PARTIES: THE QUEEN
v
SEAN ANDREW TELFORD HANSEN

TITLE OF COURT: In the Supreme Court of the Northern Territory of Australia

JURISDICTION: Supreme Court of the Northern Territory of Australia exercising Territory jurisdiction

FILE №: № 49 of 1993

DELIVERED: Delivered at Darwin 23 June 1993

HEARING DATES: Heard at Darwin 4 June 1993

JUDGMENT OF: Mildren J

CATCHWORDS:

CRIMINAL LAW - General principles - Altered count at trial - Application to quash indictment - Absence of committal in respect of altered count - Whether abuse of process - Stay of proceedings - *Criminal Code (NT)*,s299

Criminal Code (NT),s299
R v Siugzdinis & Mauri (1984-5) 32 NTR 1, applied
R v Jimmy Boungaru (unreported, Martin CJ, 13/5/93), applied

CRIMINAL LAW - General principles - Other general matters - Importance of committal proceedings - Fairness to accused - Convenience of further committal proceedings

R v Siugzdinis & Mauri (1984-5) 32 NTR 1, applied

REPRESENTATION:

Counsel
Crown: I Glasgow
Accused: J Waters

Solicitors
Crown: DPP
Accused: NAALAS

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

№ 49 of 1993
(9304899)

BETWEEN:

THE QUEEN

Crown

AND:

SEAN ANDREW TELFORD HANSEN

Accused

CORAM: Mildren J

REASONS FOR DECISION
(Delivered 23 June 1993)

This is a motion by the accused to quash an indictment pursuant to s339(1) of the *Criminal Code* on the ground that it is calculated to prejudice or embarrass him in his defence to the charge.

The indictment alleges that on 8 March 1993 at Darwin, the accused assaulted Geoffrey Mark Wood with intent to steal an amount of money from the said Geoffrey Mark Wood and that the assault involved the following circumstance of aggravation:

> (a) that Sean Andrew Telford Hansen was armed with a firearm, namely, a KTG 12 gauge semi-automatic shotgun with a barrel and stock shortened,
>
> contrary to ss212(1) and (2) of the *Criminal Code*.

The maximum penalty provided for the offence, if the circumstance of aggravation is also proved, is imprisonment for fourteen years.

On 10 March 1993, the prisoner was arrested and charged with attempting to rob Geoffrey Mark Wood whilst armed with a firearm, namely a sawn-off semi-automatic 12 gauge shotgun, contrary to s211 of the *Criminal Code* read with

s277 of the *Criminal Code*. On the same day, having been refused bail by the police, the prisoner engaged a solicitor who appeared on his behalf in the court in the Darwin Court of Summary Jurisdiction. His solicitor was handed a copy of the Information setting out the charge together with two counts on Complaint, namely possession of an unregistered firearm and possession of a firearm whilst unlicensed. The maximum penalty for the charge contained in the Information is seven years' imprisonment. His solicitor indicated to the magistrate that the accused intended to plead guilty and that he did not wish to apply for bail. The matter was then adjourned for a 'hand up' committal on 8 April 1993 and the prisoner was remanded in custody.

Several days prior to 8 April 1993, his solicitor had a discussion with Mr Glasgow of the office of the Director of Public Prosecutions to ascertain his attitude to the matter proceeding as a plea in the Court of Summary Jurisdiction. Mr Glasgow indicated that he would oppose such a course on the basis that, whilst the charge was within the jurisdiction of the Court of Summary Jurisdiction, the charge was of a serious nature and should be dealt with by the Supreme Court. At that stage Mr Glasgow did not indicate that there would be any alteration to the charge.

On 8 April 1993, the matter proceeded by way of a 'hand up' committal in the Darwin Court of Summary Jurisdiction. No application was made to the learned magistrate to the effect that the applicant should be committed for trial on any charge other than that of attempted robbery.

The learned Stipendiary Magistrate found sufficient evidence to commit the applicant for trial on the charge of attempted robbery and the accused's solicitor again indicated that the accused intended to plead guilty to that charge in the Supreme Court. Mr Glasgow indicated to the court that the two offences which were the subject of the charges on the Complaint would be withdrawn following the resolution of a more serious charge in the Supreme Court.

The accused did not apply for bail and again he was remanded in custody until 4 May 1993 when he appeared before a judge of this court. The court was informed that the accused would be entering a plea of guilty to the charge and the accused was remanded in custody until Tuesday 11 May 1993 when the matter was to proceed by way of a plea.

On or about 7 May 1993, the accused's solicitor contacted the office of the Director of Public Prosecutions and spoke to Mr Davies. The purpose of the call was to advise that counsel was unavailable to appear on behalf of the accused on 11 May and to arrange for the matter to be mentioned before the court on 10 May. During this discussion, Mr Davies informed the solicitor for the accused that the indictment would contain one count alleging a charge of assault with intent to steal pursuant to s212 of the *Criminal Code*. The accused's solicitor told Mr Davies that the charge was different from that for which the applicant had been committed and Mr Davies indicated that he would discuss the matter with Mr Glasgow.

On 10 May 1993, the accused appeared in the Supreme Court and the matter was adjourned until 31 May 1993.

On 31 May 1993, the accused again appeared in the Supreme Court and the matter was listed for a plea on 4 June 1993. However, the solicitor for the accused indicated to counsel for the Director of Public Prosecutions that such plea would depend upon whether the accused was charged with attempted robbery or not.

Later that day, the accused's solicitor was informed by Mr Glasgow that the indictment would remain unaltered.

The matter came before me on 4 June 1993 when the indictment was presented for the first time. Mr Waters, on behalf of the accused, then moved that the indictment be quashed.

Mr Waters submitted that the accused was prejudiced or embarrassed by the indictment in his defence to the charge. The thrust of the submission was that the accused's decision to plead guilty to the charge of attempted robbery was based on uncontested evidence that immediately after the attempt to steal the accused had threatened to use violence upon Mr Wood. The accused denied to the police that at the time he attempted to steal from Wood, he pointed the shotgun at Wood's chest. This was contrary to what Wood said in his statement handed up to the magistrate at the committal. The threat to use violence which the accused was prepared to concede occurred, happened after Wood had run away when it was common ground that the accused yelled out to him: "Stop I'll shoot you," and then: "I'll shoot." Wood says that he did not look back and ran into the front bar of the Airport Hotel, where the offence had been committed, and then escaped through an exit door. Mr Waters submitted that the allegation contained in the present indictment, that the accused assaulted Wood with intent to steal, rested upon Wood's evidence that, at the time of the demand for the money, the accused pointed the shotgun at him, which, as I have said before, the accused denies, and which I note the accused denied when interviewed by the police.

It was submitted that had the matter proceeded by way of a plea of guilty to attempted robbery, the question of whether or not the accused pointed the shotgun at Wood could have been the subject of evidence at the time of the hearing of the plea. Even if the matter was then decided adversely to the accused, the maximum penalty for which he stood to be sentenced was seven years' imprisonment. However, as things now stand, the accused, having foregone his right to a committal based upon the Information for which he was charged, has lost his opportunity to cross-examine Mr Wood on that issue and to attempt to persuade the magistrate that there was not sufficient evidence to support that charge.

Mr Waters referred me to a number of authorities, but probably the authority most in his favour is the decision of Muirhead J in *R v Siugzdinis & Mauri* (1984-5) 32 NTR 1.

In that case his Honour said (at 5-6):

> "The decision of the magistrate upon committal proceedings is not always the end of the matter. Section 299 of the *Criminal Code* provides as follows:-
>
> > 'When a person charged with a crime has been committed for trial or sentence and if, in the opinion of the person responsible for the presentation of the indictment, the evidence produced at the preliminary proceedings is such that he ought to be charged with some other offence he may present an indictment charging such other offence.'
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> But the *Justices Act* and the *Criminal Code* combine to implement a system of committal, indictment and trial on indictment which, in the interests of justice should be adhered to. As this matter illustrates, once the decision of the magistrate as to committal is departed from, difficulties so frequently arise, Defence counsel in committal proceedings must keep an eye on the offence alleged in the information and naturally sets the sails of advocacy accordingly. The laying of new counts after committal tends to deprive a person charged of the full benefit or opportunities that committal processes provide and are designed to provide. There may thus be a failure to cross-examine witnesses on issues which subsequently prove of importance ...
>
> I can only endeavour to emphasise how important it is to give the greatest weight to the decisions of the committing magistrates who, whilst they may, in this capacity be acting administratively, have had the opportunity of considering the material before them, including submissions of counsel. It would be wrong, in these early days of the *Criminal Code*, to regard the functions of magistrates in committal proceedings lightly.
>
> As I commented, s299 of the *Criminal Code* provides for charges to be altered, but the wording of the section indicates that this is basically to ensure the charge is supported by the evidence at the preliminary proceedings. The section must not be regarded as a warrant by which the Crown substitutes its views for those of the magistrate."

Later (at 11), his Honour said:

> "The power in s299 to present an indictment after committal charging another offence is, as I have said,

'corrective' — and designed to ensure the indictment charging the offence is supported by the evidence upon the preliminary proceedings."

In *R v Jimmy Boungaru* (unreported, Martin CJ, 13/5/93) this Court considered a Motion to quash an indictment in circumstances where the Crown at the time of committal had charged the accused with murder; the committing magistrate in fact committed only for manslaughter; but counsel for the accused thought that as a result of discussions between himself and counsel for the prosecution, the Crown would not be asking for the accused to be committed for trial upon anything else other than manslaughter. His Honour found that there was a misunderstanding on the part of counsel for the accused in that case, a misunderstanding which meant that there had been no real committal proceeding in respect of the charge of murder.

His Honour referred to the comments of Muirhead J in *R v Siugzdinis & Mauri, supra*, to which I have referred above, and said (at 9):

> "With respect, it would be a mistake to seek to cut down the powers under s299 by applying what his Honour said in the context of that case to all cases. The provision expressly authorises the person responsible to add or substitute charges for offences to those upon which an accused has been committed. Had the misunderstanding not arisen in this case and his Worship simply committed the accused for trial for manslaughter, then provided the responsible person was of the opinion that the evidence was such that the accused ought to be charged with murder, there is no reason why he should not present an indictment accordingly. The practice is not new (*R v Martin* [1884] 10 VLR 343). However, that does not mean that the court is deprived of any of its statutory or inherent powers to quash or stay an indictment altered in accordance with s299, if to proceed upon it would produce unfairness to the accused."

His Honour concluded in that case that unfairness had occurred to the accused arising from his counsel's mistake, and balancing the interests of the accused against that of the Crown representing the community, it would be unjust for the indictment to proceed to trial at that stage in its

present form and he ordered that the proceedings be stayed accordingly. His Honour said (at 6-7):

> "Assuming that counsel for the accused understood, at the commencement of the committal proceedings that his client was not at risk of being committed for murder, then there has not been any such proceedings in relation to the charge of murder because nothing was done to test the evidence with that charge in mind. The detriment to the accused is plain. The loss of the opportunity to cross-examine Crown witnesses before trial will be irremediable (per Stephen J in *Barton's* case at p105). The seriousness of the loss is aggravated by the charge being that of murder. If a trial were allowed to proceed on that basis it must necessarily be unfair to the accused. 'It is a fundamental defect which goes to the root of the trial, of such a nature that nothing that a trial judge can do in the conduct of the trial can relieve against its unfair consequences' (per Wilson J in *Barton* at 111)."

Although his Honour's comments were made in the context of a charge for murder, I consider that his Honour's approach is apposite in this case. It is clear that the accused, and those representing him, thought that he was facing a charge of attempted robbery, when in fact the indictment now charges a much more serious offence involving different elements. I accept that no-one on behalf of the Crown did anything to positively mislead the accused's counsel as to the nature of the charge which the accused might ultimately face, but, on the other hand, the accused and his counsel were not forewarned, either formally or informally, as to the course which was ultimately taken. The opportunity to cross-examine a critical Crown witness on a piece of evidence critical to an element of the present charge which was not an element of the charge the accused previously had to face has been lost; and the opportunity to submit that the accused should not be committed on that charge has also not been given to him. Fairness dictates that in cases such as this, the accused is not misled by silence, albeit inadvertently. I do not think it is necessary to repeat the many observations that have been made by superior courts as to the importance of committal proceedings. In balancing the interests of the community I bear in mind that the

witnesses are all local, that further committal proceedings would not be lengthy, that there would not be significant expense to the community in arranging for a further committal hearing, and nor would there be undue delay in bringing the proceedings to trial. No prejudice to the Crown has been shown.

In these circumstances I consider that it would be unjust for the indictment to proceed to trial at this stage in its present form. I have been asked to quash the indictment, but I note the relief granted by Martin CJ in *Boungaru, supra,* was a stay. I respectfully agree with his Honour that that is the appropriate relief. Further proceedings will be stayed accordingly.