[1980–87 Gib LR 62]

VICTORY and FOX v. ATTORNEY-GENERAL

SUPREME COURT (Davis, C.J.): November 9th, 1981

Criminal Procedure—committal for trial—prosecution discretion as to mode—prosecution has discretion which mode of committal to use—full old-style committal with witnesses (preliminary inquiry under Magistrates' Court Ordinance, ss. 22–25) if wishes court to rule that prima facie case, or short-style committal on written statements (under ss. 25A and 26B) if itself confident that prima facie case—court not able to dictate how to exercise discretion

The appellants were charged in the magistrates' court with offences contrary to the Misuse of Drugs Ordinance 1973 and the Criminal Offences Ordinance (*cap.* 37).

The Crown wished to follow "old-style" committal proceedings under the Magistrates' Court Ordinance, s.25, with a view to obtaining the committal of the appellants for trial on indictment in the Supreme Court. It proposed to call witnesses to appear before the Stipendiary Magistrate in his capacity as examining magistrate and satisfy him that it had made out a *prima facie* case against them.

The appellants objected to this procedure and wished the committal proceedings to be in the short form under which written statements complying with s.25B of the Magistrates' Court Ordinance would be submitted as the basis for committal under s.25A. They maintained that to follow the old form of preliminary inquiry in this case would be oppressive to the accused and an abuse of the process of the court, since the large number of witnesses to be called, the length of time needed to take their depositions, the time expended by the court and counsel, and the unjustified expense made the old form undesirable. Moreover, the evidence to be given at such a preliminary inquiry would, despite reporting restrictions, inevitably become known to the public in a small jurisdiction such as Gibraltar, and make it difficult for the appellants to have a fair trial.

The Stipendiary Magistrate ruled that the court had no right to compel the prosecution to follow one committal procedure rather than the other. The s.25A committal could only be used if the requirements of the section were satisfied (which did not appear to be the situation here) and the starting point remained the old-style s.25 preliminary hearing. At the appellants' request, the Stipendiary Magistrate stated a case for the Supreme Court, seeking a decision on whether his ruling was correct.

The appellants submitted that (a) magistrates' courts had an inherent

jurisdiction to regulate their own proceedings, to ensure that they were fair and convenient and avoided anything which might cause embarrassment or oppression to an accused person; and (b) it followed that the prosecution had to justify its choice of the form of committal proceedings it had adopted—and if the one it had chosen was inconvenient, oppressive or unfair to the accused, as the preliminary inquiry was likely to be in this case, the magistrates' court should in its discretion order the prosecution to use the s.25A procedure.

The Crown conceded that (a) all courts had a discretion under their inherent jurisdiction to regulate their own procedure so that it did not operate unfairly to any party, but maintained that (b) it was for the prosecution to decide which method of committal for trial it wished or was able to adopt—if it chose not to submit written statements complying with s.25B (presumably itself not being satisfied that there was a *prima facie* case against the accused and wishing the court to make that determination), it could not be compelled to do so and the committal proceedings had to be by the fuller preliminary inquiry method,

Held, answering the case stated, that the Stipendiary Magistrate's ruling had been correct:

(1) Although the magistrates' court had an inherent jurisdiction to regulate its own procedure, it had no discretion in committal proceedings to order the prosecution to proceed by way of written statements from witnesses under ss. 25A and 25B of the Magistrates' Court Ordinance, rather than by way of a full preliminary inquiry under ss. 22–25 (para. 18).

(2) The prosecution was always entitled to obtain a finding from the magistrates' court that a *prima facie* case had been made out against the accused before proceeding to committal for trial on indictment. It could proceed under ss. 25A and 25B without such a finding, if it were confident enough in its own judgment and wished to expedite the trial—but if it wished to ask the court to make the finding (or even be unable to submit the written statements required under ss. 25A and 25B) it had to proceed under ss. 22–25. This might prolong the committal proceedings but it could not conceivably be said to be an abuse of process to follow the procedure prescribed by the Ordinance (para. 15).

Cases cited:

(1) *Connelly* v. *D.P.P.*, [1964] A.C. 1254; [1964] 2 All E.R. 401; (1964), 48 Cr. App. R. 183, considered.

(2) *D.P.P.* v. *Humphrys*, [1977] A.C. 1; [1976] 2 W.L.R. 857; [1976] 2 All E.R. 497; [1976] RTR 339; (1976), 63 Cr. App. R. 95, considered.

(3) *Mills* v. *Cooper*, [1967] 2 Q.B. 459; [1967] 2 All E.R. 100, referred to.

(4) *R.* v. *Epping & Harlow JJ., ex p. Massaro*, [1973] Q.B. 433; [1973] 1 W.L.R. 158; [1973] 1 All E.R. 1011; (1973), 57 Cr. App. R. 499, distinguished.

Legislation construed:
Magistrates' Court Ordinance, s.20(3): The relevant terms of this sub-section are set out at para. 9.
22: The relevant terms of this section are set out at para. 9.
25(1): The relevant terms of this sub-section are set out at para. 9.
25A: The relevant terms of this section are set out at para. 9.
25B: The relevant terms of this section are set out at para. 9.

J.J. Neish for the appellants;
E. Thistlethwaite, *Crown Counsel*, for the Crown.

1 **DAVIS, C.J.:** This is an appeal by way of case stated under s.100 of the Magistrates' Court Ordinance against a determination on a point of law by the learned Stipendiary Magistrate.

2 The facts giving rise to this appeal, as set out in the learned Stipendiary Magistrate's case stated, are as follows. The two appellants, together with nine others, appeared before the Stipendiary Magistrate on October 16th, 1981, charged with a variety of offences contrary to the Misuse of Drugs Ordinance 1973 and the Criminal Offences Ordinance (*cap.* 37) Prosecuting counsel informed the magistrates' court that the charges preferred against the accused were indictable and triable on indictment in the Supreme Court and that he proposed to lead evidence before the learned Stipendiary Magistrate with a view to their being committed for trial to the Supreme Court (under s.25 of the Magistrates' Court Ordinance) on the court's being satisfied that a *prima facie* case had been made out against them.

3 It was submitted on behalf of the appellants and the other accused that to proceed by way of preliminary inquiry in accordance with ss. 22–25 of the Magistrates' Court Ordinance would in all circumstances be oppressive to the accused and an abuse of the process of the court. It was submitted that the magistrates' court in exercise of its inherent jurisdiction had discretionary power to order that the accused should be committed for trial in accordance with the provisions of s.25A of the Magistrates' Court Ordinance, and the court was asked to exercise its discretion accordingly.

4 The grounds adduced in support of these submissions, as set out in para. 6 of the case stated, were as follows:

> "(1) Assuming there was a right of election on the part of the prosecution there should be a right on the part of the defendants to object.
>
> (2) The onus is on the prosecution by way of Section 25A of the Magistrates' Court Ordinance and that it is contrary to natural justice to proceed arbitrarily.

(3) There was no reason for the prosecution to proceed by way of depositions, especially as—

(a) there were approximately 80 witnesses involved;

(b) the time of the court is precious and other matters would be unnecessarily delayed;

(c) the waste of time which depositions would involve, approximately six weeks, and that time wasted is a denial of justice to the appellants and the other persons charged;

(d) the time of counsel is precious. They have other work to look after. There are seven counsel involved and it is not purely the convenience of one counsel but the bar as a whole that is involved. Moreover, it would be difficult for all seven counsel to be available at the same time during a long committal;

(e) costs would escalate immensely and the time spent taking depositions would be duplicated in the Supreme Court;

(f) the expense on the public purse is unnecessary and unjustified;

(g) some defendants were in regular employment and might be deprived of their means of support if long committals were held;

(h) the prosecution evidence might be presented to defence counsel piecemeal, thereby preventing a global view of the evidence and prejudicing the advice given to the appellants.

(4) Section 25A is quicker, cheaper and more equitable to the appellants in this case. In effect, by proceeding as proposed the prosecution will be having a dress rehearsal.

(5) There would be grave injustice to the appellants if the evidence is led before the trial as such evidence will, notwithstanding reporting restrictions, leak in a garbled and prejudicial way in a small place like Gibraltar, thereby prejudicing the fair trial of the appellants especially as the admissibility of certain statements will be challenged at the trial. Furthermore, the defence, because it does not know the prosecution's case, can only cross-examine briefly and this in effect will restrain cross-examinations and render an old-style committal a charade.

(6) The examining justice should protect himself from abuse of the magistrates' court's own proceedings.

(7) Counsel for the appellants were unable to advise their clients as to what manner of proceeding was in their best interests as they

did not know the nature of the prosecution evidence. In these circumstances, the defence had the right to know of the nature of the case as soon as possible and that a docket containing all the statements of the prosecution witnesses should be made available in the usual manner in the first instance."

5 Prosecuting counsel submitted *inter alia* that to proceed by way of preliminary inquiry as provided for in ss. 22–25 of the Magistrates' Court Ordinance would not amount to an abuse of the process of the court and that it lay with the prosecution in its discretion to proceed by way of preliminary inquiry or by committal under s.25A.

6 The learned Stipendiary Magistrate came to the following determination:

"9. I determined the submissions in favour of the following terms:

(a) On Monday I ruled that this court does not have the right to force the prosecution in its election of proceding by different ways of committal.

(b) I have heard counsel again this morning on the point and it still seems clear to me that the 'old-style' committal is the starting point. The s.1 committal (more precisely in Gibraltar, s.25A committal) is merely permissive and can only be used if the requirements set out in the section are complied with. Mr. Thistlewaite points out and I agree with him that the requirements are not met.

(c) Can this court interfere with the proceedings before it on the grounds that the prosecution's decision amounts to an abuse of the process of the court? The answer must be No. It is the prosecution's right; it is the statutory rule.

(d) Can this court interfere with the proceedings before it on the grounds that the conduct of the proceedings is oppressive and vexatious? The answer must be the same for similar reasons.

(e) The arguments adduced by the defendants are in my view related to trials not to committal which is procedure regulated by statute.

(f) In short, I have no discretion."

7 The question for the opinion of this court is whether the learned Stipendiary Magistrate came to a correct determination in law.

8 Mr. Neish for the appellants submitted that magistrates' courts as well as superior courts have inherent jurisdiction to regulate their own proceedings so that they work fairly and conveniently for the parties appearing before them and to prevent an abuse of the process of the court which

might result in embarrassment or oppression to the accused. In relation to this aspect of the inherent jurisdiction of the law courts, Mr. Neish quoted *dicta* in the speeches of the Law Lords in *Connelly* v. *D.P.P.* (1) and *D.P.P.* v. *Humphrys* (2) and Lord Parker, C.J. in *Mills* v. *Cooper* (3), and he drew my attention to an article by Feldman, *Declarations and the Control of Prosecutions*, [1981] *Criminal Law Review* 25, particularly at 31–34. I quote the following passage from this article (*loc. cit.*, at 33–34):

> "In *Connelly* and *Humphrys* no concluded view was expressed as to whether magistrates had similar powers over proceedings in their courts. However, in *Saull* v. *Browne* Lord Cairns L.C. accepted that magistrates have a discretion whether or not to hear a prosecution. In *Mills* v. *Cooper* all three members of the Divisional Court held that magistrates 'undoubtedly' have a power to refuse to hear oppressive prosecutions or those which are an abuse of the powers of their court. It is respectfully submitted that this is the true position. There is no reason to distinguish for this purpose between Crown Courts and magistrates' courts. Every court and tribunal has a general power to determine its procedure. Courts also have, according to the majority in *Connelly* and at least two of the three Law Lords who spoke about it in *Humphrys*, a power to protect people from oppressive and unfair use of court procedures. Prosecutors do not have a right to prosecute people: they act on behalf of the Community which has a legitimate expectation that alleged offenders will be brought to justice; but that must be weighed against the legitimate expectation of members of society that the courts will protect them against oppressive use of legal procedures.
>
> The power of judges and magistrates is to be used only in clear cases, because of the importance of upholding the community interest in the prosecution of offenders as a general rule; but in a proper case the power should be exercised. In *Mills* v. *Cooper* it was apparently accepted that an earlier decision on a point would make it oppressive and an abuse of process to prosecute on that same point again if the facts could not have altered since the first decision. As Ormrod L.J. said in *Imperial Tobacco*, 'The object of all procedural rules is to enable justice to be done between the parties consistently with the public interest.'"

9 The relevant provisions of the Magistrates' Court Ordinance relating to committal proceedings are as follows:

> "20. (3) The magistrates' court shall have jurisdiction as examining justices over any offence committed by a person who appears or is brought before the court, whether or not the offence was committed in Gibraltar, if an indictment for the offence may legally be preferred in Gibraltar."

(It is not disputed that the offences with which the appellants and the other accused are charged are indictable in Gibraltar.)

"22. (1) The functions of examining justices may be discharged by a single justice.

(2) Examining justices shall sit in open court except where any enactment contains express provision to the contrary and except where it appears to them as respects the whole or any part of committal proceedings that the ends of justice would not be served by their sitting in open court.

(3) Evidence given before examining justices shall be given in the presence of the accused; and the defence shall be at liberty to put questions to any witness at the inquiry."

"25. (1) Subject to the provisions of this Ordinance and any other law relating to the summary trial of indictable offences, if the magistrates' court inquiring into an offence as examining justices is of opinion, on consideration of the evidence and of any statement of the accused, that there is sufficient evidence to put the accused upon trial by jury for any indictable offence, the court shall commit him to the Supreme Court for trial and, if it is not of that opinion, it shall, if he is in custody for no other cause than the offence under inquiry, discharge him."

"25A. (1) The magistrates' court inquiring into an offence as examining justices may, if satisfied that all the evidence before the court (whether for the prosecution or the defence) consists of written statements tendered to the court under section 25B, with or without exhibits, commit the defendant for trial for the offence without consideration of the contents of those statements, unless—

(a) the defendant or one of the defendants is not represented by counsel or a solicitor;

(b) counsel or a solicitor for the defendant or one of the defendants, as the case may be, has requested the court to consider a submission that the statements disclose insufficient evidence to put that defendant on trial by jury for the offence.

(2) Subsection (1) of section 25 shall not apply to a committal for trial under this section."

"25B. (1) In committal proceedings a written statement by any person shall, if the conditions mentioned in subsection (2) of this section are satisfied, be admissible as evidence to the like extent as oral evidence to the like effect by that person.

(2) The said conditions are—

(a) the statement purports to be signed by the person who made it;

(b) the statement contains a declaration by that person to the effect that it is true to the best of his knowledge and belief and that he made the statement knowing that, if it were tendered in evidence, he would be liable to prosecution if he wilfully stated in it anything which he knew to be false or did not believe to be true;

(c) before the statement is tendered in evidence, a copy of the statement is tendered in evidence, a copy of the statement is given, by or on behalf of the party proposing to tender it, to each of the other parties to the proceedings; and

(d) none of the other parties, before the statement is tendered in evidence at the committal proceedings, objects to the statement being so tendered under this section.

(4) Notwithstanding that a written statement made by any person may be admissible in committal proceedings by virtue of this section, the court before which the proceedings are held may, of its own motion or on the application of any party to the proceedings, require that person to attend before the court and give evidence.

(5) So much of any statement as is admitted in evidence by virtue of this section shall, unless the court commits the defendant for trial by virtue of Section 25A or the court otherwise directs, be read aloud at the hearing, and where the court so directs an account shall be given orally of so much of any statement as is not read aloud."

10 Mr. Neish submitted that the object of committal proceedings was to have the accused committed for trial to the Supreme Court, and he referred me in this connection to the judgment of Lord Widgery, C.J. in *R.* v. *Epping & Harlow JJ., ex p. Massaro* (4). It is sufficient, I think, to cite the headnote to that case, which reads as follows (57 Cr. App. R. at 499):

"The function of committal proceedings is to ensure that no one shall stand his trial unless a prima facie case against him has been made out. Provided that the prosecution can establish a prima facie case by the witnesses whom they do call, they are not obliged to call any particular witness, even though that witness be a very important one such as the complainant on a charge of a sexual offence and even though the defence desire that witness to be called."

11 Mr. Neish suggested that this case was authority for saying that the prosecution in committal proceedings must justify its decision to proceed in a particular way. With respect, however, I cannot see that this case is authority for any such thing.

12 Mr. Neish pointed out that ss. 25A and 25B of the Ordinance conferred on the magistrates' court a wide discretion as to the conduct of committal proceedings. He contended that if it appeared to the magistrates' court that the circumstances were such that to proceed by way of preliminary inquiry under ss. 22–25 of the Ordinance would be inconvenient, oppressive, or unfair for the accused (as it was, Mr. Neish submitted, in the present case for the reasons set out in the case stated), the court was empowered in its discretion to order that the committal of the accused should proceed in accordance with the provisions of s.25A rather than those of the preceding sections.

13 Mr. Thistlewaite, for the Crown, conceded that all courts had a discretionary power in exercise of their inherent jurisdiction to regulate their own procedure so that it did not operate unfairly to any party and to prevent oppression or embarrassment to a party by abuse of the process of the court. But, Mr. Thistlewaite said, ss. 22–25 of the Magistrates' Court Ordinance provided how a person who had been charged with indictable offences was to be committed for trial to the Supreme Court. The procedure by way of preliminary inquiry provided for in these sections was mandatory. It was only if the prosecution, acting under s.25A and 25B of the Ordinance, tendered to the court written statements conforming to the requirements of s.25B, that the court had a discretion under s.25A to commit the accused for trial without consideration of the evidence against the accused (subject of course, to the provisions of sub-s. (1)(a) and (b) of that section). It was within the discretion of the prosecution, Mr. Thistlewaite submitted, to tender to the court written statements under s.25B. Unless it did so, committal proceedings could only take place as provided in ss. 22–25, and the magistrates' court had no discretionary power to order otherwise. Accordingly, Mr. Thistlewaite submitted that the question posed to the Supreme Court by the case stated should be answered in the affirmative.

14 In *R.* v. *Epping & Harlow JJ., ex p. Massaro* (4), Lord Widgery, C.J. said (57 Cr. App. R. at 501): "For my part I think it is clear that the function of committal proceedings is to ensure that no one shall stand his trial unless a prima facie case has been made out."

15 In my view the prosecution is as much entitled to a finding by the magistrates' court on committal that a *prima facie* case has in its view been made out against the accused as is the accused himself. But the procedure for committal laid down in s.25A precludes any such finding. Where the prosecution is satisfied that there is a *prima facie* case against the accused on the charge or charges as preferred, and it is in a position to tender to the examining justices written statements of all its witnesses under s.25B, then, in the interests of expediting the trial, it is open to the prosecution to apply to the courts for committal under s.25A. But the prosecution may wish to establish by a finding of the magistrates' court

that a *prima facie* case on the charges as preferred has in the view of the court been made out against the accused. Or it may be that the prosecution is not in a position to submit written statements under s.25B and wishes to call evidence and to proceed by way of preliminary inquiry. Even if the prosecution is in a position to tender written statements of all its witnesses under s.25B, it appears to me that it is not to be precluded from electing to proceed for committal by way of preliminary inquiry as provided for in ss. 22–25 of the Ordinance. To proceed in the manner prescribed by the Ordinance for committal proceedings cannot conceivably be said in my view to be an abuse of the process of the court.

16 The cases of *Connelly* v. *D.P.P.* (1), *Mills* v. *Cooper* (3) and *D.P.P.* v. *Humphrys* (2) referred to by Mr. Neish all dealt with rules of practice. In *Connelly* v. *D.P.P.*, Lord Devlin said ([1964] A.C. at 1347):

> "My Lords, in my opinion, the judges of the High Court have in their inherent jurisdiction, both in civil and criminal matters, power (*subject of course to any statutory rules*) to make and enforce rules of practice in order to ensure that the coroner's process is used fairly and conveniently by both sides." [Emphasis supplied.]

17 Whether or not the magistrates' court has a similar power (and Mr. Thistlewaite concedes that it has), the magistrates' court is bound by the provisions of ss. 22–25 of the Magistrates' Court Ordinance as to the manner it shall conduct committal proceedings. As I have already said, the court has no discretion to commit except by way of preliminary inquiry under ss. 22–25 unless the prosecution tenders to it written statements under s.25B. In that case—and in my view in that case only—the court does have a discretion to commit without considering the evidence under s.25A.

18 I find, therefore, that the magistrates' court has no discretionary power in committal proceedings to order the prosecution to tender written statements to the court under s.25B in order that it may commit the accused for trial under s.25A, and accordingly I find that the answer submitted by case stated for the opinion of the Supreme Court is that the learned Stipendiary Magistrate came to a correct determination in law.

Ruling accordingly.
