The Queen v Brown [2012] NTSC 1

PARTIES:	THE QUEEN
	v
	BROWN, Vivienne
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	21034325
DELIVERED:	4 January 2012
HEARING DATES:	27 October 2011
JUDGMENT OF:	BLOKLAND J

CATCHWORDS:

CRIMINAL LAW AND PROCECURE – whether Basha inquiry necessary in the interests of securing a fair trial – whether court should order a Basha inquiry so that evidence can be taken afresh from witness prior to jury empanelment – no serious risk of an unfair trial – Application for Basha inquiry refused.

Justices Act s 110, s 111, s 116(1), s 116(2),

R v Sandford (1994) 33 NSWLR 172; applied

Hiroti v R (1997) 95 A Crim R 72; *R v Mungaribi* (1988) 92 FLR 264; considered/distinguished

R v Ngalkin (1984) 12 A Crim R 29; distinguished

Barton v R (1980) 147 CLR 75; *Director of Public Prosecutions (Cth) v Bayly (No 1)* (1994) 63 SASR 97; *P v P* [2008] Fam CAFC 25; *R v Basha* (1989) 39 A Crim R 337; *R v Ibrahim* [2007] NSWSC 1140; referred to

REPRESENTATION:

Counsel:

Prosecution:	Dr N Rogers SC
Accused:	Mr Sinoch

Solicitors:

Prosecution:	Office of the Director of Public Prosecutions
Accused:	Central Australian Aboriginal Legal Aid Service

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

The Queen v Brown [2012] NTSC 1
No. 21034325

BETWEEN:

The Queen

AND:

Vivienne Brown

CORAM: BLOKLAND J

RULING ON APPLICATION FOR A BASHA INQUIRY

(Delivered 4 January 2012)

Introduction

[1] Vivienne Brown is to stand trial for unlawfully causing serious harm to Danny Frank on 12 October 2010. This is an application to have a witness, Mr Frank, the alleged victim, called to give evidence and be cross-examined prior to the empanelment of the jury at trial. The procedure is generally referred to as a *Basha* inquiry.[1] The Crown opposes the application on the basis that Mr Frank was called at committal and cross-examined, and full disclosure of the Crown case has been made.

1 Derived from *R v Basha* (1989) 39 A Crim R 337.

[2] The reason for the application for a *Basha* inquiry is that a portion of the transcript of the committal, namely the whole of the oral evidence given by Mr Frank is not available. It never will be.

[3] On behalf of the accused it is contended Mr Frank should be called to give evidence again prior to the trial in the interests of securing a fair trial. The Crown submits it would not be unfair to the accused in these particular circumstances to proceed to trial without a *Basha* inquiry.

Relevant History

[4] Counsel for the Crown was advised formally via email communication from the Judicial Registrar of the Magistrate's Court that a portion of the audio recordings of the committal at the Tennant Creek Court of Summary Jurisdiction had failed.[2] As there was no sound recording of Mr Frank's evidence, (his evidence was given by audio-visual link), no transcript of his evidence would be available.[3] What needs to be determined is whether in these circumstances the Court should order a *Basha* inquiry so that evidence can be taken afresh from Mr Frank prior to empanelment.

[5] It is not in dispute that the accused was served with copies of all available statements prior to the commencement of the oral committal. This included Mr Frank's police statement dated 25 November 2010.

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2 Affidavit, Nanette Rogers, 9 September 2011, Annexure 'B'.

3 This application initially also sought a *Basha* inquiry in relation to the evidence of Dr Eileen Yap who gave evidence at the committal but whose testimony similarly was not recorded. During the course of submissions counsel for the accused advised the application would no longer be pursued in relation to Dr Yap's evidence.

[6] Initially the oral committal was set down at the Tennant Creek Court of Summary Jurisdiction on 4 March 2011. That date was vacated and eventually listed for oral committal on 22 June 2011 at Tennant Creek.

[7] At all court appearances and throughout the oral committal the accused was legally represented by a lawyer from the Central Australian Aboriginal Legal Aid Service (CAALAS).

[8] All witnesses who were required by the accused under (the then) s 105B(3) of the *Justices Act* were produced to give evidence; that is save for a Doctor Barui who could not be located at the time of the committal. Instead, a report was provided by Doctor Scott who gave oral evidence and was cross examined at the committal hearing.[4] The Crown were advised on 21 June 2011 that certain other witnesses were no longer required by the accused for cross examination at the oral committal.

[9] On 22 June 2011 the oral committal commenced before His Honour Mr Borchers SM. The accused was represented by Ms Gill of CAALAS. Arrangements had been made for the alleged victim Mr Frank to give oral evidence by audio-visual link from Alice Springs Correctional Centre. On 22 June 2011 Mr Frank gave his oral evidence at the committal and was cross examined by Ms Gill. The matter was adjourned part-heard to 23 June 2011 and was completed on 27 July 2011 at 2.00pm after Doctor Scott gave evidence via audio visual link about the injuries to Mr Frank's jaw.

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4 Transcript, Court of Summary Jurisdiction 27/7/2011, 3 – 9.

[10] On 27 July 2011 His Honour committed the accused for trial under s 109(1) of the *Justices Act*.

Discussion of the Issues

[11] On behalf of the accused it was argued that s 116(1) *Justices Act* has not been complied with, in that a transcript of the record of the depositions of Mr Frank has not been transmitted to this Court. It was submitted that while this omission may be grounds for the accused to apply to have the matter remitted to the Court of Summary Jurisdiction for further committal proceedings, without taking that step it was put that any unfairness could be cured by a *Basha* inquiry being ordered. No application has been made to remit the matter. Section 116(1) *Justices Act* provides as follows:

> (1) Whenever a defendant is committed for trial, the Justice shall forthwith deliver, or cause to be delivered, to the Director of Public Prosecutions a copy of the committal brief, a copy, certified by writing under the hand of the clerk for the relevant district to be a true copy, of a transcript of the record or of the record, as the case requires, of the depositions of any witnesses who gave oral evidence at the preliminary examination and all recognisances recognisance (sic) of witnesses, bail undertakings and conditions of bail entered into.

[12] The problem here is that in respect of Mr Frank's evidence there is no transcript of his previous oral evidence. Section 116(2) *Justices Act* goes on to require the Director of Public Prosecutions to deliver the transcript and other relevant documents to the court of trial.[5] It is further provided the Director of Public Prosecutions shall be subject to the same duties and

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5 S 116(2) *Justices Act*.

liabilities in respect of the documents as the justice would have been subject to had the documents not been transmitted to the Director of Public Prosecutions.[6] Section 116(3) of the *Justices Act* appears to acknowledge the role of the Director of Public Prosecutions in ensuring the provision of the documents in the more modern context, rather than the responsibility falling solely on the justice conducting the committal, or a court-to-court transmission of the documents. In any event, s 116(3) only applies to documents "whilst the documents are in the custody of the Director of Public Prosecutions". The section is silent on what is to occur in relation to a failed recording of evidence and therefore the impossibility of the provision of a transcript by the Justice to the Director and subsequently to this Court at trial. The fact is the relevant transcript is not available but all other documents contemplated by s 116 *Justices Act* have been transmitted as required.

[13] Section 116(1) is expressed in mandatory terms but in circumstances where there is no possibility of a transcript being made, full compliance is simply not possible. In any event, I will not express a final opinion on compliance or lack of it and any consequences as I am not being asked to remit the matter, nor being asked to rule on the validity of the committal.

[14] A number of authorities concerning defective committal proceedings were

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6 S 116(3) *Justices Act*.

advanced in argument. Both the cases of *Hiroti*[7] and *Mungaribi*[8] applied the principles derived from *Barton v The Queen:*[9] a trial held without antecedent committal proceedings, unless justified on strong and powerful grounds, must necessarily be considered unfair. In *Hiroti,*[10] a stay was granted at trial for defective committal proceedings. A police précis summarising the alleged facts was admitted as evidence at committal through the officer in charge of the investigation. The accused subsequently pleaded guilty before the Magistrate without a proper determination of whether there was sufficient evidence to place her on trial as required under (the former) ss 109 and 106 *Justices Act.* In *Mungaribi,* non-compliance with ss 110 and 111 *Justices Act* was the basis for ruling the committal proceedings were void. There is nothing in the nature of similar non-compliance in the conduct of the committal proceedings here. Any non-compliance, if it can be so categorized is after the conclusion of a validly conducted committal.

[15] In *Hiroti,*[11] Kearney J referred to the South Australian decision of *Director of Public Prosecutions (Cth) v Bayly*[12] that acknowledges a *Basha* inquiry could remedy certain disadvantages flowing from inadequate committal proceedings. In *Hiroti* it was held the risk of being tried unfairly would remain regardless of a *Basha* inquiry being held. The error in *Hiroti* was of a fundamental nature; there was effectively no evidence on which the

7 (1997) 95 A Crim R 72.
8 (1988) 92 FLR 264.
9 (1980) 147 CLR 75.
10 (1997) 95 A Crim R 72.
11 (1997) 95 A Crim R 72.
12 (1994) 63 SASR 97.

committing Magistrate made the decision to find sufficient evidence to place the defendant on trial.

[16] The Magistrate here has made a decision to commit for trial on the basis of the evidence that was given at the committal including Mr Frank's evidence. Section 116 *Justices Act* has been complied with as much as is possible. Ordering a *Basha* inquiry would not resurrect the testimony that was given at committal. It would effectively create another discrete portion of evidence. The result would be the same if the matter were remitted to take Mr Frank's evidence a second time before a committing Magistrate. The question is whether a fair trial can be secured without Mr Frank giving full testimony a second time before the commencement of this trial.

[17] Counsel for the accused has not put forward any particular issue that will need clarification or any particular area of evidence that needs to be examined that would be capable of forming the basis of a conclusion that without such further examination the accused would be disadvantaged at trial. The application is in general terms, solely for Mr Frank to give oral evidence again. Counsel for the accused relies on the many authorities emphasising the importance of committal proceedings and their proper conduct. Here however, there is nothing to suggest the committal was not conducted properly and that full disclosure of the Crown case was not made. Disclosure of the Crown case is primarily at the heart of the authorities that emphasise the importance of committal proceedings.

[18] Reliance was placed on *R v Ngalkin*[13] where insufficient committal proceedings enlivened the jurisdiction to stay the trial. In *Ngalkin* only one eye witness had been called at the committal proceedings; the Crown proposed to call a further four eye witnesses at trial. It was found in *Ngalkin* the accused had suffered serious detriment in that he had been deprived of the full knowledge of what the Crown witnesses would say on oath; he had been deprived of the opportunity of cross examining them and he had lost the distinct possibility that the Magistrate would have held that no prima facie case had been made out. This is not a comparable situation with what is confronted here. The witnesses, including Mr Frank were cross examined by counsel at committal and his statement to police had been provided to the accused.

[19] The majority judgement in *Barton v The Queen*[14] was relied on. The majority there emphasised that without a committal an accused is denied the knowledge of what Crown witnesses may say on oath; the opportunity of cross-examining them; the opportunity of calling evidence in rebuttal; and the possibility that a Magistrate will not commit for trial.[15]

[20] None of that is the case here. The accused here and her representatives must know the nature of the case against her. This case does not approach the level of unfairness as was palpable in an *ex officio indictment* case such as *Barton v The Queen*; important and authoritative as the observations of the

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13 (1984) 12 A Crim R 29.
14 (1980) 147 CLR 75.
15 *Barton* at 99; see also 100-101.

High Court are generally in relation to committals,[16] the deprivations suffered by the appellants in *Barton* v *The Queen* are not present here.

[21] It was pointed out that in *DPP v Bayly,*[17] Olsson J preferred to rectify the impacts of an error in the committal process by way of a *Basha* inquiry rather than by a stay of the trial and remittal to the Magistrate. In *Bayly* however, the defect was found to be the decision of the Magistrate to deny an adjournment applied for by the accused. In those circumstances it was found a *Basha* inquiry was required to overcome the prejudice that may arise from the fact that a committal hearing had not been held. That is not the case here. The ruling in *Bayly* was qualified to the extent that His Honour still found it would be inappropriate to permit a "wide ranging voir dire type inquiry".[18] No particular area of the proposed evidence of Mr Frank or any particular issue has been isolated here to justify a *Basha* inquiry. It is simply asserted that Mr Frank give oral testimony afresh.

[22] It was argued that the disadvantage the accused may suffer was that without a transcript of his committal evidence, there could be no conclusive or proper exploration or resolution of any inconsistencies in the previous evidence. I was referred to *P v P*[19] where the Full Court of the Family Court held an appeal should not proceed because a transcript was not available in circumstances where the findings of fact of the trial judge were under challenge. Such an appeal necessitated the availability of a reliable record

16 Although *Barton v The Queen* was determined well before statutory modification of committals.
17 (1994) 63 SASR 97.
18 *Bayly* at 120.
19 [2008] Fam CAFC 25.

of what was said at trial. It was held contemporaneous notes made by the appellant's solicitor did not obviate the need for transcript.[20]

[23] A committal hearing is of quite a different nature. There were no findings of fact made other than the mixed fact/law conclusion inherent in the decision that there was sufficient evidence for the accused to stand trial. A general hearing afresh of the evidence of Mr Frank would not alleviate the problem of unrecorded evidence. There will always be an earlier unrecorded version that may or may not have inconsistencies with later evidence, whether Mr Frank gives evidence a second and then subsequently a third time at trial before the jury. What is important is that the accused and those who advise her know the case against her. There is no evidence before this Court that Ms Gill, or counsel briefed for the trial are unaware of what Mr Frank's testimony will be.

[24] It would be an inappropriate use of the *Basha* procedure to simply allow a broad ranging cross examination to generate a body of evidence in the hope that inconsistencies emerge at the trial proper. Evidence given before this Court in a *Basha* inquiry cannot be in substitution for the committal evidence that has already been given. It seems there would be nothing in principle in any event to prevent cross-examination about earlier evidence, whether there is a *Basha* inquiry or not. The possibility of an unresolved inconsistency remains. If there is doubt about what was said on an earlier occasion by Mr Frank, the jury may well be invited if deemed appropriate,

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20 *P v P* at [84].

to resolve any such doubt in favour of the accused. Appropriate directions if required will however be a matter for the trial judge.

[25] Important restrictions on holding a *Basha* inquiry were outlined in *R v Sandford*;[21] an accused must demonstrate in advance the particular issue he or she intends to pursue; that the trial judge must be satisfied that there is at least a serious risk of an unfair trial if the accused is not given the opportunity to do what otherwise would have been done at committal proceedings; the procedure is not to be used inappropriately in order to try out risky questions which may otherwise prove to be embarrassing in the presence of the jury; that such an examination is not permitted to interrupt the trial significantly.

[26] I am unable to find there is a serious risk of an unfair trial. A significant degree of speculation would be required to make such a finding. Utilizing the *Basha* procedure in circumstances where effectively the whole evidence of an alleged victim is to be given again, amounting to three times by the time their evidence is given at the trial proper is a consequence beyond what is anticipated by the *Basha* procedure.

[27] It was not the case at the time of argument before me that there was any suggestion of any change in the position of Mr Frank's testimony. If that type of issue were to arise in conferencing prior to trial, that would obviously need to be drawn to the trial judge's attention and may well be

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21 (1994) 33 NSWLR 172 at 181.

grounds to consider ordering pre-trial evidence on the basis of a change in position or divergent evidence.[22] Nothing of that sort however has been drawn to my attention.

[28] The application for a *Basha* inquiry in respect of the witness Mr Frank is refused. These reasons will be forwarded by email to counsel as indicated at the hearing. I note the matter is next listed in the arraignment list on 6 February 2012 at Alice Springs.

[22] As occurred in *R v Ibrahim* [2007] NSWSC 1140, (5 October 2007).