Santamaria v Judge Fong Lim & Andreas Andreou [2017] NTSC 27

PARTIES:	BALDOMERO SANTAMARIA v JUDGE FONG LIM AND ANDREAS ANDREOU
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	115/16 (21617193)
DELIVERED:	6 April 2017
HEARING DATES:	16 January 2017
JUDGMENT OF:	BLOKLAND J

CATCHWORDS:

ADMINISTRATIVE LAW – Judicial review – Prerogative writs and orders – Local Court (Criminal Procedure) Act – Local Court to have regard to certain matters when considering whether to permit cross-examination of witnesses at committal – Local Court Judge failed to consider an essential pre-condition to the exercise of jurisdiction – Jurisdictional error established – No substantial miscarriage of justice – Applications dismissed

PROCEDURE – Local Court (Criminal Procedure) Act – Committal procedures – Application for leave to cross-examine witnesses – Prosecutor did not consent to leave being granted – Factors the Local Court is to have regard to under s 105H(4) are mandatory – Local Court Judge failed to consider an essential pre-condition to the exercise of jurisdiction – Jurisdictional error established – No substantial miscarriage of justice - Applications dismissed

PROCEDURE – Application to extend time – Special circumstances made out – Extension of time granted

Criminal Code (NT)

Local Court (Criminal Procedure) Act (NT)

Supreme Court Rules (NT)

Craig v South Australia (1995) 184 CLR 163, applied

Barton v The Queen (1980) 147 CLR 75; *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141; *Day v Yuendumu Social Club Inc* [2010] NTSC 7; *DPP (NSW) v Losurdo* (1998) 44 NSWLR 618; *Goldsmith v Newman* (1992) 59 SASR 404; *Hanna v Kearney* (Unreported, NSWSC, Studdert J, 28 May 1998); *Hiroti v The Queen* (1997) 95 A Crim R 72; *House v The King* (1936) 55 CLR 499; *Keighran v Lowndes* (1996) 5 NTLR 140; *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332; *Qaumi v DPP (NSW)* (2008) 186 A Crim R 72; *R v Ngalkin* (1984) 12

A Crim R 29; *R v Siugzdinis* (1984) 81 FLR 360; *Sankey v Whitlam* (1978) 142 CLR 1; *Sim v Corbett* [2006] NSWSC 665, referred to

Justice Legislation Amendment (Committals Reform) Bill 2010 (NT), Second Reading Speech <https://legislation.nt.gov.au/>

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REPRESENTATION:

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Second Defendant:	T.Moses

Solicitors:

Plaintiff:	Northern Territory Legal Aid Commission
Second Defendant:	Crown Counsel

Judgment category classification:	B
Judgment ID Number:	BLO 1703
Number of pages:	28

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Santamaria v Judge Fong Lim & Andreas Andreou [2017] NTSC 27
No. 21617193

BETWEEN:

BALDOMERO SANTAMARIA
Plaintiff

AND:

JUDGE FONG LIM
First Defendant

AND

ANDREAS ANDREOU
Second Defendant

CORAM: BLOKLAND J

REASONS FOR JUDGMENT

(Delivered 6 April 2017)

Introduction

[1] The plaintiff is a defendant in criminal proceedings. He is charged on indictment with two counts against s 243(1) of the *Criminal Code* (NT), namely, using fire to intentionally or recklessly cause damage to a conveyance and to a building.

[2] In these proceedings the plaintiff seeks prerogative relief. First, an order in the nature of certiorari to quash the decision of the first defendant refusing

the plaintiff leave to cross examine three witnesses at a preliminary examination as well as the order to commit for trial; and second, an order in the nature of mandamus to compel the first defendant to permit cross examination of those witnesses. Associated declaratory relief is also sought, as is a stay of the criminal proceedings pursuant to s 339 of the *Criminal Cod*e (NT). The stay is sought until the issues raised in these proceedings are determined.

[3] The first defendant, a Judge of the Local Court, has not participated in these proceedings. As is customary, the Court was advised the learned Judge will abide by the decision of the Court, save as to costs.

[4] A complication is evident with respect to the date of the commencement of these proceedings. An application to extend time was made pursuant to order 56.02. The issue with respect to extension of time will be dealt with later in these reasons. It is convenient to deal first with the substantive questions which have some bearing on the question of whether an extension of time should be granted.

[5] As will be seen, in my view, an error of a kind that is susceptible to judicial review has been identified, however this is not a case where any substantial miscarriage of justice has resulted. What prejudice if any has been suffered by the plaintiff as a result of the error may be cured in this Court in the plea proceedings.

[6] The error was relevant to the exercise of jurisdiction granted by Part V of the *Local Court (Criminal Procedure) Act* (NT) to the Local Court that requires the Local Court to have regard to certain matters when considering whether to permit cross-examination of particular nominated witnesses. There was no consideration by the Local Court of an essential pre-condition to the exercise of that jurisdiction. However, this is not a case in which the discretion should be exercised in favour of granting the relief sought.

Relevant Legislation

[7] Preliminary examinations are conducted pursuant to Part V of the *Local Court (Criminal Procedure) Act* (NT) (the Act). Part V of the Act amended a number of previous procedures relevant to the conduct of committals. When the *Justice Legislation Amendment (Committals Reform) Bill 2010* (NT) was introduced, the Minister for Justice and Attorney General said:[1]

> The main objectives of this bill are to release stress on witnesses associated with having to give evidence at committal and trial, and to ensure committals are run more efficiently. To achieve this the bill provides for: committals to proceed as paper or hand up committals with a full oral committal only to be conducted where justified…

[8] The relatively new statutory framework, *inter alia*, regulates, to a high degree, the occasions when cross-examination of a witness will be permitted. It does not abolish cross-examination, save that it maintains the

[1] *Justice Legislation Amendment (Committals Reform) Bill 2010* (NT), Second Reading Speech <https://legislation.nt.gov.au/>.

position that 'protected witnesses'[2] cannot be examined or cross-examined. Rather, the statute contemplates cross-examination with restrictions will take place if the Court grants leave after certain criteria are met and after the Court weighs any relevant competing factors.

[9] In *Sim v Corbett*,[3] Whealey J made a number of observations about the purpose of similar legislation in New South Wales. His Honour referred particularly to the need to avoid delays in the criminal process by unnecessary or prolix cross-examination at committal. He confirmed that in the New South Wales regime, the onus was on the defence to satisfy the Local Court that an order should be made directing the attendance of witnesses. His Honour also noted the refusal of an application for attendance and cross examination may have a significant impact upon the ability of the defendant to defend himself.

[10] Under Part V of the Act, save for some exceptions not relevant here, a preliminary hearing must be conducted by the Local Court for all matters charged on information;[4] the prosecution is to serve a brief of evidence within particular designated timeframes;[5] and the brief of evidence must contain a copy of the charge, relevant administrative notices, a list of persons whose statements are intended to be tendered, a list of documents or things to be tendered, statements or transcripts of proposed evidence and

[2] *Local Court (Criminal Procedure) Act* (NT) s 105L.
[3] [2006] NSWSC 665 at [20].
[4] *Local Court (Criminal Procedure) Act* (NT) s 105A.
[5] *Local Court (Criminal Procedure) Act* (NT) s 105C.

copies of relevant documents.[6] There is an obligation on the prosecution to continue to update the brief.[7]

[11] Of particular relevance here are the provisions concerning the examination and cross-examination of witnesses. Section 105G provides a defendant may apply to the Court for leave to cross-examine a witness listed in the brief. Under s 105J(1), a witness's statement must be admitted as the witness's evidence in chief. Section 105J provides leave may be granted to the prosecution to supplement a witness's tendered statement with oral evidence, if the Court is satisfied it is in the interests of justice to do so. The Court may also grant leave to the prosecution to adduce oral evidence from a witness who is not listed in the brief to give oral evidence, if satisfied it is in the interests of justice to do so. If leave is granted to the prosecution to adduce oral evidence on either of those two grounds, a defendant may apply for leave to cross-examine the witness without complying with s 105G.

[12] Section 105H(1) provides a defendant cannot cross-examine a witness at a preliminary examination unless they have applied for leave under s 105G or s 105J(9)(b) and the Court grants leave. If the prosecutor consents to leave being granted, the Court must grant leave unless satisfied it would not be in the interest of justice to do so. If the prosecutor does not consent to leave being granted, s 105H(3) provides the Court must not grant leave unless

[6] *Local Court (Criminal Procedure) Act* s 105D and s 105F.
[7] *Local Court (Criminal Procedure) Act* s 105E.

satisfied the defendant has identified an issue which relates to the proposed cross-examination, has provided a reason why the evidence of that witness is relevant to that issue, and that the cross-examination is justified having regard to the matters listed in s 105H(4) and (5).

[13] Section 105H(5) deals with considerations in respect of child witnesses and is not relevant for these purposes. Neither does this case concern a 'protected witness' who as a matter of law cannot be required to attend the hearing or to give evidence.[8]

[14] Section 105H(4) provides as follows:

> In determining whether cross-examination is justified, the Court must have regard to the need to ensure that:
>
> (a) the prosecution case is adequately disclosed; and
>
> (b) the issues are adequately defined; and
>
> (c) the evidence is sufficient to put the defendant on trial for any indictable offence; and
>
> (d) a fair trial will take place if the matter proceeds to trial, including that the defendant will be able adequately to prepare and present a defence; and
>
> (e) any matters relevant to a potential plea of guilty are clarified; and
>
> (f) any matters relevant to a potential discontinuance of prosecution are clarified; and
>
> (g) trivial, vexatious or oppressive cross-examination is not permitted; and

[8] *Local Court (Criminal Procedure) Act* (NT) s 105L.

(h) any mental, intellectual or physical disability to which the witness is or appears to be subject and of which the Court is aware is taken into consideration; and

(i) the interests of justice are otherwise served.

[15] Although it is clear that at the completion of a preliminary examination the Court must consider whether the evidence is sufficient to put the defendant upon trial for any indictable offence,[9] equally it would seem ancillary purposes are contemplated with respect to a preliminary examination. So much is indicated by the breadth and variety of matters the Court *must* have regard to in s 105H(4). Of particular interest here is the consideration 'any matters relevant to a potential plea of guilty are clarified.' To illustrate the breadth of potential matters that *must* be considered, it may be noted this includes issues that clarify matters relevant to 'potential discontinuance of prosecution.'

[16] Importantly s 105H(4) also includes considerations consistent with the stated objectives of the legislation that may operate to reduce negative impacts on witnesses and improve the efficiency of the committal process. Those matters include the vulnerabilities of witnesses who may be subject to cross-examination, the restriction on trivial, vexatious or oppressive cross-examination, and broadly the interests of justice. It might be expected the 'interests of justice' would include consideration of efficiencies such as the cost and delay involved in arranging the attendance of witnesses, and the

[9] *Local Court (Criminal Procedure) Act* (NT) s 112(1).

overall balancing and weighting of the various relevant factors in a given case.

[17] It is clear the Act places a burden on a defendant to apply to the Court for a grant of leave to cross-examine. Further, a defendant must satisfy the Court of each of the matters in s 105H(3).[10] However, that does not, in my view, translate into a position as submitted on behalf of the Crown, that when the prosecution does not consent to the cross-examination of a witness, the presumption is that leave should be refused, subject to the exercise of the Court's discretion. This would amount to an extreme interpretation of s 105H(3), unwarranted by the Act. Cross-examination and indeed examination in chief may be regarded as highly regulated in the setting of a preliminary examination, but there is no necessity to invent a presumption against cross-examination when cross-examination is opposed by the Crown. The lack of consent on the part of the Crown is a significant factor, but in those circumstances the Court is required, indeed the Court 'must' consider other factors, including the matters set out in s 105H(4).

[18] Unlike other jurisdictions that have legislated to regulate committals, there are no new novel standards that require satisfaction to the level of 'special reasons' or 'substantial reasons' in the interests of justice. In order to determine whether leave should be granted for a defendant to be permitted to cross examine, there is a process for making an application for leave, then

[10] For the New South Wales equivalent see: *Sim v Corbett* [2006] NSWSC 665 at [20]; *Qaumi v DPP (NSW)* (2008) 186 A Crim R 72 at [52].

a balancing and weighing of various factors, informed significantly by the consent or otherwise of the Crown.

The proceedings before the Local Court

[19] The plaintiff filed a 'Notice In Relation To Witnesses'[11] (the Notice) in the Local Court on 17 August 2016, seeking to cross examine three witnesses. The issues identified as the issues the proposed cross-examination related to (in compliance with s 105H(3)(a)(i)) were the question of the use and occupancy of the house (the subject of count two) by the plaintiff and the three witnesses. The second issue was the nature and extent of a dispute which occurred between the witnesses listed in the Notice and the plaintiff on 8 – 10 April 2016, including a physical altercation on 10 April 2016, said to be a short time before the fires. In compliance with s 105H(3)(a)(ii) the Notice contained detail about the reasons why the evidence of the nominated witnesses was relevant to those issues. A central reason given was that the prosecution case alleged that the house the subject of the second count was not used or occupied by the plaintiff. That fact was disputed. It was said the conflict which occurred between the witnesses listed in the Notice and the plaintiff related to the dispute about the use and occupation of the house. Further, the plaintiff contended there was a physical altercation between the three witnesses and himself. As part of that dispute, the plaintiff claimed he was assaulted by the witnesses and that he had a prosthetic leg. The

[11] Affidavit of Ambrith Abayasekara of 8/12/2016 annexure B.

significant escalation of tensions between the parties was said to be relevant to the plaintiff's actions.

[20] The Notice also referred to the following s 105H(4) considerations: to ensure the prosecution case is adequately disclosed;[12] that the issues were adequately defined;[13] that matters relevant to a potential plea of guilty were clarified;[14] and the interests of justice were otherwise served.[15]

[21] In terms of the justification given for the need to cross-examine the three witnesses, the Notice stated it was important as a basis for mitigation on the plea of guilty to enable the plaintiff's actions to be properly understood and assessed by a sentencing court. It was said the actions of the plaintiff were not random acts, but rather were impulsive in response to a significant build-up of frustration, and after a physical attack upon him. The Notice also stated that if cross-examination was not permitted on those issues at the preliminary examination, they were likely to become the subject of a disputed facts hearing in the Supreme Court.

[22] On 21 September 2016, before the Local Court, the plaintiff's barrister made an oral application to cross-examine the three witnesses in accordance with the Notice filed on 17 August 2016. The Court was told there had been adjournments to enable police to explore whether agreement could be reached about the matters raised in the Notice without the need for witnesses

[12] *Local Court (Criminal Procedure) Act* (NT) s 105H(4)(a).
[13] *Local Court (Criminal Procedure) Act* (NT) s 104H(4)(b).
[14] *Local Court (Criminal Procedure) Act* (NT) s 104H(4)(e).
[15] *Local Court (Criminal Procedure) Act* (NT) s 104H(4)(i).

to be called, but no agreement had been reached. As there was no agreement after a number of adjournments, an application was made for the witnesses to be made available for cross-examination on the specific points referred to in the Notice.[16]

[23] Counsel for the prosecution told the Court the application was opposed on the basis that the witnesses had given detailed statements. The Court was told the events for which cross-examination was sought were not matters canvassed in the statements of the three witnesses. Further, the Court was informed police had spoken to the witnesses in relation to the history of the building in the particular community and that the results of the discussions had been communicated to counsel for the plaintiff. A portion of the statement of one of the witnesses, Agatha Morgan, was drawn to the Court's attention. It may be noted there is some reference made in that part of the statement to a dispute in relation to bedding and materials. There is reference made to the demeanour of the plaintiff. It was also pointed out that the witness Rosemary Morgan's statement referred to a dispute that involved the plaintiff concerning wet bedding. Counsel for the prosecution submitted there was 'nothing to be gained by cross-examining them further in respect of those interactions really (sic) outlined in their statements.'[17]

[24] Counsel for the plaintiff continued to submit it was an appropriate case for cross-examination of the three witnesses. It was submitted this was 'to

[16] Transcript of Proceedings, Darwin Local Court, 21 September 2016.
[17] Transcript of Proceedings, Darwin Local Court, 21 September 2016 at 3.

attempt to get a set of agreed facts that can form the basis for a plea in the Supreme Court. If the defence is not able or not permitted to cross-examine on these issues which are, at the moment, point of strong dispute between both parties, the only other way to resolve those disputes is by a contested facts hearing on the plea in the Supreme Court.'[18] Counsel suggested it would be preferable to attempt to resolve those matters at the preliminary hearing stage, as the Crown case was that there was no explanation for why the plaintiff had committed the offences and, in the context of a long running dispute, it was submitted that some explanation was relevant to inform the factual basis of sentencing.

[25] The learned Judge asked counsel for the plaintiff why the cross-examination was relevant to the establishment of the charge and stated the purpose of the proceedings was to establish whether or not there was sufficient evidence to put the plaintiff on his trial in relation to that charge.[19] It was acknowledged that cross-examination can be granted in respect of establishing defences, however the purpose of the proceedings, the learned Judge emphasized, was to decide whether or not there was enough evidence to place the plaintiff on his trial for the charge.

[26] After the application was made in the terms already summarised, her Honour stated:

[18] Transcript of Proceedings, Darwin Local Court, 21 September 2016 at 3.
[19] Transcript of Proceedings, Darwin Local Court, 21 September 2016 at 3-4.

> ‘So why’s that relevant to the establishment of the charge? It isn’t.’[20]

[27] After the further submissions as outlined, her Honour stated:

> ‘The purpose of these proceedings is to establish whether or not there’s sufficient evidence to put him on trial in relation to this charge.’[21]

And further:

> ‘The basis upon which the cross-examination can be granted, yes, I accept that may be in establishing defences however the purpose of these proceedings is to decide whether or not there’s enough evidence to place the matter on his trial on this charge. And if there’s, for example, evidence and there may be some defensive conduct and that may be something that you could cross-examine on.
>
> But I’m not going to allow you to cross-examine these people on the basis that there was a previous dispute. Is it motivation? It’s clear from the evidence, well, it’s clear what the prosecution case is from the evidence of these witnesses.’[22]

Counsel for the plaintiff responded:

> ‘Well, their case – sure. If you accept what is in their statements. Their allegation is that he has done these acts and there’s nothing really proffered as to why it’s occurred. In fact they basically say, ‘we found water in the house. We accused him of putting the water there.’ And in response to that he has set a car on fire and set a house on fire. It’s completely illogical and’[23]…

[20] Transcript of Proceedings, Darwin Local Court, 21 September 2016 at 3.
[21] Transcript of Proceedings, Darwin Local Court, 21 September 2016 at 4.
[22] Transcript of Proceedings, Darwin Local Court, 21 September 2016 at 4.
[23] Transcript of Proceedings, Darwin Local Court, 21 September 2016 at 4.

Her Honour:

> 'People don't necessarily act logically, Mr Bellach.'[24]

[28] After further brief submissions on behalf of the plaintiff, leave to cross-examine was formally refused and the plaintiff was committed for trial on the papers.

[29] With respect to the discussion of the issues that have arisen in this Court, it must be remembered that decisions such as the impugned decision, on questions of leave to cross-examine, are made relatively quickly in the Local Court, a high volume, busy Court. It is unsurprising that reasons would be brief on an issue of this kind, not unlike the style of reasons given by her Honour.

Discussion of the issues

[30] A number of authorities advanced on behalf of the plaintiff in these proceedings have emphasised the importance of cross-examination in committal or preliminary examinations. Due regard is paid to those authorities, however, it is the terms of the *Local Court (Criminal Procedure) Act* (NT) that must govern the exercise of the jurisdiction granted to permit or refuse cross-examination. Attention was drawn to what King CJ said in

[24] Transcript of Proceedings, Darwin Local Court, 21 September 2016 at 4.

Goldsmith v Newman[25] in the context of the South Australian regime requiring 'special reasons' for cross-examination:

> It may be helpful to Magistrates to indicate some circumstances which may amount to special reasons.
>
> 1. It may appear that there is sound reason to suppose that some degree of cross-examination will eliminate possible areas of contention and refine the matters really in dispute.
>
> 2. Cross-examination may be desirable to establish important facts as the foundation of a defence or to eliminate any possibility of a particular defence.

[31] Attention was also drawn to *DPP (NSW) v Losurdo*[26] where the Court referred to Studdert J in *Hanna v Kearney*:[27]

> Substantial reason may be shown for cross-examination where this may lead to the narrowing of matters in dispute: see *Goldsmith v Newman*.[28] This is a consideration of particular importance where the prospect exists of a lengthy trial, as it does in the present cases.

[32] On behalf of the plaintiff, it was submitted that similar reasoning should be applied when considering cross-examination at a preliminary examination for the purpose of enabling a defendant to consider making admissions, or considering whether or not to require a witness to give evidence at trial or upon a disputed facts hearing. It was submitted that these factors provide a legitimate justification for a grant of leave, either under ss 105H(4)(b) or (e). While s 105H(4)(e) on its terms should not be enlivened in respect of

[25] (1992) 59 SASR 404 at 411, King CJ.
[26] (1998) 44 NSWLR 618 at 626-627.
[27] (Unreported, NSWSC, Studdert J, 28 May 1998).
[28] (1992) 59 SASR 404 at 411.

all forms of potential mitigation, if the subject of the cross-examination is genuinely relevant to clarifying a matter with respect to a potential plea of guilty, it cannot be excluded from consideration. That is not to say the discretion will be exercised in favour of a defendant, but it is a matter that is required to be considered. That may well envisage facts and matters immediately associated with the charge. It is not accepted here, as argued on behalf of the Crown, that s 105H(4)(e) is relevant only to cases where there is yet to be a decision on whether there will be a plea, to what charge and similar factors. Section 105H(4)(e) is about clarifying a 'potential' plea. It would appear to differ from the procedure in s 134 of the Act that in certain circumstances allows a defendant to plead guilty and to be committed for sentence only. Section 105H(4)(e) refers to a 'potential' plea and 'matters' relevant to it being 'clarified.'

[33] On behalf of the Crown in these proceedings it was submitted the application for judicial review amounts to no more than a contention that, in all of the circumstances, the Local Court Judge ought to have been satisfied that cross-examination was justified on the basis of the matters in s 105H(4). In those circumstances, it was submitted the assertion of error was simply a matter of an alleged miscarriage of a discretion of the kind identified in *House v King*.[29] The proposition put on behalf of the Crown, and accepted here, is that an error in the exercise of a discretionary judgement will only ever amount to jurisdictional error where it is so unreasonable as to bespeak

[29] (1936) 55 CLR 499 at 504-505.

arbitrariness or capriciousness in its exercise, such that it cannot properly be said that the discretion was ever truly exercised.[30]

[34] The argument put on behalf of the plaintiff does not however require an examination of the exercise of the discretion to allow or refuse cross-examination. The principal error alleged is that the learned Judge failed to consider a requirement mandated by the statute, namely, under s 105H(4)(e) to ensure that 'any matters relevant to a potential plea of guilty are clarified'. That was an essential pre-condition to the exercise of the jurisdiction conferred. From the material and transcript of the proceedings below that have been summarised already, it is accepted an error of that kind has been identified. The only matters held to be relevant in terms of the exercise of jurisdiction in the Local Court were whether the evidence was sufficient to place the defendant on trial and whether the prosecution case had been disclosed. The grant of jurisdiction under Part V encompasses and requires the Court to regard, if relevant, the matters listed in s 105H(4), including s 105H(4)(e). That said, it is by no means clear that cross-examination would have been permitted once all of the relevant matters were considered, but given s 105H(4)(e) was excluded from consideration, error in the exercise of the jurisdiction has been demonstrated. What consequences should properly flow from that is an entirely different matter.

Available Relief

[30] The example given by Counsel for the Crown was from *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332.

[35] In terms of the relief that may potentially be available, it has long been recognised that this Court has the power to exercise supervisory jurisdiction including granting prerogative relief.[31] However, it is also recognised that it is only in rare and exceptional cases that the Supreme Court should intervene in relation to committal proceedings.[32] Absent exceptional circumstances, criminal procedures should be permitted to run their course without unnecessary fragmentation brought about by review proceedings.[33]

[36] Counsel for the plaintiff referred the Court to *Hiroti v The Queen*[34] where Kearney J set out a number of principles about the importance of committals. Significant caution must be exercised when referring to cases decided at a time before the enactment of the current legislative regime governing committals and preliminary examinations. A matter that distinguishes *Hiroti* from this case is that *Hiroti* concerned the complete lack of a committal, albeit after the defendant had initially indicated an intention to plead guilty. Later, the defendant decided to contest the charges. In the circumstances of a total absence of a committal, Kearney J said the Court could utilise its power to quash an existing order for committal. His Honour also noted that a declaration was the more usual remedy. He did not believe that any deficiency in the process in *Hiroti* could be sufficiently remedied by a *Basha* inquiry. Although *Hiroti*

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[31] *Keighran v Lowndes* (1996) 5 NTLR 140 at 144.
[32] *Keighran v Lowndes* (1996) 5 NTLR 140 at 144 per Thomas J at 144; citing *Kunakool v Boys*; *Kunakool v Simpson* (1987) 77 ALR 435; *Seymour v Attorney General (Cth)* (1984) 53 ALR 513; *Lamb v Moss* (1983) 49 ALR 533.
[33] *Sankey v Whitlam* (1978) 142 CLR 1 at 26 per Gibbs ACJ.
[34] (1997) 95 A Crim R 72.

confirmed the availability of the relief sought here, there had in fact been no committal at all. The matter in *Hiroti* was also destined for trial rather than a plea.

[37] A similar approach was taken in *R v Ngalkin*,[35] however *Ngalkin* was also to be a trial. Committal proceedings were deficient as only one witness was called at committal and a further four eye witnesses were to be called at trial. In reliance on *Barton v The Queen*,[36] O'Leary J stayed the proceedings pending a committal re-commencing. The level of prejudice was of a far more significant nature in *Ngalkin* than here. Similar reasoning applied to the decision to quash the indictment in *R v Siugzdinis*,[37] however the potential prejudice there was of a grave nature.

[38] As has been indicated, in support of the case establishing jurisdictional error, the plaintiff argued the purported exercise of jurisdiction was in error, as an essential condition to its existence had not been satisfied. As to whether such an error does amount to an error going to jurisdiction it is convenient to consider *Craig v South Australia*.[38] The High Court there rejected the argument that an order to stay a criminal trial involved jurisdictional error because a District Court Judge had not properly understood the legal test to be applied to stay applications. It was held that any error established was within jurisdiction. The High Court made plain that with respect to jurisdictional error the concept should be defined more

[35] (1984) 12 A Crim R 29.
[36] (1980) 147 CLR 75.
[37] (1984) 81 FLR 360.
[38] (1995) 184 CLR 163.

narrowly in the case of courts than in the case of administrative tribunals and other decision makers. The ordinary jurisdiction of a court encompasses the authority to decide questions of law and therefore to answer questions of law wrongly. Administrative tribunals lack that authority.

[39] As is illustrated in the earlier authorities already mentioned, committal or preliminary proceedings are generally understood to be administrative in nature, although clearly in the Northern Territory preliminary examinations are conducted by Judges, acting judicially and in a judicial capacity. In *Craig* it was recognised there existed 'anomalous courts or tribunals' which do not fit the broad descriptions relevant to the general discussion on jurisdictional error.[39] Clearly prerogative relief is available in respect of preliminary examinations, however in my view preliminary examinations conducted in the Northern Territory should be more aligned to the position of courts than of administrative bodies.

[40] In *Craig*, jurisdictional error was discussed with respect to courts as follows:[40]

> 'An inferior court falls into jurisdictional error if it mistakenly asserts or denies the existence of jurisdiction or if it misapprehends or disregards the nature or limits of its functions or powers in a case where it correctly recognises that jurisdiction does exist. Such jurisdictional error can infect either a positive act or a refusal or failure to act. Since *certiorari* goes only to quash a decision or order, an inferior court will fall into jurisdiction error for the purposes of the writ where it makes an order or decision (including an order or decision to the effect that it lacks, or refuses to exercise,

[39] *Craig v South Australia* (1995) 184 CLR 163 at 177.
[40] *Craig v South Australia* (1995) 184 CLR 163 at 177.

> jurisdiction) which is based upon a mistaken assumption or denial of jurisdiction or a misconception or disregard of the nature or limits of jurisdiction.'

[41] The Court went on to describe 'less obvious[ly]' examples of a court falling into jurisdictional error:[41]

> 'Similarly jurisdictional error will occur where an inferior court disregards or takes account of some matter in circumstances where the statute or other instrument establishing it and conferring its jurisdiction requires that that particular matter be taken into account or ignored as a pre-condition of the existence of any authority to make an order or decision in the circumstances of the particular case. Again, an inferior court will exceed its authority and fall into jurisdictional error if it misconstrues that statute or other instrument and thereby misconceives the nature of the function which it is performing or the extent of its powers in the circumstances of the particular case. In the last-mentioned category of case, the line between jurisdictional error and mere error in the exercise of jurisdiction may be particularly difficult to discern.'

[42] The difficulties with drawing the line between jurisdictional error and error within jurisdiction have been commented upon in a number of authorities,[42] however the error here in my view does fall into the 'less obvious' examples of jurisdictional error discussed in *Craig*.

[43] I mentioned briefly above that the decision of the Local Court may not have been any different had the learned Judge considered all of the matters in s 105H(4) that the Act states the Court *must* consider. It is not however the correct approach to determine whether a relevant error has occurred by reasoning on the merits or speculating as to what might have been. Judicial

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[41] *Craig v South Australia* (1995) 184 CLR 163 at 177-178.
[42] Eg. *Day v Yuendumu Social Club Inc* [2010] NTSC 7 at [31] per Martin (BR) CJ, cited with other authorities in Michael Grant, *Civil Procedure Northern Territory* (Presidion Legal Publications) 5.56.25.

review 'is not an appeal from a decision, but a review of the manner in which the decision was made.'[43] It is an error to attempt to determine the merits of the decision the subject of review.

The discretionary nature of the remedy sought

[44] Although I have found jurisdictional error established that potentially grounds judicial review, I would decline to exercise the discretion to make orders in the nature of certiorari and mandamus,[44] or to grant declaratory relief, or to further stay the proceedings. It is important that criminal proceedings not be fragmented unless there are exceptional circumstances. Although there has been an error, it may be remedied by holding a disputed facts hearing in this Court, if the facts continue to be in dispute. The error here is quite unlike the errors in cases that have led to preliminary hearings being quashed and/or remitted or proceedings stayed.

[45] I fail to see the plaintiff will be prejudiced in terms of the amount of any adjustment or discount for the plea on account of the factual basis of the plea needing to be determined. It will be a matter for the sentencing Judge to deal with the question of plea discount on the basis of submissions. The matters the plaintiff apparently wishes to put to the Court may well provide some mitigation. There may need to be a hearing of some kind on the facts. While it may have been preferable for the plaintiff to have been in a position to agree facts before his appearance in this Court, he is not prejudiced in any

[43] *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141 at 155.
[44] *Supreme Court Rules* (NT) o 56. .

significant manner. Had cross-examination taken place in the Local Court, the sentencing Judge would in any event be informed that witnesses were required. Depending on the outcome of any cross-examination, requiring witnesses at the preliminary hearing may have an impact on the plea discount, but that can occur whether cross-examination takes place at committal or in this Court. I do not see that it makes much difference in terms of any potential discount, which is a matter for the sentencing Judge, who in turn must assess a variety of factors relevant to the quality of the plea.

[46] A further statement taken since the preliminary examination from Marjorie Morgan indicates that she asked the plaintiff why her 'stuff' was wet and that she threw a stick at him either before he charged at her or at the time. The stick did not reach him. He smashed a car window and she threw a coconut at him that did not reach him. She appears to deny the plaintiff occupied the house. The altercation happened on the same day as the fires. It has been pointed out that in her statement filed before the preliminary examination she made no reference to any such altercation. It is accepted there is a genuine dispute between this witness and the plaintiff on some issues, however, these issues may be dealt with in this Court. I disagree the plaintiff will be prejudiced.

[47] To quash the order committing the plaintiff to this Court and remitting the matter to the Local Court would be a disproportionate response to the identified error. It is unknown whether the decision would be any different

if all of the relevant matters were considered on a remittal. The potential delay could be significant for little if any gain.

[48] Counsel for the plaintiff advised the Court that the costs for legal aid and fees for counsel are higher in the Supreme Court than the Local Court. I accept that generally speaking that would be the position, however that factor either alone or together with the other matters raised on the plaintiff's behalf does not persuade me that it is appropriate to quash the decision and remit this particular matter. That is not to say that costs of contested pleas are not relevant to the interests of justice. Whether the interests of justice are otherwise served is required to be considered under s 105(4)(i). Clearly cost is a factor, but it is one factor of many. However, given how rarely this issue has arisen, in this particular case I am not persuaded further delay or costs should be incurred by quashing and remitting the proceedings.

Extension of time

[49] Order 56.01(2) provides an application for judicial review shall be commenced by Originating Motion.

[50] Order 56.02 provides a proceeding of this kind shall be commenced within 60 days. The Court is not to extend time, save in special circumstances. The grounds for the grant of relief arose on 21 September 2016 when leave to cross-examine was refused at the preliminary examination. Proceedings therefore should have been commenced by 21 November 2016.

[51] There is some real confusion about precisely when this action commenced. It can reasonably be inferred that the confusion is not the fault of the plaintiff, given he was in custody and was represented by legal practitioners. I make the following findings on the basis of the affidavit of Haley Richardson, the administration manager of the criminal law section of the Northern Territory Legal Aid Commission, sworn on 13 January 2017, the documents filed in this matter and submissions.

[52] On 17 November 2016, a document bearing the title 'Originating Motion' was believed to have been filed on behalf of the plaintiff. The document Ms Richardson referred to in and annexed to her affidavit is not in fact the same as the Court sealed Originating Motion filed and stamped on 8 December 2016. The document taken to the Registry on 17 November 2016 was not filed, but it was left at the Registry.

[53] It differs from the document filed, received and stamped by the Registry on 8 December 2016. The document of 17 November 2016 has no file or proceeding number, there is no signature from the Registrar accepting the document and recording when it was filed. The document of 17 November 2016 is not signed in accordance with the rules (unlike the Originating Motion signed and filed on 8 December 2016). The addresses for service differ between the two documents. It is likely Ms Richardson has annexed a draft document to her affidavit. The preponderance of the evidence shows the Originating Motion was filed on 8 December 2016.

[54] Ms Richardson's affidavit confirms she obviously regarded the document of 17 November 2016 as filed. As the plaintiff was in receipt of a grant of legal aid, a request was made for fee waiver. On 17 November 2016 Mr Cu of the Registry advised the Legal Aid Commission of the fee being payable unless it was waived. Mr Cu advised how an application could be made. Application for fee waiver was made on 17 November 2016 and notification of the fee waiver approval was made on 21 November 2016. Mr Cu also advised the Legal Aid Commission that an affidavit and summons were required with the Originating Motion. The Legal Aid Commission requested a copy of the Local Court transcript on 28 November 2016. Counsel forwarded a final draft of the Summons, the Originating Motion and other documentation to the Legal Aid Commission on 1 December 2016. The summons, accompanying affidavit of Mr Abayasekara and the Originating Motion were filed on 8 December 2016. I find the proceedings commenced on 8 December 2016.

[55] I find special circumstances are made out and I would extend time. To find special circumstances there must be something 'unusual or different to take the matter out of the ordinary course.'[45]

[56] Those acting on behalf of the plaintiff believed they had filed originating process and were making appropriate applications to the Registry. There was some significant confusion about an issue that should be straight

[45] *Stone v Hiley* (1992) 108 FLR 332, cited in Michael Grant, *Civil Procedure Northern Territory* (Presidion Legal Publications) 5.56.109 and further cases cited.

forward. The confusion over which of the two documents was the originating process takes this matter out of the ordinary course. The Crown was aware an application of this kind was to be made. On 3 November 2016 counsel for the plaintiff informed the Master in open court at the criminal call over that it was intended to make an application pursuant to Order 56.

[57] There is no prejudice flowing to the Crown if the extension of time is granted. Although I will not exercise the discretion to grant the relief sought, the plaintiff successfully identified jurisdictional error.

[58] **Orders**

1. Pursuant to Order 56.02(3) time is extended to permit the proceeding to commence on 8 December 2016.

2. The application for a remedy in the nature of certiorari quashing the decision of 21 September 2016 refusing leave for the plaintiff to cross-examine three witnesses is dismissed.

3. The application for a remedy in the nature of certiorari quashing the order to commit the plaintiff for trial is dismissed.

4. The application for a remedy in the nature of mandamus is dismissed.

5. The application for a declaration that the decision and order of 21 September 2016 are void is dismissed.

6. The application to stay the proceedings pursuant to s 339 of the *Criminal Code* is dismissed.

[59] I will hear the parties on costs.
