one. The history of committal proceedings is traced by Dawson J in *Grassby v The Queen* (1989-90) 168 CLR 1; (1989) 87 ALR 618. The magistrate constituting the Court, and therefore the Court, is still exercising the powers of a justice of the peace when committal proceedings are being conducted. In

Grassby, the committal proceedings were heard by a magistrate sitting as the Local Court. Dawson J said, (at CLR 15):

> "As Gibbs J pointed out in *Ammann v Wegener* [(1972) 129 CLR, at p. 436,] it does not follow that because a magistrate is not exercising judicial functions he cannot be said to sit as a court. It is common enough for courts which are not subject to constitutional restraints to exercise administrative functions."

Whilst the learned Magistrate is required to act justly and fairly, (*Grassby*, at CLR p. 15) Dawson J concluded that a committing Magistrate has no power to terminate the proceeding in a manner other than that provided for by the terms of the statute. Consequently, a magistrate could not order a permanent stay: see *Grassby*, (at CLR, pps. 18-19) and was bound to proceed, and if satisfied that there was a case to answer, commit the defendant for trial. Of course, this does not mean that the committing magistrate has no power to adjourn the committal proceedings from time to time, if the interests of justice so requires it, in order that the committal proceedings can be properly concluded. In my opinion *Grassby* is binding authority, and accordingly, the magistrate must complete the committal, notwithstanding the difficulties faced by the plaintiff and his legal representatives.

As to s. 41(1) of the *Juvenile Justice Act*, I do not consider that the inability of the magistrate to satisfy herself that the present plaintiff understands the nature of the proceedings has the effect that the committal proceedings cannot be conducted at all. The *Juvenile Justice Act* does not confer a power on the Juvenile Court to determine whether a juvenile is fit to

plead; nor is there a procedure similar to that laid down in s. 357 of the *Criminal Code* which applies to the Juvenile Court. Whilst the language of s. 41(1) is apparently in mandatory terms, the magistrate is not required to perform the impossible: *lex non cognit ad impossibilia*. The requirements of s. 41(1) are not a condition precedent to jurisdiction, and if, because the means of communicating with the present plaintiff are non-existent and likely to remain so for the foreseeable future, non-compliance is excused: see *Taylor v Territory Insurance Office* (1991) 77 NTR 13 at 16, and the cases therein cited.

Similarly, I do not consider that the inability of the plaintiff to communicate with his legal advisers would prevent the magistrate from continuing with the committal proceedings. The magistrate is bound to act fairly and justly, but that does not mean that in the circumstances of this case, the proceedings cannot proceed. The authorities which recognise that a person who cannot understand the language of a court is entitled to have an interpreter present (unless the right is waived by counsel) apply only to trials: see *R v Lee Kun* [1916] 1 KB 337; *Ngatayi v The Queen* (1980) 147 CLR 1 at 8-9; *Mohammed Ahmed Saraya* (1994) 70 A. Crim R 515. However the duty to act fairly would no doubt require a magistrate to ensure an interpreter is made available in committal proceedings, if one can be found. But if no interpreter can be found, I do not consider that the same consequences flow as would be the case if the accused was called upon to plead.

First, s. 357(1) of the *Criminal Code* provides "if, when an accused person is called upon to plead to the indictment ... 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 enquire into the question of whether he is capable or not." The section then goes on to provide what is to happen, depending on the answer to this question. In *Ngatayi v The Queen*, (supra at 7), Gibbs, Mason and Wilson JJ said, of the similar Western Australian provision:

> "The incapacity to which [the section] refers may arise "for any reason". It need not be due to any physical or mental condition. For example, if the prisoner cannot speak English, and no interpreter can be found who can translate the proceedings into his tongue, the section would seem to apply."

A fortiore, if the accused does not comprehend any language.

The *Criminal Code* contemplates that the proper time to decide this question is when the accused is called upon to plead to the indictment. Whilst the language of the section, standing alone, does not intractably mean that there could never be some other earlier occasion when that question might not have been resolved in another way, no other way is provided either by the common law or by statute. At common law, the procedure is to empanel a special jury to ascertain whether the accused is fit to plead. This procedure also applies in cases where the accused is deaf and dumb: see *R v Lee Kun supra*, at 341.

Secondly, there may be some benefit to the plaintiff if the committal does proceed. Even if he is unable to instruct counsel, the evidence offered by the prosecutor may not be sufficient to put him on his trial for any indictable offence, at which time, (if he is in custody) he will be discharged, and in any event, the proceedings will come to an end. It would seem unfair to deprive him of this opportunity, limited though it may be in practical terms.

Thirdly, such authority which is directly on the point, apart from *Grassby*, suggests that this is the proper course to follow. In *Pioch v Lauder* (1976) 13 ALR 266, an aboriginal, who was totally deaf and unable to use speech, and was unable to understand the nature of the proceedings, to plead, to give instructions, or to understand or give evidence, was charged on information with aggravated assault. The learned Magistrate stated a case to the Supreme Court as to whether he should proceed. Forster J was of the opinion that as the charge was a simple offence, proceedings should have been commenced by complaint, and that in those circumstances, the learned Magistrate ought to desist from further hearing the charge, there being no statutory procedure provided in such a case. At p. 271, his Honour said that if this were an indictable offence, the magistrate should proceed and commit the defendant for trial:

> "I consider that notwithstanding the defendant's disabilities a committal proceeding may proceed since no plea is required of him. 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."

Some point was made by Mr Ross Q.C., about the standing of counsel called upon to represent the plaintiff. I observe that this difficulty does not seem to have so far embarrassed Mr Ross, either in the committal proceedings before the learned Magistrate, or in these proceedings before me, and did not seem to embarrass Mr Barker Q.C. and Mr Toyne who appeared for Lauder in *Pioch v Lauder*. Be that as it may, both the Juvenile Court and this Court has specific power under s. 40 of the *Juvenile Justice Act* to make such provision for the representation of a juvenile as it sees fit. In any event, counsel could be granted leave to appear as *amicus curiae.*

As to the requirements of ss. 110 and 111 of the *Juvenile Act*, I consider that the proper course is for the learned Magistrate to comply with those sections, as best as she is able. 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 present plaintiff is unable to understand the proceedings, or to instruct his counsel. That question will be determined by this Court when the present plaintiff 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.

As I have already said, the learned Magistrate has a duty to act justly and fairly, and this includes the duty to offer the plaintiff the opportunity to be heard. It is the *opportunity* to be heard which is important. If the plaintiff cannot be heard, so be it. The plaintiff 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 plaintiff's interests. The magistrate should nevertheless ensure that the plaintiff'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 plaintiff.

Accordingly, the relief and declarations sought against the first defendant must be refused, and I decline to grant a stay of the committal proceedings.

As to the relief sought in paragraph 2 of the summons against the third defendant, the Director of Public Prosecutions, I do not consider it is appropriate to grant relief in the nature of prohibition against the third defendant. In *Barton v The Queen* (1980) 147 CLR 75, it was held that the decision to file an ex officio indictment was not reviewable by the courts. In the Northern Territory, a statutory discretion to issue an ex officio indictment is conferred upon the Director of Public Prosecutions by s. 300 of the *Criminal Code*, whether the accused has been committed for trial or not. The discretion granted by the statute is unfettered, and because the language of the statute leaves the Director of Public Prosecutors at large in deciding what course he must take, his decision is immune from judicial review: cf. *Barton*, at 94, 103,

107, 109. Consequently prohibition does not lie, and the relief sought in paragraph two of the summons must be dismissed.

Nevertheless, it is well established that this Court has a power to stay an indictment, including an ex officio indictment, until committal proceedings are properly completed: see for example *R v Munigaribi* (1988) 55 NTR 12; *Barton v The Queen* (1980) 147 CLR 75. As Gibbs A.C.J. and Mason J observed in Barton, at p. 100:

> "It is now accepted in England and Australia that committal proceedings are an important element in our system of criminal justice. They constitute such an important element in the protection of the accused that a trial held without antecedent committal proceedings, unless justified on strong and powerful grounds, must necessarily be considered unfair."

No "strong and powerful ground" appears to exist for the presentation of the ex officio indictment, other than the delay caused by the inability of the second defendant to have the committal proceedings completed. That delay is not the fault of the second defendant, but has been caused by the circumstance that those acting for the plaintiff have drawn to the attention of the learned Magistrate the difficulties under which they and the plaintiff are labouring, and the need, in the interest of justice, to find a solution to the problems thus posed. As matters presently stand, the delay is now not so long, that it is appropriate for the abandonment of the committal proceedings and the presentation of the plaintiff to this Court upon an ex officio indictment. Indeed, as I understand Mr Birch, the second defendant proposes to pursue the

committal proceedings in the ordinary way, and will not call upon the plaintiff to plead to the indictment until the committal proceedings have concluded. In these circumstances it is difficult to see what purpose the ex officio indictment is intended to serve. I do not consider that it is an answer that the prosecution does not intend to call upon the accused to plead to the indictment until the committal proceedings are over. It is sufficient to observe that if this is the case it serves no purpose. This Court in the exercise of its criminal jurisdiction is not required to supervise the committal proceedings. The indictment is potentially embarrassing. The indictment will be stayed until the committal proceedings are concluded.

Accordingly, the relief sought in the originating motion is refused, the temporary order which I made on 7 February 1997 prohibiting the future hearing of the committal proceedings is revoked, and the motion is dismissed. In the proceedings brought in this Court in its criminal jurisdiction in matter number 26 of 1996 (9503690), there will be an order that the indictment be stayed until the conclusion of the committal proceedings.

I will hear the parties on the question of costs within 28 days. If no application is made within that time, there will be an order that each party pay their own costs.