Birkeland-Corro v Tudor-Stack [2005] NTSC 23

PARTIES:	BIRKELAND-CORRO, Emma v TUDOR-STACK, Paul
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 16 of 2003 (20207651)
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JUDGMENT OF:	MARTIN (BR) CJ

CATCHWORDS:

CRIMINAL LAW
Appeal – Justices Appeal – appeal against conviction – committal proceeding – application for summary hearing – contempt of court – arrest of appellant – procedural fairness – miscarriage of justice – duty to unrepresented defendant – jurisdiction – appeal allowed.

Justices Act 1928 (NT), s4, s101, s105A, s106, s106A, s109, s121A, s131A-E and s 131B; *Criminal Code* (NT), s3, s188(2) and s298(1); *Interpretation Act* (NT), s38E.

MacPherson v The Queen (1981) 147 CLR 512 (pp 524, 534, 547), followed.
R v White (2003) 7 VR 442 (p 451), applied.
Haymon v Deland (1992) 111 FLR 62, *Salmon v Chute* (1994) 94 NTR 1, considered.

REPRESENTATION:

Counsel:

Appellant:	I Rowbottom pro bono
Respondent:	D Lewis

Solicitors:

Appellant:	Withnall Maley
Respondent:	Office of the Director of Public Prosecutions

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

Birkeland-Corro v Tudor Stack [2005] NTSC 23
No. JA 16 of 2003 (20207651)

BETWEEN:

EMMA BIRKELAND-CORRO
Appellant

AND:

TUDOR-STACK
Respondent

CORAM: MARTIN (BR) CJ

REASONS FOR JUDGMENT

(Delivered 20 May 2005)

Introduction

[1] This is an appeal against a conviction for aggravated assault contrary to s188(2) of the Criminal Code recorded by a Magistrate on 6 December 2002. A sentence of three months imprisonment was imposed and suspended forthwith.

[2] The appellant was charged on information with unlawful assault involving a circumstance of aggravation, namely, that the victim of the assault suffered bodily harm. In essence it was the prosecution case that on 14 May 2002 the appellant was one of a group of people who entered the Chamber of the Legislative Assembly while the Assembly was in session. The victim of the

alleged assault was a security officer. As the victim was removing a male person from the Chamber, the appellant jumped onto the victim's back causing him to fall to the ground. A second security officer removed the appellant from the back of the victim.

[3] According to the prosecution evidence, as a consequence of the assault the victim sustained strained muscles in his lower back and a swollen knee. He experienced pain for which he took Panadol over about three days. He was on light duties for a week.

Proceedings before the Magistrate

[4] It is necessary to set out the sequence of events in some detail. On 1 November 2002 the matter was listed for what was described as a "committal hearing" commencing 6 December 2002. At a conference on 29 November 2002 the appellant advised a different Magistrate that she was ready for the committal hearing to commence on 6 December 2002, but not to call witnesses that day. The learned Magistrate advised the appellant that she could apply to the Magistrate hearing the proceedings for an adjournment at the end of the prosecution case. His Worship informed the appellant that one reason why the case might be adjourned was that her friends could be witnesses and it might embarrass those persons in their defence to the charge of disturbing the Legislative Assembly if they were to give evidence in the appellant's proceedings.

[5] At the outset of the hearing on 6 December 2002 the prosecutor advised the learned Magistrate that the matter was proceeding as a "committal". The appellant commenced making a submission that the proceedings were tainted by problems of bias and denial of natural justice, but after a few words the Magistrate cut the appellant off and declined to hear the submission. The appellant made it plain that she wanted the hearing adjourned until she had presented her submission and the matters raised in her submission had been investigated. The prosecutor responded by stating that he was ready to proceed. He also indicated he did not expect to finish that day and the matter would almost certainly be part heard to a date in the future. The Magistrate then stated that he would deal with the matter as an "oral committal".

[6] The Magistrate invited the appellant to put a submission as to whether the matter should proceed on that day "by way of oral committal". The appellant said that her written submissions explained why she was not prepared to take part in the hearing because she was being railroaded and denied natural justice. She spoke of new evidence which had been obtained over the last few days. Unfortunately, the Magistrate did not give the appellant a reasonable opportunity to explain her position. Nor was the appellant able to explain the nature of the "new evidence". His Worship cut across the submission:

> "HIS WORSHIP: Madam, if you wish to absent yourself from this courtroom, and you refuse to take part in the proceedings, you can do

that. I certainly shan't stop you, but I'll proceed in your absence by virtue of s 361 of the Criminal Code.

APPELLANT: Well, sir, if you're not prepared to hear my submission, then, yes, I will make myself absent.

HIS WORSHIP: That isn't what I said to you. I said to you that if you didn't wish to participate in the proceeding, you could leave."

[7] Prior to the Magistrate's interruption the appellant had not given any indication of an intention to absent herself from the hearing. Presumably the Magistrate's advice that the appellant could absent herself was based on the appellant's comment that her written submissions explained why she was not prepared to take part in the hearing. That advice is significant in view of events a few moments later.

[8] The appellant repeated that she wanted to make a submission and started to speak of the rules of natural justice. The Magistrate again interrupted to refer back to the appearance before another Magistrate on 29 November 2002. The appellant attempted to explain that one of the reasons she needed the adjournment was that the "hearing of witnesses in this case is going to prejudice my trial for the Parliament invasion, which I think's in February." His Worship responded that the case before him had nothing to do with the Parliamentary invasion. It appears that his Worship may not have appreciated that the offence before him was alleged to have occurred during the "invasion" of Parliament and that he misunderstood the problem that could arise if witnesses were required to give evidence before his Worship of events that were to be the subject of a later trial.

[9] Without hearing more than a few words, and without any knowledge as to the essence of the appellant's submission, the Magistrate refused the application to adjourn the proceedings. In doing so, his Worship said:

> "There is no, in my contemplation, prospect of you suffering any prejudice by dealing with this matter now. In the circumstances, I propose to proceed with an oral committal. That will necessitate the charge being put to you. Now you said something about if the matter was to proceed, you didn't want to be heard or something."

[10] The appellant responded by saying she was not going to participate in the proceeding.

[11] I pause in the sequence of events to make the following observations. The appellant was unrepresented. She had attempted to make a submission directed to her position that the proceedings should be adjourned. As events transpired, the appellant was referring to a written submission that was subsequently tendered before the Magistrate. That written submission comprised a general attack upon the police and the judicial system and contained allegations about the conduct of named persons. The submission, if it had been given, would inevitably have been rejected. But that is not to the point. The Magistrate did not permit the appellant to present sufficient of her submission to enable his Worship properly to make a reasoned judgment that the submission was irrelevant.

[12] From the perspective of the appellant, the Magistrate had refused to hear even the essence of her submission. His Worship made no attempt to explain to the appellant why her submission was irrelevant nor to explain

the nature of an "oral committal". There was nothing in the material before his Worship or the exchanges between his Worship and the appellant which could reasonably have led to the view that the appellant fully understood the procedures and her rights with respect to the proceedings generally.

[13] I return to the sequence of events. The appellant having responded to the Magistrate's question by saying that she was not going to participate in the proceedings, his Worship responded as follows:

> "Yes, very well. Well then, that's your choice.
>
> Sergeant, the only provision I can conceive of which, in the circumstances, assists is s 361 of the Criminal Code."

[14] The mention of s 361 by the Magistrate introduced a short discussion between his Worship and the prosecutor about the possibility of arresting the appellant and taking her into custody. This exchange occurred notwithstanding that a few moments earlier the Magistrate had specifically advised the appellant that he "certainly" would not stop her if she refused to take part in the proceedings and absented herself from the courtroom.

[15] The Magistrate did not address any remarks to the appellant by way of explanation of the brief exchange that occurred between his Worship and the prosecutor about the possibility of taking the appellant into custody. No attempt was made to explain that the situation had changed from the earlier statement of the Magistrate that the appellant could decline to participate and leave the courtroom. No hint was given to the appellant that by

indicating she was not prepared to participate in the proceedings, she might be taken into custody.

[16] The brief exchange concluded with an offer by the Magistrate to leave the bench and a request by the prosecutor for a few minutes to seek the advice of more experienced counsel. After observing that the prosecutor might, in the absence of the Magistrate, be able to "get some common sense into the matter", his Worship informed the appellant that "one way or another, young lady, this matter will proceed, in my perception." The appellant then attempted to speak to the Magistrate. The transcript records that she managed to say "Sir, if I can ... " before his Worship again interrupted with the following observation:

> "You can make it difficult, but you can't make it impossible. It's my view that you are best served by allowing the oral committal to go ahead. You can argue if – subsequent to the conclusion of the proceeding, you can argue before a Superior Court, if you wish, that there's bias or whatever else you want to argue.
>
> An oral committal is not a trial, it's an administrative proceeding."

[17] After an adjournment, the length of which is not recorded in the transcript, the discussion between the Magistrate and the prosecutor continued. The prosecutor submitted that it was necessary for the proceedings to be conducted within the hearing of the appellant. The Magistrate observed that although the appellant was not on bail, the only way he could secure her attendance was to remand her in custody "and then she'll be coerced into staying here". Again, the appellant was not involved in the discussion. She

was not advised of the action being contemplated nor of any reason for such action.

Application for Summary Hearing – Arrest of Appellant

[18] During this discussion, for the first time, the prosecutor changed his position about the nature of the proceedings and submitted that the Magistrate should proceed to hear the matter summarily. A discussion followed in which the prosecutor submitted that the consent of the appellant was not required. At the conclusion of the discussion the Magistrate remarked to the prosecutor that before he dealt with the application to proceed with the matter by way of summary hearing it was necessary to hear from the appellant.

[19] Before asking the appellant to respond to the prosecutor's application, the Magistrate should have carefully explained the nature of the application and its consequences. His Worship should have ensured that the appellant understood the nature of the change in the hearing if the application was granted, the consequences of proceeding with a summary hearing and her rights in such a hearing. Instead of a careful explanation, the following exchange then took place between the Magistrate and the appellant:

> "HIS WORSHIP: Now, Ms Birkeland-Corro, I ask you whether you are now going to participate in and respond to me in relation to the proceeding which the prosecution has indicated it intends to pursue?
>
> MS BIRKELAND-CORRO: Are you going to hear my submission, sir?
>
> HIS WORSHIP: You answer my question, will you?

MS BIRKELAND-CORRO: It depends on what your answer is.

HIS WORSHIP: Will you answer my question?

MS BIRKELAND-CORRO: Are you going to hear my submission or not?

HIS WORSHIP: I will only ask you one more time to respond, and I think you should listen, young lady: if ---

MS BIRKELAND-CORRO: I'm not a young lady, sir, I'm a person before the court. Are you going ---

HIS WORSHIP: When I next ask you ---

MS BIRKELAND-CORRO: --- to hear my submission or not?

HIS WORSHIP: When I next ask you for your response, if you give me the same answer I shall charge you with contempt of court. Now, I ask you to tell me whether you are going to participate in this proceeding or not?

MS BIRKELAND-CORRO: I'm not going to participate.

HIS WORSHIP: I direct that the defendant be arrested and I remand the defendant in custody. I shall come back at half past 11 and I will hear the matter to its conclusion with or without the co-operation of the defendant.

ADJOURNED"

[20] The appellant was arrested and remained in custody for the balance of the proceedings.

[21] A number of unsatisfactory features of this part of the proceedings are readily apparent. First, as I have said, the prosecutor having changed his

position and sought a summary hearing, no attempt was made by the Magistrate to explain to the appellant what the application meant. His Worship was not entitled to assume that the appellant possessed any meaningful understanding of the nature of the application and its consequences.

[22] Secondly, the background of events that day is relevant. The appellant had come to the court expecting a hearing by way of "oral committal" and the Magistrate had confirmed that the hearing would proceed in that way. After being denied the opportunity of presenting a submission she wished to advance, the appellant was told she could decline to participate and absent herself, but that advice was followed by a discussion between the Magistrate and the prosecutor in which the appellant did not participate concerning the possibility of arresting the appellant and taking the appellant into custody. No explanation was given to the appellant as to why there was talk of taking her into custody. From the perspective of the appellant, immediately following talk of taking her to custody, again without explanation to her, there was discussion of an entirely different topic, namely, a summary hearing. Rather than being provided with an explanation as to the nature of the application by the prosecutor and its consequences, the appellant was then faced with a question as to whether she was going to participate in and respond to the Magistrate "in relation to the proceeding which the prosecution has indicated it intends to pursue". Unfortunately, the Magistrate had not explained to the appellant anything about "the

proceeding which the prosecution has indicated it intends to pursue." There is no material before the Court to indicate that the appellant had any understanding of the nature of the proceedings being suggested or the consequences of the change in the nature of the proceedings.

[23] It is against that background that the terse exchange occurred which concluded with the arrest of the appellant. That exchange began with the Magistrate asking the appellant whether she would now participate in and respond to his Worship in relation to the proceedings. The respondent replied by asking his Worship whether he would hear her submission. After a second occasion when the respondent replied in the same way, his Worship warned the appellant that if she again gave the same answer to his question he would charge her with "contempt of court". No explanation was given to the appellant as to the implications or consequences of being charged with contempt of court. In particular, the Magistrate did not advise the appellant that if he charged her with contempt of court she might be arrested and taken into custody.

[24] In the light of what followed, it must be borne in mind that the "same answer" which the Magistrate warned would result in a charge of contempt of court was a response to his Worship's question by asking again whether his Worship would hear the submission.

[25] The warning having been given, the specific question that was asked of the appellant was whether she was going to participate in the proceedings or

not. The appellant gave a direct and responsive answer. She said she was not going to participate. The appellant did not commit the contempt of court about which his Worship had warned her. She did not respond by asking again whether his Worship would hear her submission.

[26] Notwithstanding that the appellant did not commit the contempt about which she had been warned, and notwithstanding that the appellant responded directly to the question with a responsive answer, the Magistrate directed that the appellant be arrested.

[27] The Magistrate did not give any reason for directing that the appellant be arrested. His Worship could not have been exercising a power to arrest the appellant by reason of the contempt about which he had warned her. She had not committed such a contempt.

[28] It was not a contempt of court for the appellant, in response to the Magistrate's question, to respond that she would not participate in the proceedings. It was not a contempt to decline to participate. Against the background to which I have referred, it is difficult to avoid the conclusion that the Magistrate directed the arrest of the appellant because she might in the future absent herself from the courtroom and thereby disrupt the continuation of the proceedings.

[29] As to the possibility of the appellant absenting herself, the passage I have earlier cited demonstrates that it was the Magistrate who first raised the possibility of the appellant absenting herself from the courtroom. The

appellant had stated that she was not prepared to take part in the proceedings because she was being denied natural justice. In response, it was the Magistrate who first mentioned the question of the appellant absenting herself from the courtroom when he advised the appellant that she was entitled to absent herself and he would not stop her. It was in answer to that advice from the Magistrate that the appellant said that if his Worship was not prepared to hear her submission she would absent herself.

[30] Apart from the first mention of absenting herself to which I have referred, the appellant did not display any indication of an intention to absent herself. Notwithstanding the initial indication that she would absent herself, when the Magistrate subsequently adjourned to enable the prosecutor to seek advice, the appellant did not absent herself. When the issue of taking the appellant into custody was discussed, the appellant was not asked whether she would remain in the courtroom for the duration of the proceedings even if she was not participating.

[31] As I have said, there was a complete failure to provide the appellant with appropriate explanations. The direction to arrest came without warning or explanation. It came against the background of the specific advice given a few moments earlier that the appellant was at liberty not to participate and to absent herself and it came without informing the appellant of a change in that position. The appellant was not warned that if she indicated an intention not to participate in the proceedings she would be arrested and deprived of her liberty. The appellant was not advised of the reason for her

arrest and was not offered the opportunity of taking the necessary steps to secure her release from custody. At no time did the Magistrate offer the appellant the opportunity of obtaining legal advice or assistance.

[32] A citizen, including a litigant before a court, should not be deprived of their liberty other than in accordance with the law and, in the circumstances under consideration, after being afforded procedural fairness. Leaving aside the question of when the power of a Magistrate to direct that a defendant be arrested is enlivened and the limits of that power which it is unnecessary to discuss, the course followed was highly undesirable. The Magistrate failed to observe the fundamental requirements of procedural fairness.

Summary Hearing

[33] I return to the sequence of events. After the arrest of the appellant, the court adjourned for what appears to be a relatively short period. The prosecutor then outlined the allegations against the appellant. Again without giving any explanation to the appellant, his Worship asked the appellant whether she wished to say anything "in relation to the application made by the prosecution for the matter to be heard summarily". The appellant responded that she was not participating following which His Worship specifically stated that he determined the matter should proceed summarily. His Worship made that decision without explaining to the appellant the change in the nature of the proceedings and without hearing further from her concerning the unavailability of witnesses that she wished

to call. The appellant was not asked whether she wished to seek legal advice.

[34] The matter proceeded as if it was a summary hearing. The appellant was called upon the plead. She declined saying she was not participating. The Magistrate recorded pleas of not guilty to the charge of unlawful assault and to the circumstance of aggravation. The prosecutor called the victim and another security officer who identified the appellant as the person who had jumped onto the back of the victim.

[35] When asked whether she wished to cross-examine the victim, the appellant declined saying she was not cooperating. The Magistrate advised the appellant that if the witness's evidence was accepted without qualification, there would at least be a "prima facie" case made out against the appellant as to the offence of aggravated assault. His Worship added:

> "If you fail to ask any questions which have the effect of changing the witness's evidence, the consequences must be obvious to you, but, if there're not, his evidence will be accepted without qualification."

[36] The appellant confirmed that she was not participating. The prosecutor then called the second witness and, at that time, the Magistrate advised the appellant that if he found the appellant guilty and convicted her he had the power to sentence her to gaol for up to two years. This was the first occasion on which his Worship gave any advice to the appellant of the

serious consequences that might follow a conviction. The appellant indicated she understood, but repeated that she was not cooperating.

[37] At the conclusion of the evidence of the second witness, the appellant again confirmed that she was not cooperating and did not wish to cross-examine. The prosecutor closed his case and the Magistrate asked the appellant if she wished to say anything apart from referring to her written submission. The appellant responded in the negative. His Worship then addressed the following remarks to the appellant:

> "You now have the opportunity, if you wish, to do several things. You may, if you wish, submit that there is no case to answer. I would counsel you against such a course because it isn't in the remotest concept, that I can imagine, possible that you would succeed.
>
> You can give evidence on your own behalf, in which case you'll be required either to take an oath or an affirmation and you'll then give evidence and be subject to cross-examination. You may, after that, if you choose that course, call any evidence in aid of your defence.
>
> What do you want to do?"

[38] The appellant indicated she wished to make a submission that there was no case to answer because of bias and denial of natural justice. His Worship declined to hear that submission because it was not directed to whether the prosecution had made out the elements of the offence. Asked if she wished to make a submission "on a logical and relevant basis in respect of a no case submission", the appellant responded that her submission based on bias and denial of natural justice was the only submission she wished to make.

[39] The Magistrate then asked the appellant if she wished to give evidence. The appellant responded that she would "like to make this submission". An exchange between the Magistrate and the prosecutor followed which led to the extraordinary decision of his Worship to require that the appellant take an oath or affirmation in order to present the submission:

> "HIS WORSHIP: Sergeant, is it the procedure that she should simply make those submissions or give her evidence from where she sits, or do I have to actually put her in the witness box?
>
> MR THOMAS: If it's only a submission, Your Worship, I don't mind if the defendant stays where she is.
>
> HIS WORSHIP: Well, I'd have to at least attempt to administer an oath. I'm not sure what the consequences will be.
>
> MR THOMAS: I'm not sure she wants to give evidence.
>
> HIS WORSHIP: Well, even in relation to submissions, I don't propose to hear them without her taking an oath. If she refuses to take an oath or an affirmation, I'll consider my position.
>
> MR THOMAS: If she's going to be sworn, Your Worship, I think the normal practice is she should go into the witness box.
>
> HIS WORSHIP: Well, prison officer, can you please take the defendant to the witness box?"

[40] The decision of the Magistrate to direct that the appellant be sworn or take an affirmation is discussed further later in these reasons.

[41] The appellant then took an affirmation. She presented a document to the Magistrate as her submission and indicated that there was nothing else she

wished to say. The submission was marked as an exhibit and his Worship advised the appellant in the following terms:

> "Once I and the prosecutor have read it, the prosecutor's entitled to cross-examine you. What you do when he makes that election is a matter for you. I simply refer again to what I've said before: if you refuse to allow cross-examination by the prosecutor, then the consequences of doing that will obviously be reflected in the disposition in due course. I think you should consider your position, which I think is the fourth time I've told you that."

[42] After the Magistrate had read the submission, the following exchange occurred between the Magistrate and the appellant:

> "HIS WORSHIP: Ms Birkeland-Corro, when I asked you before whether you wanted to say anything or lead any evidence other than this document, you said no. I have read this document and I wish to point out to you that the document does not in any objective, logical or legal way, put in issue, attack, the allegations that have been made against you which are central to the elements of whether or not you have committed an aggravated assault. There's nothing in here which controverts the evidence of Wigmore or McCormick. In the circumstances, do you still wish to add nothing to this document?
>
> A. No."

[43] The Magistrate then invited the prosecutor to cross-examine. The prosecutor commenced a cross-examination plainly aimed at the merits of the case. In substance, the appellant challenged the relevance of the questioning. When told by the Magistrate to answer the question, the appellant responded that she was not cooperating except by putting the submission. Asked by the Magistrate whether she was going to refuse to answer questions, the respondent replied in the affirmative. His Worship observed:

> "In the circumstances I simply record that your cross-examination was utterly obfuscated and I pass on to the next stage."

[44] The Magistrate then advised the appellant in the following terms:

> "All I can say, Ms Birkeland-Corro, is that your so-called legal advice is so wanting in any aspect of legal advice, it's criminally stupid for you to have accepted it."

[45] A brief exchange followed during which the Magistrate asked the appellant whether she wished to call any witnesses either as to the events or as to her character. The appellant responded in the negative and stated that she was not cooperating. She also declined to make submissions as to whether she should be found guilty.

[46] The Magistrate heard submissions from the prosecutor and found that the elements of the charge were proven. In the course of brief remarks his Worship referred to the written submission tendered by the appellant in the following terms:

> "In so far as the evidence – if it can be graced with that description – of the defendant is concerned, and despite warnings to her that after reading it the document didn't constitute evidence controverting any of witnesses called by the prosecution, in so far as that document is concerned, it's a diatribe of irrelevancy which has no bearing on the matter before me."

[47] In my opinion, the Magistrate was correct in rejecting as irrelevant the written submission advanced by the appellant. As I have said the submission contained general allegations concerning police conduct and the legal system generally in the Northern Territory. The allegations were

irrelevant to the issues before the Magistrate. Having properly rejected as irrelevant assertions that the Northern Territory police generally had failed to comply with principles of natural justice or procedural fairness, his Worship added the following remarks:

> "The proceeding before this Court has, in my finding and perception, been an example of natural justice exhibited to and dispensed to someone largely undeserving of the several opportunities which were declined. In the circumstances, I find the defendant guilty of the offence as charged."

Errors

[48] The Magistrate's perception that the proceedings before him had "been an example of natural justice exhibited to and dispensed to" the appellant was misconceived. I have been driven to the conclusion that the proceedings were riddled with significant errors, many of which in themselves are sufficient to constitute a miscarriage of justice.

[49] The appellant was unrepresented. At the outset of the proceedings she sought to read a submission to the Magistrate that the proceedings were attended by bias and a denial of natural justice. Rather than permit the appellant to identify at least the essence of her submission, which would have demonstrated to his Worship the irrelevancy of that submission and which would have given his Worship an opportunity to explain to the appellant why the submission was irrelevant, his Worship declined to hear the submission without any explanation to the appellant. From the outset the proceedings were attended by an approach of the Magistrate which was

not conducive to the fair conduct of the proceedings in circumstances where the appellant was unrepresented.

[50] Next, the Magistrate failed to explain the nature of the proceedings in any meaningful manner. His Worship's invitation to the appellant to put a submission as to whether the matter should proceed that day by way of oral committal was meaningless in the absence of some material before the Magistrate demonstrating that the appellant understood the nature and purpose of an oral committal. Similarly, a later observation by his Worship that an oral committal is an administrative proceeding and not a trial lacked any significance in the absence of an understanding by the appellant of the difference between an oral committal and a trial.

[51] Unfortunately, the events that followed did not amount to an improvement on the unsatisfactory way in which the proceedings had commenced. I have already dealt with the absence of explanations in the context of discussions concerning taking the appellant into custody and with the circumstances in which the appellant was arrested. I have also dealt with the failure to explain the change in the nature of the proceedings from an oral committal to a summary hearing. That failure was a fundamental flaw in the proceedings. In that context the Magistrate erred in failing to address again the question of the availability of the appellant's witnesses. The unavailability of witnesses assumed a different significance once the proceedings had been converted from an oral committal to a summary hearing. In the context of that conversion, the Magistrate also erred in

failing to invite the appellant to consider whether she wished to seek legal advice.

Submission from Witness Box

[52] I return to what I described as the extraordinary decision of the Magistrate to require that the appellant take an oath or affirmation in order to present her submission at the conclusion of the prosecution evidence.

[53] As misconceived as the written submission was, the appellant was entitled at the conclusion of the prosecution case to make a submission from the bar table in the same way as counsel. The appellant did not give any hint that she wanted to give evidence. She plainly stated that she wanted to make a submission. Notwithstanding that the Magistrate had peremptorily cut off the appellant from making the submission earlier in the proceedings, enough had been said to demonstrate that the submission related to claims of bias and denial of natural justice. It was readily apparent that the submission was not directed to the evidence directly bearing upon the guilt or otherwise of the appellant. At the least the Magistrate should have perused the written submission in order to determine whether it was a "submission" or more in the nature of evidence.

[54] The transcript discloses that yet again the Magistrate and the prosecutor had a discussion without involving the appellant. The Magistrate did not make any attempt to explain to the appellant the nature of the issue that he was considering or the alternatives that were available to the appellant. His

Worship did not offer the appellant the opportunity of presenting any submissions directed to the issue whether his Worship should hear or read the written submission without requiring that the appellant take an oath or affirmation. The Magistrate reached his decision to require the appellant to take an oath or affirmation in order to present the submission notwithstanding that the prosecutor commented that if it was only a submission the appellant could stay "where she was" and notwithstanding the further observation of the prosecutor that he was not sure that the appellant wanted to give evidence. At the conclusion of the discussion, and without any explanation to the appellant, his Worship simply directed a prisoner officer to take the appellant into the witness box.

[55] In substance, the appellant was compelled to enter the witness box. She was in custody. Having regard to the conduct and attitude of the Magistrate throughout the proceedings, the content of the discussion between the Magistrate and the prosecutor and the absence of any remarks addressed to the appellant, coupled with the direction to the prison officer to take the appellant into the witness box, the strong impression of compulsion is irresistible.

[56] No explanation was given to the appellant that by entering the witness box and taking an affirmation she would render herself liable to cross-examination by the prosecutor about the events that were the subject of the charge. Against the background of advice given by the Magistrate to the appellant at the conclusion of the prosecution case that she was entitled to

make a submission of no case to answer or to give evidence on her own behalf and the appellant's response that she wanted to make a submission that there was no case to answer, by requiring the appellant to enter the witness box in order to present the submission the clear impression was conveyed to the appellant that she was taking an affirmation solely for the purpose of presenting the submission.

[57] The Magistrate did not possess any power to require the appellant to enter the witness box for the purpose of presenting the submission. The course followed was entirely inappropriate.

Duty to Unrepresented Defendant

[58] The fundamental duty of a Magistrate or Judge conducting a trial in which a defendant is unrepresented is to ensure that the defendant receives a fair trial. As Gibbs CJ and Wilson J observed in a joint judgment in *MacPherson v The Queen* (1981) 147 CLR 512 at 524:

> "There is no limited category of matters regarding which a Judge must advise an unrepresented accused – the Judge must give an unrepresented accused such information as is necessary to enable him to have a fair trial. And although no doubt some accused persons refuse the offer of legal representation for tactical reasons, an accused does not become disentitled to a fair trial because he has declined, and even perversely declined, an offer of legal assistance."

[59] Mason J expressed the same view in the following passage (534):

> "Giving full weight to the adversary character of a criminal trial and the difficulties of advising an accused who is not represented, I nevertheless consider that the trial Judge is bound to ensure that an accused person has a fair trial. To that end he is under a duty to give

the accused such information and advice as is necessary to ensure that he has a fair trial."

[60] Brennan J made the following observation (547):

> "Whether any and what advice should be given to an accused depends upon the circumstances of the particular case and of the particular accused. What can be said that if it is necessary to give any advice, the necessity arises from the judge's duty to ensure that the trial is fair. That duty does not require, indeed it is inconsistent with, advising an accused how to conduct his case; but it may require advise to an accused as to his rights in order that he may determine how to conduct the case."

[61] In *R v White* (2003) 7 VR 442 the Victorian Court of Appeal discussed the obligations of a trial Judge in the context of evidence led by an unrepresented accused of his past criminal activities. Chernov JA referred to the duty of the Judge to ensure that the accused is fully aware of the legal position in relation to the substantive and procedural aspects of the case. Citing *MacPherson* his Honour said that the High Court:

> "emphasised the obligation of the trial Judge to ensure that the unrepresented accused is fully aware of the legal and procedural options that are open to him or her in the conduct of the defence." (457)

[62] The fundamental principles to which I have referred are directly applicable to the duty of a Magistrate to ensure that an unrepresented defendant receives a fair trial. What is required will depend upon the circumstances of the individual case and particular defendant. The duty imposed upon a presiding judicial officer to ensure that the fundamental requirements of a fair trial are met is an onerous duty, particularly if the unrepresented

defendant behaves in an uncooperative manner. While it is readily understandable that judicial officers faced with difficult or recalcitrant defendants might become impatient, the behaviour of a defendant and the impatience that follows must not deflect the judicial officer from that fundamental duty of ensuring that appropriate explanations and opportunities are afforded to the unrepresented defendant which will ensure that the trial is fair. The Magistrate failed in a number of respects to carry out these fundamental obligations.

Jurisdiction

[63] Independently of the fundamental flaws in the proceedings to which I have referred, it is necessary to consider whether the Magistrate had jurisdiction to convert the proceedings from an "oral committal" (identified in the Justices Act as a preliminary examination) to a summary hearing. Both counsel argued that the Magistrate erred in purporting to proceed with a summary hearing without first conducting a preliminary examination and forming relevant opinions based on prosecution evidence presented at such an examination.

[64] In this context regard must be had to the scheme of the Justices Act ("the Act") in connection with "indictable offences". Section 101 of the Act provides that an information made be laid before a Justice where a person is suspected of having committed "any treason, felony, or indictable misdemeanour, or other indictable offence whatsoever, within the Territory

...". There is no definition of "indictable offence", but s 3(1) of the Criminal Code identifies offences of three kinds, namely, crimes, simple offences and regulatory offences. While there is no definition of "crime" in the Code or the Act, s 38E of the Interpretation Act provides that where the penalty for an offence is a period of imprisonment of more than two years, the offence is a crime. Section 3(4) of the Code states that an offence not otherwise designated is a simple offence.

[65] Section 3(2) of the Code provides as follows:

> "(2) A person charged with a crime cannot, unless otherwise stated, be prosecuted or found guilty except upon indictment."

[66] Section 298(1) of the Code requires that where it is intended to put a person on trial for a crime for which the person has been committed for trial, "the charge is to be reduced to writing in a document that is called an indictment." Subsequent sections deal with the form of the indictment.

[67] By this somewhat circuitous route involving the Act, the Interpretation Act and the Criminal Code, it may be concluded that where the Act speaks of an indictable offence it is referring to a crime which, unless otherwise stated in the Act, must be prosecuted upon indictment. An offence of aggravated assault contrary to s 188(2) of the Code is an indictable offence.

[68] As I have said, s 101 of the Act provides that an information may be laid before a Justice charging a person with an indictable offence. Subject to

specific matters later discussed, the procedure for dealing with a person charged with an indictable offence commences with s 106:

> "106. **Preliminary examination where written statements not tendered**
>
> Subject to section 106A, where a person appears or is brought before a Justice charged with an indictable offence and a notice has not been given to that person in accordance with section 105A, the Justice shall, in the presence or hearing of the defendant, and if the defendant so desires, in the presence or hearing of his counsel or solicitor, take the preliminary examination or statement on oath of any persons who know the facts and circumstances of the case, and the defendant or his counsel or solicitor may cross-examine those persons."

[69] Section 105A sets out the procedure to be followed where the prosecutor proposes to tender written statements to the Court as evidence in the preliminary examination and s 106A is concerned with the power to take a plea of guilty without hearing evidence. Subject to those exceptions, read in isolation s 106 would appear to require that where a person is brought before a Justice charged with an indictable offence, the Justice shall conduct a preliminary examination by hearing the prosecution evidence. It is well established that a Justice who undertakes a preliminary examination is not exercising a judicial function. The Justice is exercising an Executive or Ministerial function. If a Magistrate is performing this function, the Magistrate is not sitting as a court exercising summary jurisdiction.

[70] At the conclusion of the prosecution evidence or a preliminary examination, the Justice is required to consider whether the evidence is sufficient to put

the defendant upon trial for any indictable offence: s 109. If the Justice is of the opinion that the evidence is not so sufficient, the Justice is directed forthwith to order that the defendant be discharged on that information.

[71] If the Justice is of the opinion that the evidence is sufficient to put the defendant upon trial, s 109(3) provides alternatives as to the next stage of the proceedings. The Justice may proceed with the preliminary examination in accordance with subsequent provisions found in Div 1 of Pt V. Those provisions are not relevant for present purposes.

[72] If the charge is one of a "minor indictable offence", pursuant to s 109(3)(a) the Justice may proceed in the manner directed and under the provisions contained in Div 2 of Pt V. A "minor indictable offence" is defined in s 4 as an indictable offence which is capable of being, and is, in the opinion of the Justice, fit to be heard and determined in a summary way under the provisions of Div 2.

[73] Division 2 of Pt V contains a number of provisions conferring jurisdiction upon a Magistrate to hear and determine charges of indictable offences in a summary manner. Section 131A of the Act is in Div 2 and provides that the court constituted by a Magistrate has jurisdiction to hear and determine in a summary manner a charge in respect of a number of offences including an offence against s 188(2) of the Code. The first critical question is whether it is a condition precedent to the enlivening of the jurisdiction under s 131A that a preliminary examination be conducted before the Magistrate

determines to proceed by way of summary hearing. The second is whether the jurisdiction can be enlivened without the consent of the defendant.

[74] In considering the issue of a preliminary hearing as a condition precedent it is necessary to consider s 131A in its context and to address the effect of other sections in Div 2 which confer jurisdiction to hear and determine in a summary manner charges of indictable offences.

[75] The relevant sections for present purposes are as follows:

> "***Division 2 – Minor Offences***
>
> **120. Minor offences**
>
> (1) Subject to this Act, the Court constituted by a Magistrate has jurisdiction to hear and determine in a summary manner a charge in respect of an offence against section 210, 219, 221, 224, 227 or 229 of the Criminal Code, or an attempt to commit such an offence, where the value of the property involved does not exceed $5,000.
>
> (2) The jurisdiction conferred by subsection (1) may be exercised whether or not the defendant consents to its exercise.
>
> **121. [Repealed]**
>
> **121A. Offences that may be dealt with summarily**
>
> (1) Subject to section 122A, where –
>
> (a) a person is charged before the Court with an indictable offence;
>
> (b) the offence is either –
>
> (i) punishable by not more than 10 years imprisonment; or
>
> (ii) against sections 210, 213, 228, 229, 240, 241, 243, 245, 246, 247, 251 or 252 of the Criminal Code and punishable by not more than 14 years imprisonment;
>
> (c) in the opinion of the Court, the charge is not one that the Court has jurisdiction, apart from this section, to hear and determine in a summary manner;

(d) the defendant consents to it being so disposed of;

(e) the prosecutor consents to it being so disposed of; and

(f) the Court is of the opinion that the case can properly be disposed of summarily,

the Court has jurisdiction to hear and determine the charge in a summary manner, and pass sentence on the person so charged.

(1AA) The Court may seek from the prosecutor or, if the informant is appearing in person, from the informant, and the prosecutor or informant shall give to the Court, an outline of the evidence that will be presented for the prosecution, for the purpose of enabling the Court to determine whether to hear and determine the charge in a summary manner.

(1AB) A statement made by the prosecutor or informant under subsection (1AA) is not admissible in evidence in a subsequent proceeding in respect of the charge.

(1A) Subject to subsection (1B), a person the subject of a charge referred to in subsection (1)(a) being dealt with in the manner referred to in subsection (1) and who, in respect of the charge, is represented by a legal practitioner, may, at any stage of the proceedings relating to the hearing of that charge, plead guilty to that charge.

(1B) The Court hearing a charge being dealt with in the manner referred to in subsection (1) shall not, in respect of that charge, accept a plea of guilty under and in accordance with subsection (1A) from the person the subject of that charge unless it is of the opinion that it is proper to do so.

(2) [Omitted]

(3) In this section "Court" means the Court constituted by a Magistrate.

122. [Repealed]

122A. Serious or difficult matters not to be dealt with summarily

If it appears to the Court that an offence being dealt with pursuant to section 120 or 121A, having regard to its seriousness, the intricacy of the facts or the difficulty of any question of law likely to arise at the trial or any other relevant circumstances, ought to be tried by the Supreme Court, the Court may conduct a preliminary examination under this Part in relation to the offence.

123. [Repealed]

125. Charge to be reduced into writing and defendant required to plead

(1) When a Magistrate proceeds to dispose of any case under section 120 or 121A, the charge shall, in the case of a parol information, be reduced into writing, and the defendant shall be asked whether he is guilty or not guilty of the charge.

(2) Thereafter the Magistrate shall be the Court of Summary Jurisdiction within the meaning of this Act, and, subject to this Act, the procedure and the powers of the Court shall be the same, and the provisions of this Act shall apply, as if the charge were a complaint for a simple offence under this Act.

126. Witnesses for prosecution may be recalled for cross-examination

When the evidence of any witness has been taken before the Justices constituting the Court, his evidence need not be taken again, but any such witness shall, if the defendant so requires, be recalled for the purposes of cross-examination.

131A. Summary jurisdiction in respect of bodily harm and aggravated assault

(1) The Court constituted by a Magistrate has jurisdiction to hear and determine in a summary manner a charge in respect of an offence against section 186, 188(2) or 189A(1) or (2)(a) of the Criminal Code.

(2) The Court shall not hear and determine in a summary manner a charge referred to in subsection (1) if it is of the opinion that the charge should be prosecuted on indictment.

[76] The three primary sections for consideration are ss 120, 121A and 131A. They are expressed in different terms.

[77] Subject to s 122A, s 120 is a straightforward conferral of jurisdiction with respect to identified offences or attempt to commit those offences where the value of a property involved does not exceed $5,000. Subsection (2)

specifically states that the jurisdiction may be exercised whether or not the defendant consents to its exercise.

[78] Section 120 has existed in various forms since at least the Justices Ordinance 1928. In that Ordinance s 120 conferred summary jurisdiction on a Court of Summary Jurisdiction constituted by a special Magistrate or by any two or more Justices to hear a number of minor offences of dishonesty. Section 122 provided that the Court of Summary Jurisdiction so constituted did not have jurisdiction "to hear and finally determine any charge" unless the defendant consented.

[79] In 1933 s 122 was repealed and replaced by a new s 122 which provided that the jurisdiction conferred by s 120 "may be exercised irrespective of the consent of the accused". Section 122 as enacted in 1933 also contained a proviso to jurisdiction in terms almost identical to the current s 122A.

[80] In 1983 various provisions including s 120 were repealed and s 120 was enacted in terms very similar to the current section. In the Second Reading Speech the Attorney-General, Mr Robertson, made the following statement:

> "A new section 120 is proposed. This new provision sets out those minor offences for which the Magistrates Court has inherent jurisdiction; that is, matters shall be heard before a Magistrate or a JP and there will be no right of trial by jury. Basically, the provision restates the current provision but takes into account the fact that the offences are now dealt with in the Code."

[81] The history of the legislation with respect to s 120 demonstrates that initially a defendant was not deprived of a right of trial by jury. Until 1933

the consent of the defendant was required in order for the summary jurisdiction conferred by s 120 to be enlivened. That situation changed in 1933 when defendants were deprived of a right of trial by jury with respect to those offences falling within the terms of s 120. In those circumstances, it would seem somewhat counterproductive to require that a Magistrate conduct a preliminary examination before the jurisdiction to proceed in the summary manner under s 120 is enlivened. I return to the topic of s 120 later in these reasons in the context of discussing the impact of s 122A.

[82] Section 121A is subject to s 122A and contains a number of conditions that must be fulfilled before jurisdiction under s 121A is enlivened. Those conditions include the requirement that both the defendant and the prosecutor consent to the disposition of the charge in a summary manner. In addition the court must be of the opinion that the case can properly be disposed of summarily.

[83] Significantly, s 121A(1AA) provides that for the purpose of enabling the court to determine whether to hear and determine the charge in a summary manner, the court may seek from the prosecutor an outline of the evidence that will be presented for the prosecution. Subsection (1AA) would have no work to do if the conduct of a preliminary examination was a condition precedent to proceeding with a summary hearing pursuant to s 121A. If a preliminary examination had been conducted, the court would already be in possession of the prosecution evidence.

[84] In addition, s 122A is of significance to the operation of both s 120 and s 121A. In substance, s 122A provides that if it appears to the court that an offence "being dealt with pursuant to section 120 or 121A" should, by reason of seriousness, intricacy of facts or difficulty of any question of law "likely to arise at the trial or any other relevant circumstances", be tried in the Supreme Court, "the court may conduct a preliminary examination" in relation to the offence.

[85] Section 122A is concerned with the procedure after a court has commenced dealing with an indictable offence pursuant to either s 120 or s 121A. It refers to the court reaching a view that an offence "being dealt with pursuant to s 120 or s 121A" should be tried in the Supreme Court (before the 1997 amendment s 122A did not contain the words "being dealt with ..."). In that context, s 122A provides that if the court reaches such a view, "the court may conduct a preliminary examination" in relation to the offence. Provision to conduct a preliminary examination in those circumstances does not sit well with the view that a court has no jurisdiction to deal with an indictable pursuant to s 120 or s 121A unless it has first conducted a preliminary examination to the conclusion of the prosecution evidence. If the conduct of a preliminary examination was a condition precedent to enlivening the jurisdiction pursuant to s 120 or s121A, the Legislature would have provided that if the court, having embarked upon the summary hearing, determined that the matter should be tried by the Supreme Court, the court could "continue" with the conduct of the preliminary examination

in accordance with those sections that apply to the procedure of a preliminary examination after the conclusion of the prosecution evidence.

[86] The provisions to which I have referred point strongly to an intention on the part of the Legislature that subject to the conditions found in ss 120, 121A and 122A, a court constituted by a Magistrate has jurisdiction to hear and determine in a summary manner a charge in respect of offences identified in ss 120 and 121A without first conducting a preliminary examination. Counsel submitted, however, that this view would be in conflict with decisions of single Judges of this Court to which I now turn.

[87] In *Haymon v Deland* (1992) 111 FLR 62, Martin J had occasion to consider the appropriate procedure to be followed before embarking upon a summary hearing pursuant to s 121A. In *Salmon v Chute* (1994) 94 NTR 1, Kearney J also addressed s 121A in the context of s 106A and the power of the Court of Summary Jurisdiction to accept a plea of guilty to an offence falling within the provisions of s 121A. Their Honours were both of the view that it was necessary to conduct a preliminary examination before the jurisdiction to proceed pursuant to s 121A was enlivened. However, their conclusion in that regard was based upon the wording of s 121A at that time which was significantly different from the current wording.

[88] At the time of the decisions in *Haymon v Deland* and *Salmon v Chute*, ss 106 and 109 of the Act contained the same provisions for the conduct of a preliminary examination where a person was brought before a Justice

charged with an indictable offence. In particular, the Justice was required to consider the same question, namely, whether the evidence for the prosecution was sufficient to put the defendant upon trial for any indictable offence. In that context, s 121A included subpar (c) (which was subsequently repealed):

> "(1) Subject to sections 121B and 122A, where
>
> (a) a person is charged before the Court with an indictable offence;
>
> (b) ...
>
> (c) the evidence for the prosecution is, in the opinion of the Court, sufficient to put the defendant on his trial;
>
> ...
>
> The Court has jurisdiction to hear and determine the charge in a summary manner ...".

[89] In the context of ss 106 and 109 and the test to be applied at the conclusion of the prosecution evidence on preliminary examination, s 121A(c) plainly was intended to require the court to hear the prosecution evidence on preliminary examination before the jurisdiction to proceed pursuant to s 121A was enlivened. Significantly, however, s 121A(1) was repealed by the Justices Amendment Act 1997 and replaced by s 121A(1) in its current terms which do not include subpar (c) of the repealed subsection. It is apparent that in the 1997 amendment the Legislature deliberately chose to omit the requirement that before proceeding pursuant to s 121A the court