The Queen v Faagutu [2000] NTSC 20

PARTIES:	THE QUEEN
	v
	LOTOMAU FAAGUTU
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	9918517
DELIVERED:	10 April 2000
HEARING DATES:	20 March 2000
JUDGMENT OF:	THOMAS J

CATCHWORDS:

CRIMINAL LAW - INDICTMENT - APPLICATION TO QUASH OR STAY - COURT'S INHERENT POWER TO STAY INDICTMENT - PREVENT UNFAIRNESS OR INJUSTICE

Remit back to Court of Summary Jurisdiction for further committal - Handup committal - Witnesses are children - Evidence goes to intent - Unfairness to accused in conduct of trial - Crown not acted improperly of unfairly - Must be calculated to prejudice or embarrass accused in defence - general powers under s339(2) Criminal Code - within inherent powers of the Court to prevent unfairness or injustice - Court has inherent power to ensure accused has a fair trial - That fairness is done by the parties - Opportunity to test under cross-examination evidence of children

Criminal Code (NT), s 339

Frankie Ngalkin 12 A Crim R 29, applied
Haslett v Haslett 31 A Crim R 85, distinguished
The Queen v Lovegrove (SC (NT) - 2 November 1999 - Martin CJ), applied

REPRESENTATION:

Counsel:

Applicant:	S Cox
Respondent:	J Adams

Solicitors:

Applicant:	Northern Territory Legal Aid Commission
Respondent:	Office of the Department of Public Prosecutions

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IN SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The Queen v Faagutu [2000] NTSC 20
No. 9918517

BETWEEN:

THE QUEEN

AND:

LOTOMAU FAAGUTU

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 10 April 2000)

[1] This is an application on behalf of the defence to quash or stay an indictment pursuant to s 339 of the *Criminal Code* and have the matter remitted back to the Court of Summary Jurisdiction for further committal hearing.

[2] Counsel on behalf of the Crown opposed the granting of the application.

[3] On 1 November 1999, the matter proceeded in the Summary Jurisdiction by way of hand up committal before Mr Cavenagh SM. The accused was legally represented at the committal hearing and the hand up committal proceeded by consent.

[4] At the conclusion of the hand up committal hearing the learned stipendiary magistrate committed the accused to the Supreme Court for trial on the following charges:

> "That on 24 July 1999 at Darwin in the Northern Territory of Australia
>
> 1. attempted unlawfully to kill Alfonso Savage.
>
> Contrary to section 165 of the *Criminal Code*.
>
> AND FURTHER
>
> at Darwin in the Northern Territory of Australia
>
> 2. unlawfully caused grievous harm to Alfonso Savage.
>
> Contrary to section 181 of the *Criminal Code*."

[5] On the application before the Supreme Court the accused was represented by Ms Cox of the North Australian Legal Aid Commission. Ms Cox was not the solicitor appearing for the accused at the time of the committal hearing.

[6] At the hand up committal there were a number of witness statements including statements from children who were eye witnesses or present at the time of the alleged offence.

[7] The Crown propose to proceed before the Supreme Court on the second of the two charges being a charge that:

> "On or about 24th July 1999 at Darwin in the Northern Territory of Australia, unlawfully caused grievous harm to Alfonso Savage.
>
> Section 181 of the *Criminal Code*."

[8] This is an offence which carries a maximum 14 years imprisonment.

[9] The allegations concern the accused's manner of driving of a minibus. The submission from Ms Cox is that this offence has an element of intent and the statements made by the eye witnesses, which includes the children, go to that issue. Ms Cox submits their evidence is complex and has not been tested in cross examination.

[10] Ms Cox submitted that to allow the matter to proceed to trial without the accused having the opportunity to test the evidence to be given by a number of witnesses, in particular the evidence of the children to be called by the Crown at trial, could result in an unfairness to the accused in the conduct of his trial.

[11] The power to quash or stay an indictment is set out in s 339 of the *Criminal Code* which provides as follows:

> "339. Motion to quash indictment
>
> (1) The accused person may before pleading apply to the court –
>
> (a) to quash the indictment on the ground that it is calculated to prejudice or embarrass him in his defence to the charge or that it is formally defective; or
>
> (b) to stay the proceedings on the ground that they are vexatious or harassing.
>
> (2) Upon such motion the court may quash the indictment, order it to be amended in such manner as the court thinks just, stay the proceedings or refuse the motion."

[12] Ms Cox referred me to a number of authorities including *Frankie Ngalkin* 12 A Crim R 29. In this matter, O'Leary J ordered a stay on the indictment

because the Crown had called only one eyewitness at the committal hearing and were proposing to call a further four eyewitnesses at the trial. The accused was deprived of the knowledge of the witness evidence and cross examination of them and also the opportunity that the magistrate would rule that he had no case to answer. O'Leary J held that by reason of the failure of the prosecution to call those witnesses on the committal, the accused did suffer such substantial detriment as to warrant staying the indictment.

[13] I am aware from my reading of this case that the accused in that matter was charged with an offence under the *Criminal Law Consolidation Act* not under the *Criminal Code*. However, O'Leary J appeared to rely on the court's inherent power to stay the indictment rather than reliance on any statutory power.

[14] In the matter of *Haslett & Haslett* 31 A Crim R 85, Asche J considered the provisions of s 339 of the *Criminal Code* in an application to quash or stay an ex officio indictment. The background facts in respect of that particular matter were that there were charges before a magistrate which had been adjourned for committal hearing and an order made by the magistrate that the Crown provide further and better particulars in respect of the second accused.

[15] Eight days after the magistrate's order, ex officio indictments were issued, which were for the same charges for which the accused stood for committal on the dates set by the magistrate.

[16] Asche J analysed the provisions of s 339 of the *Criminal Code* which has not been amended since the date he had reason to give the provisions consideration. His Honour set out the provisions of s 339 in the course of his reasons for judgment at 91 – 92. His Honour then proceeded at 92:

> "In *Siugzdinis* (at 365; 142), Muirhead J pointed out that the powers given by s 339 are broader in scope than its Queensland or Western Australian counterparts: *Criminal Code* (Qld), s 596; *Criminal Code* (WA), s 614. He commented further that such powers go beyond the right to amend an indictment in a corrective manner which is given by s 312.
>
> Furthermore there is no doubt that this Court as a superior court of record has the inherent power to stay or postpone the trial where that is necessary to prevent an abuse of process and to ensure that the accused receives a fair trial: *Barton* (1980) 147 CLR 75 at 96, per Gibbs ACJ and Mason J, Aickin J agreeing; Stephen J (at 103); Murphy J (at 107) and Wilson J (at 109).
>
> In *Tringali v Stewardson Stubbs & Collett Ltd* (1966) 66 SR (NSW) 335 at 334, the Full Court of the Supreme Court (NSW) agreed with the observations of the trial judge (Else-Mitchell J) that the inherent power of the court to stay an action is not 'confined to closed categories of cases of which vexatious suits is one illustration. It is a power which is exercisable in any situation where the requirement of justice demand it.'
>
> At the commencement of a very helpful survey of the case law on this subject in 'The Inherent Jurisdiction of the Court', (1983) 57 ALJ 449, Keith Mason CC remarks:
>
> > 'The mere fact that some statute or rule of court enables the court to deal with a particular problem in particular way will not usually exclude inherent powers to deal with it in other ways. Indeed this jurisdiction may be asserted even though the conduct complained of may be in literal compliance with some statute or rule of court.'
>
> The position therefore can be summed up, as it is by Gibbs ACJ and Mason J in *Barton* (at 96):
>
> > '. . . the courts exercise no control over the Attorney-General's decision to commence criminal proceedings, but once he does

> so, the courts will control those proceedings so as to ensure that the accused receives a fair trial.'
>
> In deciding whether to exercise those powers the court must determine where on balance the interests of justice lie, having regard to the interests of the Crown acting on behalf of the community as well as to the interests of the accused: *Barton* at 101, per Gibbs ACJ and Mason J."

and at p 93:

> "To the above observations one should add that, at least so far as any application under s 339 of the Code is concerned, it must necessarily be for the accused to establish one or more of the grounds therein expressly required to be established before the indictment may be quashed or stayed. Onus probandi est ei qui affirmat non qui negat.
>
> I conclude therefore that where the Crown files an ex officio indictment without preliminary examination, and the accused applies to have that indictment quashed or stayed, it is for the accused to establish one of the statutory grounds set out in s 339; or to establish that some unfairness or disadvantage has occurred to the accused which, balancing the interests of the accused against that of the Crown representing the community, makes it unjust for the indictment to proceed to trial at that stage or in that form."

[17] Asche J was concerned about the actions of the Crown in proceeding on an ex officio indictment whilst the matter was awaiting a committal hearing in the Magistrates Court. There is no concern at all in the matter before this Court with the way in which the Crown have proceeded. There is no suggestion the Crown acted improperly or unfairly in any way toward the accused.

[18] His Honour stated that he would in the matter of *Haslett & Haslett* have quashed the indictment under s 339(1)(a) because he found the lack of

particulars in respect of the indictment were calculated to prejudice or embarrass both accused in their defence.

[19] There is reference on p 102 to general powers under s 339(3) which I take to be a misprint and that what is being referred to is s 339(2) of the *Criminal Code* as there is no s 339(3) either now or at the time of the decision in *Haslett & Haslett*.

[20] His Honour considered at 101 that he should take a broader view of the case and quash or stay the proceedings under s 339(1)(b) and (2) "or within the inherent powers of the court to prevent unfairness or injustice."

[21] His Honour decided not to proceed under s 339(1)(a) or (b) although he was at 102 "satisfied that the circumstances have created a distinctly unfair situation for the accused."

[22] His Honour did in fact make an order quashing the indictment noted this did not mean the Crown could not proceed on other indictments with appropriate particulars. His Honour further noted that in such proceedings he would expect there to be a preliminary examination; unless those representing the accused consent to procedures under s 105A of the *Justices Act*.

[23] His Honour then concluded:

> "Acting therefore under the inherent power of the court to see that no shadow of unfairness or injustice should taint these proceedings I quash the indictments."

[24] Mr Adams on behalf of the Crown opposed an order either quashing or staying the indictments. He correctly pointed out that the Crown had not acted unfairly or improperly toward the accused and that the indictment was quite properly laid. I agree with him. Mr Adams submitted that the application should be refused because all that had occurred in this case was that the accused had changed solicitors and his new solicitors had a different approach to the matter. With respect I do not consider that is relevant.

[25] It appears from my reading of the authorities that the Court has an inherent power to ensure the accused has a fair trial and that fairness is done between the parties.

[26] In exercising such inherent power the purpose is not to punish or censure either of the parties but to ensure the accused has a fair trial and that fairness is done between the parties. Mr Adams does not suggest that enabling the defence to test the evidence of the children who were eye witnesses to the alleged incident would be unfair to the Crown.

[27] In this matter no criticism could be made of the Crown or the procedure that resulted in the accused being committed to the Supreme Court. However, I can accept that the accused would be disadvantaged to the point of unfairness if he does not have the opportunity to test under cross examination the evidence of the children who have made written statements.

[28] Accordingly, I consider I should exercise an inherent power and quash or stay the indictment with a view to having the matter proceed to a preliminary examination.

[29] I will hear the parties as to the appropriate order which would enable this matter to be remitted to the Court of Summary Jurisdiction for a further preliminary examination. In this respect, I refer to the decision of Martin CJ in the matter of *The Queen v Lovegrove* No. 9814524 on 2 November 1999.

[30] The alternative submission on behalf of the accused was that if the application to quash or stay the indictment was refused, the accused would seek to have an inquiry prior to the trial under the provisions of s 26L of the *Evidence Act*. This application also was opposed by the Crown.

[31] In the circumstances I think it is appropriate that I indicate if I had refused the application to quash or stay the indictment I would allow the accused an opportunity in accordance with the provision of s 26L of the *Evidence Act* to cross examine the children who have made statements as eyewitnesses to the alleged event and whose evidence the accused has not had an opportunity to test.

[32] If the matter proceeded pursuant to s 26L of the *Evidence Act* that is an inquiry which would be held in the Supreme Court prior to the jury being empanelled.

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