SUPREME COURT OF QUEENSLAND

CITATION:	*Atherton & Anor v Eaton & Ors* [2019] QSC 66
PARTIES:	**CARRIE MARIE ATHERTON AND RORY GREGORY TAYLOR** (applicants) **v** **MAGISTRATE RODNEY MADSEN** (first respondent) **DETECTIVE SENIOR CONSTABLE CHRISTOPHER EATON** (second respondent) **MAGISTRATE HAYDEN STJERNQVIST** (third respondent)
FILE NO/S:	SC No 5575/18
DIVISION:	Trial Division
PROCEEDING:	Application for a statutory order of review
DELIVERED ON:	22 March 2019
DELIVERED AT:	Brisbane
HEARING DATE:	8 March 2019
JUDGE:	Holmes CJ
ORDER:	**1. The decision of the third respondent to commit the applicant Rory Gregory Taylor for trial is set aside and remitted for further consideration according to law.** **2. The decision of the first respondent refusing to direct that the complainants be made available for cross-examination by the applicant Rory Gregory Taylor's legal representatives is set aside and remitted for further consideration according to law.** **3. The application of Carrie Marie Atherton is dismissed.** **4. The applicant Carrie Marie Atherton is to pay the costs of the second respondent in resisting her application.** **5. The second respondent is to pay the costs of the applicant Rory Gregory Taylor.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – REVIEWABLE DECISIONS – APPLICATION FOR A STATUTORY ORDER OF REVIEW – where the applicants

faced committal proceedings – where the first respondent refused to make a direction that the prosecutor call certain witnesses to enable their cross-examination – where the second respondents committed the applicants for trial without considering the evidence, in the absence of their consent – where the applicants seek review of the decision to refuse the direction and the decision to commit – whether each decision involved error – whether as a matter of discretion relief should be granted

Judicial Review Act 1991 (Qld) ss 20, 30
Justices Act 1886 (Qld) ss 83A, 104, 108, 110A, 110B, 113

R v Australian Broadcasting Tribunal; ex parte Hardiman (1980) 144 CLR 13, cited
Mosquera v Coates and Fagan [2017] QSC 134, cited
Graves v Duroux [2014] QSC 198, cited
Lamb v Moss (1983) 49 ALR 533, cited
Victoria v Sutton (1998) 195 CLR 291, cited

COUNSEL: A Edwards for the applicants
S Carvolth (*sol*) for the first and third respondents
P McCafferty QC for the second respondent

SOLICITORS: Bosscher Lawyers for the applicant
Crown Law for the first and third respondents
Queensland Police Service Legal Unit for the second respondent

[1] The applicants seek orders pursuant to s 30 of the *Judicial Review Act* 1991, setting aside the decision of the first respondent to refuse an application to cross-examine witnesses and the decision of the third respondent to commit the applicants for trial. In accordance with the *Hardiman*[1] principle, the first and third respondents have taken no active role in the application and will abide the order of the court. The second respondent is the arresting officer and acts as contradictor on this application. He accepts that both decisions are reviewable,[2] but opposes the making of orders in respect of them. His principal argument is that if my discretion arises, I should exercise it against interference.

Justices Act provisions

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1 *R v Australian Broadcasting Tribunal; ex parte Hardiman* (1980) 144 CLR 13.
2 Having regard to my decision in *Mosquera v Coates and Fagan* [2017] QSC 134 at [26] and the decision of PD McMurdo J (as his Honour then was) in *Graves v Duroux* [2014] QSC 198 at [3].

[2] Section 110A of the *Justices Act* 1886 provides for the use of tendered written statements in committal proceedings. A magistrate must not require a witness whose statement has been tendered by the prosecution to appear to give evidence unless a direction has been issued under s 83A(5AA).[3] Such a direction may not be given

> "..unless the Magistrate is satisfied there are substantial reasons why, in the interests of justice, the maker should attend to give oral evidence or be made available for cross-examination on the written statement".[4]

A defendant may apply for a s 83A(5AA) direction only after advising the prosecution, amongst other things, of the reasons for seeking the attendance of the particular witness.[5]

[3] Section 110A (6D) and (6E) in combination have the effect that if all the evidence before the magistrate consists of written statements admitted in accordance with s 110A, and the lawyer for the defendant consents to his or her client's being committed without consideration of the contents of those statements, the magistrate must, without deciding whether the evidence is sufficient, order the defendant's committal. Otherwise, s 104(2) requires the magistrate to consider whether the evidence is sufficient to put the defendant on trial, and if so, to follow certain procedures, including asking the defendant whether he or she wishes to say anything to the charge and receiving any evidence the defendant might choose to give. Section 108 then requires the magistrate to consider the evidence adduced and any response by the defendant to the charge; and if the magistrate forms the opinion that it is sufficient to put the defendant on trial, to order committal for trial (or if there is a plea of guilty, sentence[6]).

The evidence on the application for cross-examination

[4] The applicants were charged with entering premises and assaulting the occupants, and had sought to cross-examine the alleged victims of the assault, Mr and Mrs Oliver, and their 18 year old daughter, Amber, who was said to have witnessed it. It was alleged that at about midnight on 16 June 2017, the applicants engaged in what was effectively a home invasion of the Olivers' residence. The evidence which was put before the first respondent consisted of statements and addendum statements by the two complainants

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3 *Justices Act 1886* (Qld) s 110A (3)(b) ('*Justices Act'*).
4 Section 110B (1).
5 Section 110B (3).
6 Section 113.

and Amber. The statement of Amber, as tendered, was incomplete: it was missing its second page.

[5] According to Mrs Oliver's statement, there had previously been some ill-feeling between her and the applicant Atherton. She gave an account of hearing a loud knock at the front door, opening it and seeing Ms Atherton. The latter was holding a wine glass in one hand and a bottle of wine in the other. She lunged at Mrs Oliver with the glass and entered the house, followed by a male wearing a balaclava. At that point, Mrs Oliver screamed to her husband. The male entered the house and went into the bedroom where he engaged in a fight with Mr Oliver. Meanwhile, Ms Atherton threw herself on Mrs Oliver and they fought together on the floor. Mr Oliver managed to force the male out through the front door, and Mrs Oliver similarly was able to push Ms Atherton out of the house. They slammed the door behind them. Mrs Oliver later identified a photograph of the male applicant from a police photoboard.

[6] Mr Oliver, in his statement, said he woke to hear his wife screaming for him. He could see from their bedroom that she was struggling to hold the front door closed against someone on the other side. As he reached the front door, a male wearing a motorcycle mask came through it. He retreated a little, and the two of them ended in the bedroom. He was punched in the head, but also hit back before the pair began grappling. At some stage, the man's mask came off, but he did not see his face. He managed to push him back through the front doorway. Meanwhile, his wife was wrestling in the lounge room with a woman, whom she managed to push to the door. They succeeded in getting both assailants outside, and shut and locked the door. The man's build, Mr Oliver said in his statement, was similar to that of the applicant Taylor.

[7] There is, as I have noted, a gap of a page in the statement of the Olivers' daughter, Amber, as it was tendered to the first respondent. In the pages which were in evidence, she said that she heard noises of banging and smashing glass and what she believed to be the female applicant's voice. She did not see the other person involved. She saw a broken glass and a wine bottle and, on the floor of her parents' bedroom, a balaclava.

The application for cross-examination

[8] The applicants' solicitors wrote to the Queensland Police Service seeking agreement to the calling of the three witnesses. In relation to each, it was said that cross-examination

was sought in order: to gain a proper understanding of the nature of the witness' evidence in relation to his or her memory of the events of the night in question; to avoid the applicants' being taken by surprise at trial in relation to the witness' recounting of his or her version of events; to narrow the issues for trial; to avoid "any Basher [sic] Enquiry"; and to establish a defence. It was said that Mrs Oliver's account lacked detail and required further exploration as well as establishing whether it was confined to an event she had actually seen or heard; that Mr Oliver's account similarly lacked detail and did not mention details in other "statements, including his possession of a weapon"; and that Amber's account contained details missing from other statements, including possession of a weapon by Mr Oliver. The prosecution indicated that it opposed cross-examination. Further statements were taken from Mr and Mrs Oliver who both said, in effect, that they could not add any further detail of the events.

[9] The application was then made to the first respondent, Magistrate Madsen, for a direction under s 83A(5AA). One of the substantial reasons identified for seeking the orders was to cross-examine the complainants and Amber on credibility in relation to their accounts of the events. It was said that Mr and Mrs Oliver had given "significantly different versions" from each other; there were "differing versions" given by Mrs Oliver and Amber as to whether there were weapons present; and there were inconsistencies between what the Olivers had said in their initial accounts to police and their statements. Mrs Oliver had originally alleged that Ms Atherton attempted to "glass" her, but that did not appear in her statement. The basis of asserting that there were inconsistencies between the complainants' accounts seems to have been a recorded account of the incident which Mr and Mrs Oliver gave the police who attended the house immediately after it. Neither the recording nor the part of Amber's statement referring to a weapon were in evidence before the first respondent. A further proposed substantial reason was that the applicant Atherton had given a significantly different version of events in her police interview (although this also was not in evidence) which had not been dealt with in the witness statements. On her account, apparently, she would have a full defence.

[10] In oral submissions before the magistrate, the applicants' solicitor added a new basis for seeking cross-examination: that Mrs Oliver had identified the applicant Taylor from a photo on a Facebook page. While Mr Taylor's DNA had been found in the balaclava, there were two other DNA contributions. There might be a basis for challenge of the

admission of the DNA evidence against Mr Taylor, so that there was more significance to the Facebook identification.

[11] The first respondent observed that the applicants were entitled to know the case against them; however, the witnesses had made it clear that they had given as much detail as they could recall. So far as the applicants sought to cross-examine in relation to the identification issue, his Honour said, at the trial

> "… most barristers would carefully take witnesses through their statements to make sure – their evidence to make sure that the jury, which is ultimately the arbiter of fact, properly understands the nature of case against each defendant, in this case Ms Carrie Atherton and Mr Taylor - an experienced trial judge would be expected to give directions to a jury, to properly instruct them in relation to issues that arise during the course of the hearing which might relate to what I called identification issues, which might relate to versions being given at the time."

[12] In addition, there was the assertion that the applicant Atherton had provided a version which would amount to a full defence. If so, the first respondent observed, she would be acquitted, but there was no substantial reason in the interests of justice for cross-examination. He was unable to discern from the application any reason to allow cross-examination. The prosecution case, his Honour said, achieved the purpose of providing an understanding of the case on which the defendants could be convicted. He refused to make any s 83A(5AA) direction.

The committal for trial

[13] That decision was made in April 2018. In December 2018, the applicants were committed for trial. On that occasion, the third respondent, Magistrate Stjernqvist, was informed by the prosecutor that the committal was not by consent. The solicitor for the applicants said,

> "With respect to a lack of consent, that only extends to the fact that I don't have any submissions to make with respect to the state of the evidence. I don't need to consent for the committal to take place."

He went on to say that he sought to preserve his clients' positions and reiterated that he had no submissions to make in relation to the evidence. The third respondent then proceeded to commit the applicants for trial. It is quite clear that he did not consider the evidence before doing so.

[14] The applicants seek review of the decision in each case on the ground of that failure to consider the evidence. One assumes that they seek to rely on s 20(2)(b) of the *Judicial Review Act*, that the procedures required by law to be observed in relation to the making of the decision were not observed, or perhaps that the decision was made without jurisdiction (s 20(2)(c)). Both those grounds seem to be made out. The solicitor, although not offering any opposition, did not in terms consent to the committal. Sections 104 and 108 of the *Justices Act,* then, required the third respondent to consider the evidence before committing the applicants for trial. There remains, however, the question of whether I should exercise my discretion to make an order quashing the committal decisions, when the evidence before the third respondent was sufficient to demonstrate a prima facie case against each applicant. I will return to that question later.

The refusal to allow cross-examination

[15] The applicants' real concern, of course, is with the refusal to allow cross-examination. It is said that the first respondent failed to take into account material considerations, in the form of inconsistencies in the evidence of material witnesses. But the principal difficulty with the applicants' argument is that the evidence of the supposed inconsistencies was not in fact before the first respondent: neither the recording of the complainants' initial account to the police on the night of the assault nor the relevant part of the witness Amber's statement. The submissions before the first respondent contained a bald assertion that there were inconsistencies, but there was nothing on which his Honour, even accepting that assertion, could have formed any view as to whether they were in fact material inconsistencies. The contention that both Amber and Mrs Oliver had mentioned a weapon in other versions not before the court, entirely without detail as to what the weapon was or what was supposed to have been done with it, did not enable any determination as to whether it mattered so as to warrant cross-examination.

[16] As to Mrs Oliver's supposed failure to mention the "glassing" in her statement, her reference in it to the applicant Atherton lunging at her with a glass would seem to meet most people's description of an attempted glassing. More importantly, having failed to put material before the court to support or illuminate the submission that there were inconsistencies, the applicants can hardly complain that the first respondent expressed

himself unable to discern a substantial reason in this respect. (It was not argued here that Ms Atherton's exculpatory record of interview, relied on in submissions before the first respondent, arguably constituted a substantial reason or had any bearing on this application.)

[17] The position is different, however, in relation to the question of identification. This was important: no one claimed to have got a clear view of the male assailant. According to Mrs Oliver's statement, she had identified him from a police photoboard; but if, in fact, as the applicants' solicitor informed the first respondent, she had done so subsequent to looking at a Facebook page photo, that would put a very different complexion on the quality of the identification. (Again, it is unsatisfactory that evidence of the Facebook identification, which occurred during the initial conversation with police, was not before the first respondent; but the prosecutor on the application did not take any issue with the solicitor's statement that the identification had occurred in that way.)

[18] The first respondent should have considered whether cross-examination on this issue had the potential to cast real doubt on the correctness of the photoboard identification, or at least create a basis for the exclusion of that evidence at trial; because that might well amount to a substantial reason for allowing cross-examination. His Honour's allusion to counsel's examination and directions being given at trial in relation to identification did not address the real question at all. With respect, I consider that he failed to consider a relevant matter in relation to the application to cross-examine the two witnesses who gave identification evidence, Mr and Mrs Oliver. The ground of improper exercise of power (s 20(2)(e) of the *Judicial Review Act*) is thus made out.

Exercise of discretion

[19] That brings me back to the question of quashing the committals and remitting each case for further consideration. As was the case in *Mosquera v Coates and Fagan,*[7] if the committals are not set aside, any referral directing the first respondent to further consider the application for cross-examination would amount to directing him to do something as to which he no longer had any jurisdiction. The second respondent argued, relying on statements in *Lamb v Moss*[8] and *Graves v Duroux,*[9] that the exercise

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7 [2017] QSC 134 at [29].
8 (1983) 49 ALR 533 at 564.
9 [2014] QSC 198 at [3].

of the power to make orders under the *Judicial Review Act* should, where committal proceedings are concerned, be exercised only in exceptional cases. If, in fact, the material before the third respondent was sufficient to warrant committal of the applicants for trial, there was no utility in quashing the decision to commit or remitting it. He pointed to the undesirability of fragmenting criminal proceedings. In any event, in relation to the identification question, it was submitted, there remained the opportunity for a *Basha* enquiry to be undertaken before trial.

[20] In considering the exercise of my discretion, and in particular the utility of making orders, I have had regard to the evidence which was before the third respondent. It was more extensive than that before the first respondent and included both the transcript of the police recording on the night of the assault and the full statement of Amber. In the formerly missing page of the latter document, Amber refers to her father having "a pole or a stick or something" when he was forcing the front door shut, and she identifies Ms Atherton by voice. She says nothing in relation to the appearance of the other person involved, whom, she makes clear later in the statement, she did not see.

[21] In the recording, Mrs Oliver is asked whether she can give a description of the male, given that he had a balaclava on, and she responds

> "because in the fray it's got pulled off… so he is probably about James' [Mr Oliver's] height, probably an inch or two taller, this length hair medium brown. Slightly stocker than my husband would be. Um, slightly English accent I would say. He was wearing a black balaclava with a grey ring around the bottom of it. Dark t-shirt and I think possibly jeans or something. That's…"

The police officer asks if she had seen him before and Mrs Oliver responds

> "I thought it was her old boyfriend Rory. Whose name is Rory Taylor but James thinks it wasn't him. He's not dissimilar in build though."

There is certainly no unequivocal identification at this point.

[22] Mrs Oliver goes on to propose that they

> "check [Ms Atherton's] Facebook page and see who she is in a relationship with now".

It appears from the recording that they find Ms Atherton's Facebook page and on it the only photograph she has posted in the last nine months. The police officer asks if any of the men in the photograph look like the man in question and Mrs Oliver responds

"That one, whoever the fuck he is, I'd say that's him".

A little later she says that it is "Rory", but it is not clear whether that statement is the product of recollection, or information on the Facebook page.

[23] The quality of the identification is plainly very dubious indeed. Had the third respondent considered the evidence for the purpose of committing and had the complainants been given the opportunity to cross-examine Mrs Oliver, in particular, it was not out of the question that her identification evidence could have been shown to be worthless. Mr Oliver's statement that his attacker's build was similar to that of Taylor's would also have been considered in the context of that initial, questionable identification. There was, of course, Mr Taylor's DNA on the balaclava; but there was also the DNA of others. A magistrate would at least have to consider whether that was sufficient evidence on which to commit him.

[24] In the circumstances, I do not think that it can be said that Mr Taylor's committal was a foregone conclusion. The same does not apply to Ms Atherton, in respect of whom there was a clear identification and a relatively strong prima facie case. Accepting that the Court should be hesitant to interfere with committal proceedings, the circumstances in this case – the combination of failures by the first and third respondents properly to exercise their jurisdiction – are, in my view, exceptional, and warrant interference in Mr Taylor's case. (The availability of a *Basha* enquiry to remedy a refusal of cross-examination will not always be a satisfactory answer, particularly given that it has the effect of shifting to the higher courts a task statutorily allocated to the Magistrates Court.)

[25] I consider that my discretion is appropriately exercised in relation to Mr Taylor's application by setting aside the decision to commit him and the decision to refuse cross-examination of Mr and Mrs Oliver, and remitting both decisions for further consideration according to law. Ms Atherton's application will be dismissed.

Costs

[26] The applicant Taylor submitted that the second respondent should pay his costs. The applicant Atherton contended that in her case each party should bear their own costs. It was submitted that this was appropriate because: the amount of time spent arguing her position was not significant in relation to that involved in Mr Taylor's submissions and

the argument in relation to her added nothing to the costs of resisting his application; there were reviewable errors in relation to her, although the discretion was exercised against her; and given her position as a co-accused who had joined in the application to cross-examine, she was properly joined as a party. In this regard, reference was made to a statement in *Victoria v Sutton*,[10] to the effect that a court should require the joinder as a party of any person whose rights or interests may be affected by its prospective order.

[27] The second respondent argued that the applicant Taylor should not have his costs because he had agitated a number of issues but succeeded only in relation to the question of identification evidence, and had not in his written submissions dealt with the important question of whether the committal order should, as a matter of discretion, be set aside. The applicant Atherton should pay the second respondent's costs. Alternatively, it was proposed that Ms Atherton pay half of the second respondent's costs, and there otherwise be no order as to costs; or, as the last position, that Ms Atherton pay the second respondent's costs and the second respondent pay Mr Taylor's costs.

[28] I have concluded that the costs of each application should follow the event. The applicant Taylor was successful on the critical issues, even if his approach did tend a little to the scattergun. So far as the applicant Atherton is concerned, the outcome of Mr Taylor's application could in no way affect her rights so as to make her a necessary party to it (although she might indirectly benefit from his success if it had an effect in diminishing the weight of Mrs Oliver's evidence). Although there were errors in relation to the refusal of cross-examination on identification and the committal without the consideration of all the evidence, they were never likely to attract a favourable exercise of discretion in Ms Atherton's case, because the identification evidence against her personally was so strong and there was an unarguable prima facie case for committal. The question of what costs were necessarily incurred by the second respondent in opposing her application is a matter for a taxing officer, not a question for this Court's consideration.

Orders

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[10] (1998) 195 CLR 291 at [77].

[29] The orders that I make, then, are as follows:

1. The decision of the third respondent to commit the applicant Rory Gregory Taylor for trial is set aside and remitted for further consideration according to law;

2. The decision of the first respondent refusing to direct that the complainants be made available for cross-examination by the applicant Rory Gregory Taylor's legal representatives is set aside and remitted for further consideration according to law;

3. The application of Carrie Marie Atherton is dismissed;

4. The applicant Carrie Marie Atherton is to pay the costs of the second respondent in resisting her application;

5. The second respondent is to pay the costs of the applicant Rory Gregory Taylor.