Nine Network Australia Pty Ltd v McGregor & Ors [2004] NTSCFC 27

PARTIES:	NINE NETWORK AUSTRALIA PTY LTD (ACN 008 685 407) v ALASDAIR McGREGOR SM and PETER MARK THOMAS and BRADLEY JOHN MURDOCH
TITLE OF COURT:	FULL COURT OF THE SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	FULL COURT OF THE SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	No 71 of 2004 (20411799)
DELIVERED:	3 June 2004
HEARING DATES:	24 & 25 May 2004
JUDGMENT OF:	ANGEL, MILDREN & RILEY JJ

CATCHWORDS:

PROCEDURE – COURTS AND JUDGES GENERALLY - Committal proceedings - order suppressing portions of prosecution's opening address – order suppressing publication of the defendant's image – application for judicial review – whether Magistrate had power to make the orders – "evidence" in Evidence Act (NT), s 58 not limited to oral testimony or to preventing the contamination of witnesses.

PROCEDURE – INFERIOR COURTS - Magistrate conducting committal proceedings sitting as an inferior court - *certiorari* proceedings -

jurisdictional error – necessity for material to be placed before the Court upon which the decision can be based

Evidence Act (NT), s 57 and s 58; Interpretation Act (NT), s 62A; Justices Act (NT), s 107, s 112(1) and s 112(3)

Advertiser Newspapers Limited v Bunting & Ors [2000] SASC 458; BCC 200008107 (unreported); *J v L & A Services Pty Ltd (No 2)* (1995) 2 Qd R 10; *Miller v Samuels* (1979) 22 SASR 271; *R v Clement* (1821) 4 B & Ald 218, 106 ER 918; *R v Von Einem* (1991) 55 SASR 199; *Scott v Scott* [1913] AC 417; considered

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

Attorney-General v Leveller Magazine Limited [1979] AC 440; *Re Robins SM; Ex parte West Australian Newspapers Ltd* (1999) 20 WAR 511, applied

REPRESENTATION:

Counsel:

Plaintiff:	J Reeves QC with M Grant
First defendant:	No appearance
Second defendant:	R Wild QC with A Barnett
Third defendant:	C McDonald QC with A Young

Solicitors:

Plaintiff:	Minter Ellison
First Defendant:	Solicitor for the Northern Territory
Second Defendant:	Director of Public Prosecutions
Third Defendant:	NT Legal Aid Commission

Judgment category classification:	B
Judgment ID Number:	mil04336
Number of pages:	25

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

Nine Network Australia Pty Ltd v McGregor & Ors [2004] NTSC 27
No. 71 of 2004 (20411799)

BETWEEN:

NINE NETWORK AUSTRALIA PTY LTD (ACN 008 685 407)
Plaintiff

AND:

ALASDAIR McGREGOR SM
First Defendant
and
PETER MARK THOMAS
Second Defendant
and
BRADLEY JOHN MURDOCH
Third Defendant

CORAM: ANGEL, MILDREN & RILEY JJ

REASONS FOR JUDGMENT

(Delivered 3 June 2004)

[1] The second defendant, Peter Mark Thomas, has brought an information against the third defendant, Bradley John Murdoch, for the alleged murder of Peter Marco Falconio contrary to s 162 of the Criminal Code and for other offences. A committal hearing which is being conducted before the first defendant, Mr McGregor SM, commenced on Monday the 17th of May 2004 pursuant to the provisions of Part V of the Justices Act. It is alleged in

the information that the offences occurred on the 14th of July 2001 at or near Barrow Creek in the Northern Territory of Australia. It is common ground that the disappearance of Peter Falconio and the claims of his travelling companion and girlfriend, Joanne Lees, have received intense publicity both in the Northern Territory and elsewhere since mid July 2001.

[2] The committal hearing is being conducted in a specially fitted out court room in the Supreme Court building which, with the permission of the Judges, has been made available to Mr McGregor SM, there being no suitable court room for the conduct of these proceedings in the Magistrates' Court building. Every effort has been made to accommodate the intense media interest being shown in these proceedings. As there is insufficient room for all of the media to be present in the court room, arrangements have been made to enable those members of the mass media who are not able to attend inside the court room to see and hear the proceedings by means of closed circuit television viewable from other locations within the Supreme Court building.

[3] At the very commencement of the proceedings and before opening his case to the committing Magistrate, the Director of Public Prosecutions, Mr Wild QC, who represented the informant, applied to his Worship for a suppression order in respect of the whole of his opening on an interim basis as certain evidence which was intended to be led was to be objected to at the trial, notwithstanding that it may be admissible and admitted into evidence in the preliminary hearing. So as to avoid any prejudice, and assuming for the sake

of argument that the learned Magistrate was to commit the defendant in due course, Mr Wild QC applied for the suppression for the whole of the opening until it was concluded. The Court would then be invited to suppress publication of portions of it only.

[4] The plaintiff is an electronic "free to air" broadcaster of news and current affairs programs both within the Northern Territory and nationally through its Channel Nine television stations and, by syndication programming, to other television stations.

[5] At the time of the application made by the Director of Public Prosecutions to which we have already referred, the plaintiff's counsel, Mr Reeves QC, sought leave to be heard before the learned Magistrate. Mr Reeves advised his Worship that he was not instructed to oppose the application to suppress the publication on an interim basis, but he wished to be heard when the matter was argued fully. Counsel for the accused, Mr Algie, indicated that he was content with the interim suppression order at that stage. In addition, Mr Algie asked his Worship to make an order suppressing the publication of the accused's image. Mr Reeves did not seek to be heard in relation to that application at that time.

[6] Consequently, his Worship made an order prohibiting the publication of any part of the prosecution's opening address until further order and, in addition, an order was made suppressing "[p]ublication of the defendant's image,

photographic, pictorial or otherwise that would in any way tend to identify the defendant".

[7] The next matter that occurred was that an order was made that all witnesses were to leave the court and the hearing of the court, but were to remain within call until called upon. Mr Wild QC then opened the case to his Worship. The opening was reduced to writing, a copy of which was handed up to his Worship, and read by Mr Wild QC in open Court.

[8] At the conclusion of his opening, Mr Wild QC made a further application to his Worship for a suppression order in respect of those portions of his opening which had been highlighted and handed up to his Worship. In addition, his Worship was asked to suppress the name of a witness. An order was made by the learned Magistrate suppressing portions of the prosecution's opening as set out in items 1 to 8 more fully set out in the order signed by the learned Magistrate and dated the 17th of May 2004.

[9] We should mention for the sake of completeness that before that order was finalised the matter was fully argued before his Worship by Mr Wild QC, by senior counsel representing the plaintiff as well by senior counsel representing Mr Murdoch.

[10] The present proceedings are an application for judicial review in which the plaintiff seeks an order quashing the orders made by Mr McGregor SM, as well as for certain declaratory relief.

[11] The plaintiff's summons in support of the motion was heard by Bailey J on Thursday the 20th of May 2004. His Honour referred the originating motion to the Full Court pursuant to s 21 of the Supreme Court Act. After hearing preliminary submissions, we agreed to accept a reference of the whole of the proceedings thus brought.

[12] The matter proceeded before us on Monday 24th and Tuesday 25th of May at which time we reserved our decision. We had the benefit of written submissions as well as oral submissions by senior counsel for the plaintiff and for the second and third defendants. No counsel appeared for the learned Magistrate, who filed a submitting appearance, save as to costs. The submissions of counsel were extremely thorough and the arguments were presented on all sides with great clarity and industry. We express our gratitude to all counsel for their assistance.

[13] On Wednesday 26th May, we announced our decision and made the following orders:

1. Quashing the suppression order of Mr McGregor SM of the 17th of May 2004 in so far as it suppressed Item 1 referred to therein.

2. Quashing the suppression order of Mr McGregor SM of the 17th of May 2004 relating to the publication of the third defendant's image, photographic, pictorial or otherwise that would in any way tend to identify the third defendant.

3. The plaintiff's motion was otherwise dismissed.

4. The plaintiff's pay each defendant's costs of the motion.

[14] We said that we would publish our reasons at a later time. These are those reasons.

[15] The principal contention of counsel for the second and third defendants was that the power to make the orders was to be found in s 58 of the Evidence Act (NT). Alternatively, it was submitted that the learned Magistrate had an implied power by virtue of s 107 of the Justices Act (NT), or alternatively a power at common law. Counsel for the plaintiff submitted that no such power existed. It is our view that in so far as we have upheld their validity, the orders were authorised by s 58 of the Evidence Act and the orders which we have held to be invalid were not authorised either by that section or by any other provision of the law whatsoever.

[16] In order to understand the nature of the submissions and the arguments relating to the construction of s 58 it is necessary to set out s 57 and s 58 of the Evidence Act in full. Those sections appear in Part VII of the Evidence Act which is headed "Publication of Evidence".

[17] Section 57 and the heading thereto is as follows:

PART VII – PUBLICATION OF EVIDENCE

57. Prohibition of the Publication of Evidence and of Names of Parties and Witnesses

(1) Where it appears to any Court –

(a) that the publication of any evidence given or used or intended to be given or used, in any proceeding before the Court, is likely to offend against public decency; or

(b) that, for the furtherance of, or otherwise in the interests of, the administration of justice, it is desirable to prohibit the publication of the name of any party or intended party to, or witness or intended witness in, such proceeding,

the Court may, either before or during the course of the proceeding or thereafter, make an order –

(i) directing that the persons specified (by name or otherwise) by the Court, or that all persons, except the persons so specified, shall absent themselves from the place wherein the Court is being held while the evidence is being given;

(ii) forbidding the publication of the evidence, or any specified part thereof, or of any report or account of the evidence, or any specified part thereof, either absolutely or subject to such conditions, or in such terms or form, or in such manner, or to such extent, as the Court approves; or

(iii) forbidding the publication of the name of any such party or witness.

(2) Where the Court makes an order under subsection (1)(iii), the publication of any reference or allusion to any party or witness, the name of whom is by the order forbidden to be published, shall, if the reference or allusion is, in the opinion of the Court hearing the complaint for the alleged offence, intended or is sufficient to disclose the identity of the party or witness, be deemed to be a publication of the name of the party or witness.

(3) When the Court makes an order under subsection (1)(ii) or (iii), forbidding the publication of any evidence or any report or account of any evidence, or the publication of any name, the Court

shall report the fact to the Director of Public Prosecutions, and shall embody in its report a statement of –

(a) the evidence or name, as the case may be, by the order forbidden to be published; and

(b) the circumstances in which the order was made.

[18] Section 58 and the heading thereto provides:

58. Temporary Prohibition of the Publication of Evidence Where Witnesses Ordered Out of Court

Where, in the course of any proceeding before any Court, witnesses are ordered out of Court, and it appears to the Court that, for the furtherance or otherwise in the interests of the administration of justice, it is desirable to prohibit for any period the publication of any evidence given or used in the proceeding, the Court may make an order forbidding, for such period as the Court thinks fit, the publication of the evidence or any specified part thereof.

[19] Before considering the arguments in relation to s 58, it is necessary to make some mention of the history of that section and of the common law position. As counsel for the plaintiff correctly submitted, it is a fundamental principle of the common law that the administration of justice must take place in open court and nothing should be done to discourage the making of a fair and accurate report of the proceedings of a court. Prior to the decision of the House of Lords in *Scott v Scott* [1913] AC 417 there were few instances recognised by the courts when the courts would be prepared to sit *in camera*, and there were also very few instances when the courts were authorised to make non-publication orders. According to Lord Shaw of Dunfermline in *Scott v Scott* (at 482), in cases where the Court was asked to make the

proceedings secret because of something in the nature of the case itself, there were three exceptions acknowledged to the application of the rule prescribing the publicity of Courts of justice: first, in suits affecting wards; secondly, in lunacy proceedings; and thirdly in those cases where secrecy, as for instance the secrecy of a process of manufacture or discovery or invention, is of the essence of the cause. His Lordship described the first two of these exceptions as being the jurisdiction of the Judges representing His Majesty as *parens patriae* in respect of transactions truly *intra familiam*. It had long been recognised that an appeal for the protection of the Court in the case of such persons did not involve the consequence of placing in the light of publicity their truly domestic affairs. The third, that of secret processes, inventions, documents and the like, depended upon the principle that the Court would not allow judicial proceedings to be used to destroy that which the Court's very protection had been sought to prevent. Nevertheless, Lord Shaw (at 482) recognised that the Courts had the power to suppress and punish acts external to the administration of justice and truly subversive of it. As we read *Scott v Scott*, the majority of the House did not hold that there were no other categories and indeed, insofar as non-publication orders were concerned, it was recognised that non-publication orders could be made in limited circumstances – for example to protect a trade secret – even after the proceedings had been completed.

[20] In criminal proceedings it had also been recognised that non-publication orders could be made in order to maintain the purity of the administration of

justice. In *R v Clement* (1821) 4 B & Ald 218; 106 ER 918, it was held that a Court of General Gaol Delivery had the power to make an order prohibiting the publication of the proceedings pending a trial likely to continue for several successive days and to punish disobedience of such order by a fine. In that case a number of defendants were jointly charged with high treason. Applications were successfully made for separate trials of each of the accused. Lord Abbott CJ, before whom each of the trials was conducted, made an order prohibiting the publication of any of the proceedings until the whole of the proceedings had been brought to a conclusion. The order was challenged in proceedings brought by *writ of certiorari*, but the Court consisting of Abbott CJ, Bayley, Holroyd and Best JJ held that the Court had the power to make such an order. Bayley J said (at 230) (at 922 ER):

> Now the Court before whom the trial was about to take place was a Court of General Gaol Delivery, and had authority to make any order which they might judge to be necessary, in order to preserve the purity of the administration of justice in the course of the proceeding then depending before them, and to prohibit any publication which might have a tendency to prevent the fair and impartial consideration of the case. On the present occasion, it occurred to the Court that it would be of great importance, with a view both to the interest of the prisoners and that of the public, that a publication like the present should be prohibited until after the termination of all the trials; and if this had not been done, many inconveniencies might have followed…

[21] In *Scott v Scott* both Viscount Haldane LC (at 438) and Lord Atkinson (at 453-454) referred to *R v Clement* without dissent. Indeed Lord Atkinson referred to it as a "weighty authority". It is clear that that decision was not overruled.

[22] It was in this state of affairs that in 1917 the Evidence Publication Act 1917 was passed in South Australia, which contained two sections which were the progenitors of the original s 69 and s 70 of the Evidence Act 1929 (SA) and s57 and s 58 of the Evidence Act (NT), and which were first introduced in this jurisdiction in 1939.

[23] It is clear that s 57 both in its original form and now, was drafted to achieve a number of distinct purposes. First, it was drafted in order to enable a Court to prevent the publication of evidence likely to offend against public decency. It was held in *Scott v Scott* that there was no power to make such an order at common law. As Earl Loreburn said, the remedy must be found by the legislature or not at all. Secondly, s 57 by its terms enables the Court to make a suppression order either before or during the course of proceedings or thereafter. Insofaras s 57 enables the suppression of "evidence" or any report or account of "evidence" prior to hearing, it clearly is not confining "evidence" to the actual testimony of witnesses in court.

[24] Section 58 on the other hand, which is still in its original form, was predicated upon there being an order made in the course of proceedings at a time after the Court had ordered witnesses out of court. It is plain that an order could not be made forbidding the publication of evidence absolutely as was permitted under s 57, but only for "such period as the Court thinks fit". Clearly this did not empower the Court to make an absolute or permanent non-publication order.

[25] The other thing that should be mentioned is that in both the original 1917 Act and the Evidence Act of the Northern Territory the definition of "Court" included a Magistrate or Justices conducting committal proceedings, as well as any other Court, Judge or judicial officer having the power to hear, receive and examine evidence.

[26] At the time when *Scott v Scott* was decided there were virtually no statutory powers in England or elsewhere abrogating the general rule that Courts were to be conducted in public. Some exceptions are referred to by Lord Shaw in *Scott v Scott* (at 485), in cases involving offences against the Punishment of Incest Act 1908 and the Children Act 1908. There was no statutory power enabling the High Court in England at that time to sit *in camera*.

[27] Since then things are very different. There are now a number of statutory provisions in this jurisdiction enabling Courts to sit *in camera*. The Supreme Court has an express statutory power under s 17 of the Supreme Court Act which provides that the Court may order the exclusion of the public or persons specified by the Court from a sitting or part of a sitting of the Court.

[28] Courts hearing evidence from vulnerable witnesses now have power under s 21A(2)(d) of the Evidence Act to order that the Court be closed while the evidence is being given by that witness in the proceeding. A Coroner has power under s 42(2) of the Coroners Act also to sit in private in certain circumstances. Section 22(1) of the Juvenile Justice Act also provides such a

power. Nevertheless the general rule is still that all proceedings including proceedings conducted before Magistrates are to be held in open court.

[29] So far as committal proceedings are concerned, s 107 of the Justices Act provides as follows:

> The room or building in which the examination is taken shall not be deemed an open Court, and the Justice may, if it appears to him that the ends of justice will be best answered by so doing, order that no person shall have access to or be or remain in the room or building without his consent or permission: Provided nothing herein contained shall authorise the exclusion of any counsel or solicitor for either party.

[30] Section 107 owes its origins to the Imperial Statute 11 & 12 Vict, c 42, s 9, which is *in para materia*. That statute provided for committal proceedings in the United Kingdom. Prior to then, proceedings for indictable offences were commenced by a bill presented to the Grand Jury whose function was merely to say whether, from the evidence of the prosecution (at which alone they looked) there was probable ground of suspicion. The Grand Jury considered the evidence in secret: see Sir William Holdsworth, A History of English Law, Vol 1, p 322. Grand Juries never took hold as a recognised mode of bringing persons to trial in Australia (see Castles, An Australian Legal History (1982), at 204-205) and although Grand Juries were used for a short period in South Australia (see Castles, at 313-314) committal proceedings were soon adopted in that province. Section 10 of Act No 15 of 1849 (SA) provided in virtually identical terms to s 107 of the present Justices Act. One point of distinction between committal proceedings and other

proceedings is that the room where the examination is taken is not deemed to be an open court, whereas in all other cases, the statutory provisions either expressly provide or assume that the relevant Court will conduct its proceedings in open court subject to statutory exceptions however expressed.

[31] In *Raybos Australia Pty Ltd and Anor v Jones* (1985) 2 NSWLR 47 at 55 Kirby P observed that statutory derogation from openness was an exception to the rule that the administration of justice was to be open and that such statutes would usually be strictly and narrowly construed. That particular case did not in fact involve the construction of such a statute and so his Honour's observations were only obiter. However, in *The Herald and Weekly Times Ltd v The Magistrates' Court of Victoria and Ors* (1999) 2 VR 672 Beach J, who was called upon to consider the construction of s 126(1)(b) of the Magistrates' Court Act 1989 (Vic) which empowered the Court in certain circumstances to make an order prohibiting the publication of a report of the whole or a part of a proceeding, applied the dictum of Kirby P in the construction of that provision. A similar approach was taken by the Full Court of the Supreme Court of Western Australia in *Re Robins SM; Ex parte West Australian Newspapers Ltd* (1999) 20 WAR 511 at 520-521, per Ipp J (with whom Pidgeon and Steytler JJ agreed).

[32] In this jurisdiction there is a statutory requirement, to be found in s 62A of the Interpretation Act, requiring that a court when construing a provision of an Act is to prefer a construction that promotes the purpose or object

underlying the Act whether or not the purpose or object is expressly stated in the Act, to a construction that does not promote that purpose or object.

[33] Turning now to a consideration of s 58 in the light of these observations, it appears to us that the word "evidence" does not merely mean the oral testimony of witnesses given in court. There is no definition in the Evidence Act of the word "evidence". Ordinarily evidence is not limited to the *viva voce* evidence of witnesses. It would include exhibits, evidence in the form of statements, documentary evidence of other kinds, evidence given by video link and closed circuit television link and, in the case of submissions made by counsel on a plea of guilty, the factual matters that were put both by the Crown and the Defence in relation to the plea: see ***R v Bara Bara*** (1992) 87 NTR 1.

[34] The underlying purpose of s 58 is to provide a power to make a suppression order where it is necessary for the furtherance or otherwise in the interests of the administration of justice. Indeed it is that very concept which was at the heart of the common law power, limited though it may have been, for the Court to sit *in camera*. As Viscount Haldane LC said in *Scott v Scott* (at 437) the exception to the fundamental principle of open justice is subject to a yet more fundamental principle that "the chief object of Courts of justice must be to secure that justice is done". Seen in this light, if the word "evidence" in s 58 were to be so narrowly construed as not to include an account of counsel's opening address or closing submissions in respect of

the evidence, the power given by either s 57 or s 58 would be virtually worthless.

[35] It is also clear that the power under s 58 is narrower than the power under s 57 in that the order can only be made under s 58 once an order has been made ordering the witnesses out of court and during the course of the proceedings, whereas under s 57 an order might be made either before the proceedings have commenced or after the proceedings have been completed. In this sense, s 57 is both wider and narrower than s 58 because although the order may be made at a time either before or after the proceedings have been commenced or concluded, evidence may only be suppressed under s 57 if the evidence is likely to offend against public decency, whereas under s 58 there is no such limitation.

[36] That leaves the question as to whether or not, as the plaintiff contends, s 58 should be limited to cases where, as in *R v Clement*, the purpose of the order was to prevent the contamination of witnesses.

[37] We do not think that this follows. A close reading of *R v Clement* suggests that a Court of General Gaol Delivery's power was not limited in that way, but could be used whenever it was necessary to do so to ensure that the accused had a fair trial. Subsequent authority discusses how in jury trials other situations might arise: see for example, the observations of Fitzgerald P and Lee J in *J v L & A Services Pty Ltd* (No 2) (1995) 2 Qd R 10 at 45, where their Honours recognised a limited power of exclusion at common law

including limited and temporary restrictions on publicity during the course of jury proceedings in order that jurors may not become contaminated. Although the practice of permitting jurors to separate overnight is a modern practice brought about by the fact that, unlike the position in 1917, jury trials are inevitably longer than a day, it is difficult to imagine that the general principle would not have been as applicable then as it is now.

[38] A more probable reason for the requirement that witnesses be ordered out of court, is the fact that the power to make an order at all is conditioned upon the order being made in the course of the proceedings and not before the proceedings have commenced or after they have concluded, as is permissible under s 57. Generally speaking, an order made for exclusion of witnesses heralds the moment when the trial gets underway after such procedural formalities as announcing appearances, empanelling any jury and the like have been attended to. It makes sense therefore that it would be a necessary condition precedent to a much wider power under s 58 that such an order would have been made. If the purpose of s 58 is to further the interests of justice, and it has been recognised that the courts have an overriding duty to ensure that accused persons have fair trials, this is yet a further reason why the power to make an order under s 58 ought not be limited in the manner suggested, by, in effect, writing into the section words which are not there. If it was the intention of the draftsman to limit s 58 to cases where witnesses might become contaminated as opposed to jurors or potential jurors, one would have expected that instead of the words “for the furtherance or

otherwise in the interests of the administration of justice" the words "in order to prevent the contamination of witnesses" might have been used. But, as King CJ said in *G v The Queen* (1984) 35 SASR 349 at 351 in relation to the expression "the interests of the administration of justice":

> The width of this expression requires no emphasis. It comprehends every aspect of the administration of justice and is obviously intended to confer on the courts the widest of discretions. The phrase is apt to encompass, in addition to wider considerations pertaining to the administration of justice, many situations which are more suitably considered under the ground of undue prejudice or undue hardship.

[39] As to the submission that the phrase "in the course of proceedings" indicates that the order has to be directed to the hearing then being conducted and not to any subsequent trial before the Supreme Court, we see no reason why the provision should be given such a limited construction. It is rare for a magistrate conducting committal proceedings to find that there is no case to answer. Irrespective of whether or not the witnesses have been contaminated, if there is evidence sufficient to warrant placing the accused on his trial the committing magistrate has little choice but to so order. Section 112(1) of the Justices Act requires the magistrate to consider whether the evidence is sufficient to put the defendant upon his trial for any indictable offence. If it is sufficient s 112(3) requires him, amongst other things, to commit the defendant to be tried at the next sittings of the Supreme Court exercising its criminal jurisdiction. The test for whether or not the evidence is sufficient is the same as that for whether there is a prima facie case, that is, whether taking the evidence of the prosecution at its

highest, it is capable of proving the elements of the offence beyond reasonable doubt. It has been held in *Goldsmith v Newman* (1992) 59 SASR 404 at 410 per King CJ that a magistrate cannot refuse to commit because of the lack of credibility or reliability of witnesses. Therefore, given that s 58 is intended to apply to committal proceedings, it would appear most unlikely that the order has to be directed to the preliminary hearing itself and not to any subsequent trial before the Supreme Court. All that s 58 requires is that the order be finite. We do not think that an order "until further order" is necessarily outside of the section if it is contemplated that the order would be reviewed before the committal proceedings have been concluded.

[40] However, there is no justification in our view for an order under s 58 prohibiting the taking of photographs of the accused and publishing his images. Such photographs are clearly not evidence. There is no common law power to make such an order; nor is such a power to be implied. We therefore consider that the order in that respect was made without jurisdiction.

[41] The remaining orders were open to be made under s 58. But there is second question, and that is whether, notwithstanding that there was power to make such an order, the magistrate fell into jurisdictional error in deciding to make the orders which he made. We agree with the Western Australian Full Court in *Re Robins SM; Ex parte West Australian Newspapers Limited* (supra) that a magistrate conducting committal proceedings is sitting as an inferior court whilst doing so. It follows, therefore, that the test to be

applied in *certiorari* proceedings is governed by the decision of the High Court in *Craig v South Australia* (1995) 184 CLR 163 at 177:

> 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.

[42] Later their Honours went on to say (at 177-178):

> … an inferior court can, while acting wholly within the general area of its jurisdiction, fall into jurisdictional error by doing something which it lacks authority to do. If, for example, it is an essential condition of the existence of jurisdiction with respect to a particular matter that a certain event or requirement has in fact occurred or been satisfied, as distinct from the inferior court's own conclusion that it has, there will be jurisdictional error if the court or tribunal purports to act in circumstances where that event has not in fact occurred or that requirement has not in fact been satisfied even though the matter is the kind of matter which the court has jurisdiction to entertain. 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.

[43] It was submitted on behalf of the plaintiff that there was jurisdictional error because there was no evidence upon which the Court could have made its decision. We think it is well established that there must be some material

placed before the Court upon which the decision can be based. As was observed by Lord Scarman in *Attorney-General v Leveller Magazine Limited* [1979] AC 440 at 473:

> There must be material (not necessarily evidence) made known to the court upon which it could reasonably reach its conclusion…

[44] The material placed before the magistrate which the prosecutor sought to suppress primarily consisted of evidence of identity which the defence had indicated that it intended to challenge at the trial. This evidence included some evidence of a scientific nature the full basis of which the accused's legal representatives had not yet had an opportunity to examine. In respect of that evidence, it was not absolutely sure that the defence would attempt to keep the evidence out at trial. In general terms, it may be said, without going into details, that the evidence was in all probability admissible, but that the defence would be or might well be asking the trial judge to exclude that evidence in the exercise of his discretion.

[45] The application to suppress the evidence was in fact made by the Director of Public Prosecutions personally and was supported by counsel for the accused. The ground of the application was that the publication of that evidence at this time was likely to prejudice the fair trial of the accused in the future as, if that material came to be known to the prospective jury panel it would be difficult to secure a fair trial.

[46] We consider that the matters which are the subject of the order (with the exception of the first item and of item eight which suppresses the name of a witness and is not subject to challenge in these proceedings), might well be excluded by a trial judge in the exercise of his or her discretion. By this we mean that it is by no means unusual for evidence of this kind to be so excluded. We think the learned magistrate was entitled to place great weight upon the fact that the application made in this case was made by the prosecutor. Although the learned Magistrate no doubt was well aware that if the accused was committed for trial it would be quite some time before the trial would commence, his Worship was obviously also well aware of the intense media interest in the case generally and in that evidence in particular and the high degree of probability that if that evidence came to be known widely in the Northern Territory, it was likely to infect the prospective jury panel.

[47] In *Miller v Samuels* (1979) 22 SASR 271 at 272, Mitchell J said:

> The accused is charged with murder. When first seeking an order forbidding the publication of the evidence in question Mr Duggan assured the Special Magistrate and later gave an undertaking that the evidence in question would be challenged if the appellant was committed for trial and an indictment laid. What has troubled the Special Magistrate and caused him to revoke the order suppressing publication of the evidence in question is that there is nothing before him in the evidence which has been given to indicate whether there is any ground for the challenge to this evidence. He made it perfectly clear that he accepted Mr Duggan's undertaking but was of the opinion that s 69 of the Act made it obligatory upon him to satisfy himself that there was at least an arguable ground for the objection to admission of the evidence which was to be made at the trial.

[48] Her Honour went on to say, at 273:

> It seems to me, without reading the evidence, that if it is evidence which may be excluded from the trial in the event of the appellant being committed for trial it is proper in the interests of the administration of justice and in order to prevent undue prejudice to the appellant that it be not published.

[49] Counsel for the plaintiff submitted that in this particular case no such undertaking had been given. We do not think an undertaking is necessary. It is sufficient in our view if responsible counsel for the accused intends to challenge the evidence, the possibility of such challenge being successful being acknowledged by the prosecutor who supports the application for suppression of the challenged evidence.

[50] In *R v Von Einem* (1991) 55 SASR 199 at 215-216, Duggan J said:

> When there is a genuine challenge to evidence such as confessional material or evidence of a prejudicial nature it is undesirable that the content of the evidence be revealed to jurors or potential jurors prior to a decision being made to admit it into evidence. It is this reasoning, based on considerations of fairness, which constitutes the main justification for the practice of hearing argument on such matters in the absence of the jury. It is undesirable for every such argument to take place at the preliminary examination as well as at trial and this accounts for the practice, referred to by Mr Martin, of the Crown not opposing applications for suppression of evidence given at the preliminary examination when there is to be a challenge to that evidence at trial. In these circumstances the suppression order is clearly justified in order to prevent prejudice to the proper administration of justice.

[51] Similar sentiments have been expressed by Martin J, as he then was, in *Advertiser Newspapers Limited v Bunting and Ors* [2000] SASC 458; BCC 200008107 (unreported), where his Honour said at par 19:

> As mentioned, s 69A requires that the court engage in a balancing exercise between the prejudice to the proper administration of justice and the considerations favouring publication. This process necessarily involves the court in a consideration of the nature and extent of the prejudice to the proper administration of justice that might occur if an order for suppression was not made. For example, in the context of a risk to the fairness of a trial by publication of material that might be held inadmissible, the nature of that material will provide a guide to the court as to whether there is a realistic possibility of a risk being created. It will also assist the court in determining the degree of risk that might be occasioned to the fairness of the trial. In this process, it will be appropriate for the court to have regard to the measures available to a trial court to remove and ameliorate any prejudice that has been caused by publication. However, particularly at the stage of a preliminary hearing, once the court is satisfied that there is a realistic possibility of creating the relevant risk, in my opinion a court should not hesitate to use the power of suppression. In these circumstances, it will be an exceptional case in which the risk can confidently be assessed as minimal and a view reached that the prejudice to the proper administration of justice should not be accorded greater weight than the considerations favouring publication.

[52] Although s 58 does not have, as does s 69A of the South Australian provision, a statutory requirement that the courts weigh in the balance considerations favouring publication, those are obviously very relevant considerations which must be taken into account in this jurisdiction.

[53] In conclusion, we consider that there was material upon which the learned magistrate could have made the orders which he made, except for the order in relation to the first item. We are unable to see how on its face publication of that material is likely to prejudice the fair trial of the accused and we therefore think that in relation to that matter the learned magistrate's decision is vitiated by jurisdictional error. The order suppressing the name

of the potential witness was made under s 57 and was not subject to challenge and therefore we make no further comment about it.

[54] Accordingly these were the reasons for the orders which we made on 26th May as set out above.
