SUPREME COURT OF QUEENSLAND

CITATION:	*Peter James Agnew v Thacker and Commissioner of Police* [2019] QSC 161
PARTIES:	**PETER JAMES AGNEW** (applicant) **v** **MAGISTRATE ANN THACKER** (first respondent) **COMMISSIONER OF POLICE, QUEENSLAND POLICE SERVICE** (second respondent)
FILE NO/S:	SC No 7204 of 2018
DIVISION:	Trial Division
PROCEEDING:	Application for a Statutory Order of Review
DELIVERED ON:	28 June 2019
DELIVERED AT:	Brisbane
HEARING DATE:	4 March 2019
JUDGE:	Holmes CJ
ORDER:	**The application for review is refused.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – REVIEWABLE DECISIONS AND CONDUCT – REVIEW OF PARTICULAR DECISIONS – where the applicant faces committal proceedings – where the applicant seeks judicial review of two decisions of a magistrate relating to an application for a direction enabling cross-examination of four witnesses pursuant to s 83A(5AA) of the *Justices Act* 1886 – where the first decision was to receive and rely on addendum statements from those witnesses in determining the application to cross-examine them – where the applicant's solicitors wrote to the prosecution seeking consent to the cross-examination of the four witnesses and stipulating that the matters identified in the letter pursuant to s 110B(3) of the *Justices Act* not be used to obtain addendum statements – where the prosecution used the information for that purpose – whether any provision in the *Justices Act* operates to restrict the prosecution's use of information obtained under s 110B(3) – whether the magistrate should have refused to admit the addendum statements on the basis that the prosecution's response was repugnant to, and implicitly prohibited by, the legislative scheme in the *Justices Act* ADMINISTRATIVE LAW – JUDICIAL REVIEW –

GROUNDS OF REVIEW – ERROR OF LAW – IMPROPER PURPOSES – IRRELEVANT CONSIDERATIONS – where the applicant faces committal proceedings – where the applicant seeks judicial review of two decisions of a magistrate relating to an application for a direction enabling cross-examination of four witnesses pursuant to s 83A(5AA) of the *Justices Act* 1886 – where the second decision was a refusal to direct that four witnesses be made available for cross-examination on their statements – where the applicant alleges that the magistrate's decision involved errors of law and an irrelevant consideration and constituted an improper exercise of power – whether the applicant has established any basis for review of the decision under the *Judicial Review Act* 1991

Acts Interpretation Act 1954 (Qld), s 14B(1)(c)
Judicial Review Act 1991 (Qld), s 6
Justices Act 1886 (Qld), s 83A, s 83A(5AA), s 110A, s 110B, s 110C

Accident Insurance Regional Holdings v McFadden (1993) 31 NSWLR 412, distinguished
Australian Broadcasting Tribunal v Bond (1990) 270 CLR 321; 64 ALJR 462, applied
Azzopardi v The Queen (2001) 205 CLR 50; 75 ALJR 931; 119 A Crim R 8, cited
Cameron's Unit Services Pty Ltd v Kevin R Whelpton & Associates (Australia) Pty Ltd (1984) 4 FCR 428, cited
Griffith University v Tang (2005) 221 CLR 99; 79 ALJR 627, applied
Lee v NSW Crime Commission (2013) 251 CLR 196; 87 ALJR 1082; 235 A Crim R 326, cited
Minister for Immigration and Multicultural Affairs v Ozmanian (1996) 71 FCR 1, cited
R v Australian Broadcasting Tribunal; *Ex parte Hardiman* (1980) 144 CLR 13, cited
Sim v Magistrate Corbett & Anor [2006] NSWC 665, considered

COUNSEL: J Hunter QC for the applicant
M D Nicolson for the respondent

SOLICITORS: Gilshenan & Luton Legal Practice for the applicant
Queensland Police Service Legal Unit for the respondent

[1] The applicant seeks judicial review of two decisions of the first respondent, a magistrate: the first, a refusal to order, pursuant to s 83A(5AA) of the *Justices Act* 1886, that four witnesses be made available for cross-examination on their statements at his committal hearing in relation to one count of rape and five counts of indecent assault; and the second, a decision to receive and rely on addendum statements from those witnesses in determining the application to cross-examine them.

[2] The first ground for review is that the decisions involved errors of law by the magistrate in: determining that, because there was no property in a witness, the applicant could not request confidentiality for information given to the Director of Public Prosecutions in relation to his request to cross-examine; finding, on an erroneous view that amendments to the *Justices Act* supported the use of addendum statements, that there was no basis on which her Honour could decline to consider the addendum statements which were obtained; limiting her consideration of what could constitute substantial reasons for allowing cross-examination and failing to consider substantial reasons raised by the applicant; finding that the applicant had not clearly defined the purposes of the proposed cross-examination, when those had been articulated by the applicant's solicitors in a letter to the prosecution; and characterising the defence concern as principally in relation to collusion.

[3] The second ground is that the making of the decisions were an improper exercise of power because the magistrate had failed to take into account all relevant issues and reasons raised by the applicant; and the third is that the magistrate took into account an irrelevant consideration, that there was no property in a witness. There is a final, rather unclear ground which is that

> "The decisions frustrate the statutory scheme for committal proceedings".

[4] The first respondent, in accordance with the *Hardiman*[1] principle, took no part in the proceeding; the second respondent took the role of contradictor.

The Justices Act provisions

[5] The *Justices Act* provides for the admission of written statements from witnesses in committal proceedings, subject to their meeting the requirements of s 110A. Under s 110A(3)(b), the witness must not be required to give evidence in person unless a magistrate has given a direction under s 83A(5AA) that the witness appear to give oral evidence or be made available for cross-examination on his or her written statement. Section 110B(1), however, provides that no direction may be given under s 83A(5AA) unless the magistrate is satisfied that there are "substantial reasons why in the interests of justice" such a direction should be made.

[6] An application for a direction under s 83A(5AA) may only be made if the defendant has advised the prosecution of the names of witnesses, the subject of the application, the general issues relevant to it, the reasons to be relied on to justify the calling of the witness; and a time for the prosecution to respond.[2]

The evidence and the reasons for seeking cross-examination

[7] In the present case, the applicant had practised as a dentist. The witnesses originally sought for cross-examination were two complainants (to whom I will refer as "A" and "B") who had been his employees; his former wife ("C"); a third complainant ("D") who was a friend of C; and the investigating police officer, Constable Ablett. The applicant's solicitors set out in a 30 page letter to the office of the Director of Public Prosecutions details of the topics on which it was proposed to cross-examine each of the

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1 *R v Australian Broadcasting Tribunal*; *Ex parte Hardiman* (1980) 144 CLR 13.

2 Section 110B(3).

witnesses, but it was prefaced by an objection to any of the information's being disclosed to any witness, including Constable Ablett, or being used for the purpose of obtaining addendum statements. It was asserted that the applicant had revealed the proposed topics of questioning "due to legislative compulsion" and that any disclosure might adversely affect him

> "… by warning witnesses of proposed cross-examination, by depriving [him] of the opportunity of seeing how any further evidence from the witnesses comes into existence and by affecting the integrity of any subsequent evidence given by the witness".

[8] A's account was that when she was working as a dental nurse for the applicant in 1980, he had filled a tooth for her, giving her nitrous oxide through a mask in the process. While she was under the influence of the gas, he tried to unzip her uniform. A friend who had come to the practice to meet her entered the room, and interrupted what the applicant was doing. On a later occasion when A was closing the surgery in the evening, the applicant forced her to the floor, pulled down her underwear and raped her. Afterwards, he told her that if she said anything about it he would "blacklist" her. In her statement, A said that she had not told anybody what had happened until a recent occurrence that had brought it all back to her, following which she reported it to the police. Other details in her statement were that prior to these events, the applicant had unexpectedly visited her at a flat which she shared with two other young women and that the applicant had told her that prior to having children, his wife used to meet him at the door naked. In 2016, A went, on a pretext, to the applicant's surgery wearing a listening device and raised the issue of his behaviour to her, without eliciting any admissions. In the course of doing so, it seems, she spoke of a conversation with B, whom she had met at a party, in which B had revealed that much the same had happened to her.

[9] The letter from the applicant's solicitors sought cross-examination of A as to when she had made her complaint and what had prompted it; how the applicant was able to undertake the replacement of the filling without assistance and why A was prepared to let him undertake the work unchaperoned; what was said to be an inconsistency with the account of one of A's flatmates, that in fact the applicant arrived at their flat at a time when A was not at home; how the nitrous oxide was administered through the use of a mask, the defence claiming to have contrary evidence that a nosepiece was used for the purpose; the impact of the nitrous oxide on A, compared with its effect on B in a similar procedure, and the evidence of the friend who arrived to meet A as to her condition; alleged inconsistencies with the evidence of the friend; whether A's uniform in fact had a zip, as to which the applicant claimed to have contrary evidence; the layout of the practice, of which she had drawn a diagram, which, it was suggested, was inaccurate, according to evidence which the defence possessed; the blacklisting conversation; the conversation about the applicant's wife meeting him naked; a reference in the pretext encounter to the applicant's being like a previous employer, on the basis that it suggested that A might have made previous complaints about employers, which, it was asserted, would go to her credit; and, finally, A's encounter with B and the conversation between them, which A's statement did not detail.

[10] The reasons justifying cross-examination were summarised as: clarification of the evidence to avoid the defendant being taken by surprise at trial; the prospect that it would substantially undermine A's credit; the fact that (it was claimed) she had made

inconsistent statements; that the matters for cross-examination might go to the exercise of judicial discretion, including the exclusion of evidence; that it was necessary to gain a proper understanding of the case; that the witness was an alleged sexual assault victim and had been vague about the details of the incidents; and that it was intended to explore a significant claim made by her without explanation or justification. All of these were expressed in general terms and appear to have been extracted from case law. There was no attempt, for example, to identify what significant claim A was said to have made without justification or what inconsistent statements she had made.

[11] B's statement said that she had worked as a dental nurse for the applicant in 1977. His wife, C, sometimes helped in the surgery. He had often purported to bump into B, in the process touching her breasts and her bottom, and while treating patients would move his hands up between her legs. She described her uniform as having a zip up the front. On one occasion, she said, the applicant asked her to help him in testing the equipment for nitrous oxide application, but she refused. B told her mother what was happening and on her advice gave up work. When she told the applicant that she was leaving, he responded by telling her that she was fired. She did not see the applicant again, but on her wedding day three years later she saw that C (whom she referred to by the name the latter took on re-marriage, after divorcing the applicant) was standing outside the church, although she was not an invited guest. B had not revealed anything of what occurred, other than to her mother, until she was approached by police in 2017.

[12] The applicant sought to cross-examine B about: the circumstances of her leaving his employment, suggesting that the defence had evidence that her employment was terminated for different reasons; the way in which nitrous oxide was administered at the practice, and whether its use had begun before she was employed; when, precisely, she claimed to have been assaulted; how the applicant was able to put his hands up between her legs, given the position in which each stood during a dental procedure; whether the uniform did indeed have a zip; A's claim that B had disclosed the applicant's conduct to her at a party, which would go to B's credit, since she said she had revealed it to no-one but her mother, and what was said to be C's assumption when she spoke to the police that B had made a complaint; and how she knew C's altered surname, which might lead to an inference that there was collusion between B and C. The reasons given for seeking cross-examination were again expressed at a general level: clarification of evidence to avoid surprise; undermining of credit; and the desire to gain a proper understanding of the case being advanced.

[13] C, the applicant's former wife, gave details in her statement of various forms of abuse she had allegedly experienced during her marriage to the applicant. In 1987, just after she left the applicant, the witness D, a long-time friend, told her that the applicant had sexually assaulted her at his surgery and on an occasion when he was driving her to C's family's house at the Gold Coast. C had subsequently divorced the applicant. She recalled a junior dental nurse with the same first name as B, but a different surname, working at the practice. Over the period of that person's employment at the practice, her disposition changed from agreeable to irritable, a change that C also observed in other dental nurses working there. The applicant told her that he had sacked this nurse because she was using drugs. C had gone to the church on the young woman's wedding day and recalled that the latter seemed shocked to see her.

[14] The applicant wished to cross-examine C about: whether she had suffered from alcohol-induced psychosis; her animosity to the applicant; alleged false accusations she had

made against him, of sexual abuse of herself and of one of their children; sexual abuse allegations against other relatives in respect of her daughters; her contact with B; an incident in which, according to D, the applicant had sexually assaulted D in the kitchen of C's family's Gold Coast house while C was present; another incident in which D alleged that the applicant had ejaculated over his wife while she was drunk and unconscious; whether C had had contact with A and B before speaking to the police, which might indicate collusion between them; whether she had told her daughters prior to speaking to the police that the applicant had sexually abused his dental nurses; her recollection of the dental nurse uniforms and of the application of nitrous oxide; and the circumstances in which any dental nurses had their employment terminated. The reasons given, again in general terms, were clarification of evidence to avoid surprise; the potential for undermining credit; the fact that (it was alleged) C had made inconsistent statements; that the matters for cross-examination might lead to the exclusion of evidence; the need to gain a proper understanding of the case; and the exploration of a significant claim made without explanation or justification.

[15] D had been a friend of C's since their school days. She said that in 1979, the applicant undertook to drive her from her workplace to C's family home at the Gold Coast, but said that he had to stop at his surgery. At his suggestion, she got into a dental chair to read a magazine while he attended to some equipment. He came from behind her and put a mask over her face, telling her she would enjoy what was going to happen. There was some form of emission from the mask, but D did not think that she was affected by it. She resisted and shook the mask loose. The applicant put his hand under her blouse and used his hands and knees to pin her down. He then put a hand up her skirt and touched her genital area over her underwear. At some point he stopped, apologised and said that his behaviour had to do with his wife's pregnancy. Then, however, he unzipped his trousers and pulled out his penis, inviting D to suck it. She said that she would get a taxi, but he insisted on driving her to the Gold Coast house, and she allowed him to do so. On the way, he talked about sex and at one point stopped the car, described how he would have sex with her, and tried to kiss her. D resisted, and he seemed to be defeated by the confined conditions of the car. He resumed driving to the Gold Coast, telling her not to tell anybody what had happened. The following morning, while she was talking to C in the kitchen, the appellant, purporting to get a bowl out of a cupboard, ran his hand up her leg and grabbed her on the crotch before squeezing her bottom.

[16] On a later occasion, D's statement said, there was a party at which she and C fell asleep in beds next to each other, after having a good deal to drink. She was woken by the applicant kissing her, with his hands on her breasts. He apologised and said that he thought she was his wife. He then moved to the other bed and proceeded to masturbate and ejaculate on C. After that event, D distanced herself from C and her family and, if she saw C, made sure the applicant was not present. In 1987, a policeman approached her in relation to a complaint which had been made about the applicant. She agreed to be interviewed, but the following morning she received a call from the applicant, who told her to keep her mouth shut, and she decided not to make any complaint. Very shortly after, an employee of the applicant, whom she had met on a number of occasions, telephoned her and said that she had hoped she had not made up lies about the applicant. In 2016, however, when D was spoken to by a police officer, she revealed what had happened.

[17] The applicant sought to cross-examine D about the incident in which the applicant put a mask over her face; her statement that whatever was administered did not affect her and the possibility that the similarity in her complaint to A's indicated some collusion; the circumstances of the assault which took place in the applicant's kitchen while she was talking to his wife; why she agreed to drive with him after the assault at the surgery and why she did not attempt to escape from the car while it was pulled over; her statement that she had distanced herself from C and her family, to which the defence claimed to have contrary evidence; the contact from the police in 1987, of which the police had no record; claimed contrary evidence to her account of having received phone calls from the applicant and his former employee; and her relationship with C and whether there was collusion between them. The justifications for cross-examination were identified, again without detail, as: clarification of evidence to avoid surprise; that D had made inconsistent statements; the possible undermining of credit; the need to gain a proper understanding of the case; and the contention that the witness was an alleged sexual assault victim who had been vague about details.

The addendum statements

[18] Notwithstanding the defence adjuration not to seek further statements on the basis of what was communicated about the subjects for cross-examination, the prosecution did use the information for precisely that purpose. Constable Ablett took a series of addendum statements dealing with the matters the applicant's solicitors had raised. Before they were provided to the defence, a lawyer from the office of the Director of Public Prosecutions advised the solicitors that the Crown would not consent to the application to cross-examine, resulting in the filing of the application for a s 83(5AA) direction. Subsequent to the filing of the application, the addendum statements were provided to the applicant.

[19] Addendum statements were obtained from A and her de facto husband, which explained how and when she had come to make her complaint. A gave further details of the nitrous oxide mask and the uniform she wore. Her recall of the encounter with B was that it had occurred before her, A's, rape by the applicant. She had met B at a party and finding that B had worked for the applicant, asked whether she thought he was "creepy". B responded that he was "handsie". That was the end of the conversation.

[20] B's addendum statement also described the apparatus for administering the nitrous oxide and the design of the uniform she wore. She said that she could not be more precise about the date on which the assault had happened. She had no recall of meeting A, and she had not spoken to anyone other than her mother about what had happened to her. She gave details of what C had said to her when she saw her on her wedding day, and said that she had not had any other contact with her.

[21] C in her addendum statement said that she could not recall precisely what D had told her but was able to say that the first disclosure was made to her about 1988, when D revealed that the applicant had tried to use gas on her at the surgery and attempted to have sex with her when he was driving her to the Gold Coast house. C did not recall D mentioning the sexual assault at the house in that first disclosure, but she was told about it later. She, C, did not recall that incident. She did not recall anyone with B's name working at the practice, and she did not believe she had any contact with A. C described the dental nurse uniform consistently with the description given by A and B.

[22] D gave two addendum statements. In the first, she said that she believed that C may have been further away from her during the incident of the kitchen assault than she had originally described. She was standing behind a bench, so C would not have been able to see below her waist. She did not know anyone with A's or B's name, and did not believe she had had contact with them. She was not able to describe what was used to administer the gas, although she was sure it was a mask. D gave a list of the people to whom she had talked about the assaults.

[23] After the delivery of the addendum statements, the applicant's solicitors wrote again to the office of the Director of Public Prosecutions, expressing some indignation and an intention to submit to the court that the application should be determined without regard to the addendum statements. That letter also indicated an intention to amend the application to include further cross-examination topics, which were: the contact A, B, C and D had had with the police since December 2017; in relation to A, her knowledge of C's name and C's daughter's name, her disclosure of her complaint to any others, her evidence about the dental uniform and the nitrous oxide mask, and her contact with B in the conversation at the party; in relation to B, the same alleged conversation; in relation to C, her knowledge of the dental nurse whom she described as having the same Christian name but different surname from B; and relation to D, her evidence about the nitrous oxide mask and her disclosure of the alleged sexual assault at the Gold Coast. Another investigating police officer, Constable Melit, was added as a witness of whom cross-examination was sought. (No purposes for the cross-examination or matters said to amount to substantial reasons were identified, but it was implicit that those advanced in the solicitors' previous letter were relied on.) An amended application was then filed annexing the further letter.

The decision to receive the addendum statements

[24] At the hearing of the application, counsel for the applicant contended that the magistrate, the first respondent, should not receive the addendum statements. Her Honour adjourned to read the material handed up, including those statements. On her return, she referred to her impression from the material that the applicant's focus was on the possibility of collusion. Counsel expressed concern that the magistrate had given her preliminary view on the basis of the addendum statements. There was then an exchange between the bench and counsel as to whether the statutory framework permitted the prosecution to investigate further, because, on the applicant's contention, that was to negate the right to silence.

[25] In her decision, the magistrate dealt with the objection in the solicitors' first letter to any of the material being disclosed or addendum statements taken. Her Honour observed:

> "Of course, this must be ignored by the prosecution as there is no property in witnesses. The Justices Act amendments support the use of addendum statements and more importantly, the prosecution have a duty to fairly and objectively obtain all relevant and lead all admissible evidence to the court including any mitigating circumstances. Defence have no authority to limit the prosecution work in the way claimed by the applicant. Consequently, there is no basis in this case upon which the court could decline to consider the addendum statements collected by the prosecution."

The challenge to the decision to receive the addendum statements

[26] The magistrate's decision to consider the addendum statements for the purpose of deciding the application to cross-examine, cannot, in my view, be characterised as a decision "made … under an enactment". It did not

> "… confer, alter or otherwise affect legal rights or obligations"[3]

and it was not

> "… final or operative and determinative, at least in a practical sense, of the issue of fact falling for consideration."[4]

It might, however, be regarded as reviewable conduct within the meaning of s 6 of the *Judicial Review Act* 1991. So, for example, in *Australian Broadcasting Tribunal v Bond*, Mason CJ (with whom Brennan and Deane JJ agreed) observed that a decision-maker's refusal of an application of an adjournment in an administrative hearing would not constitute a reviewable decision, but it might constitute conduct engaged in for the purpose of making such a decision.[5] His Honour went on to say that a challenge to conduct was

> "… an attack upon proceedings engaged in before the making of the decision."[6]

In *Minister for Immigration and Multicultural Affairs v Ozmanian*,[7] Sackville J considered that the language which Mason CJ used in *Bond* suggested a view that

> "… conduct overtaken by a subsequent decision is not independently reviewable, but should be considered in the context of review of the decision itself."[8]

[27] Counsel for the applicant suggested that the erroneous (in his submission) receipt of the statements should be regarded as an error of law in the making of the decision to refuse cross-examination. The contention was that the magistrate had erred in regarding as ineffective the limits which the applicant's solicitors' letter sought to impose on the use of the information provided. This was because, it was submitted, the amendments to the *Justices Act* which created the legislative scheme for dealing with applications for cross-examination (to be found in s 83A, s 110A, s 110B and s 110C) could not work effectively if police were permitted to behave as they had in this case, using the information provided for other purposes. In circumstances where nothing in the *Justices Act* expressly abrogated the right to silence, the prosecution should not be permitted to take advantage of a defendant's disclosure of his defence for the purposes of a s 83A(5AA) application.

[28] If the applicant were to be taken to have impliedly waived his right to silence by communication of information in this way, it was for the limited purpose of the application to cross-examine; the information should not be regarded as available for

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3 *Griffith University v Tang* (2005) 221 CLR 99 at [89].
4 *Australian Broadcasting Tribunal v Bond* (1990) 270 CLR 321 at 337.
5 *Australian Broadcasting Tribunal v Bond* (1990) 270 CLR 321 at 337-338.
6 *Australian Broadcasting Tribunal v Bond* (1990) 270 CLR 321 at 342.
7 (1996) 71 FCR 1.
8 At 23.

further investigation. Reliance was placed on the decision of the New South Wales Court of Appeal in *Accident Insurance Regional Holdings v McFadden*.[9] In that case, Kirby P had observed in respect of waiver of privilege against self-incrimination

> "Nevertheless, as with any waiver, it is necessary to define with some precision what is waived. It will be rare that a person is taken to have waived all rights and privileges in respect of any prosecution for any offence arising out of circumstances only generally defined. The point of difficulty will be presented by the definition of the subject matter of the waiver. This will require assessment of the reasonable interpretation to be placed upon the conduct of the witness said to amount to the waiver."[10]

[29] For those reasons, it was said, the magistrate had made an error of law in receiving the statements. As to quite what the contended-for error was, the broad contention was that the magistrate should not have received the addendum statements because they were obtained in a way which conflicted with the statutory regime. Counsel did not disagree with the proposition that this must be an argument that there was some prohibition on receipt of such statements to be implied into the relevant *Justices Act* provisions, although, it must be said, he did not advance that argument with any conviction.

[30] More specific errors were alleged. It was said that the magistrate had taken an irrelevant consideration into account, that there was no property in witnesses, in concluding that the prosecution was obliged to ignore the caveat contained in the solicitors' letter. Her Honour had erred in law in concluding that the *Justices Act* amendments supported the use of addendum statements, when such statements were not the subject of any reference in those provisions. Although s 110A(3)(a) obliged the magistrate to admit a statement tendered by the prosecution as evidence, that obligation existed only in relation to the committal proceeding itself, not for the purposes of an application for witnesses to be made available for cross-examination.

Conclusions in relation to the admission and consideration of addendum statements

[31] In the present case, there was some disclosure in the letter to the prosecution of the applicant's likely lines of defence, but it seems to have been largely gratuitous. Unparticularised assertions that the applicant had "contrary evidence" as to various matters could hardly be said to cast doubt on the relevant witnesses' accounts; nor could they be expected to have much weight in the assessment of whether the cross-examination would serve a legitimate purpose. To the extent that the cross-examination was directed to alleged weaknesses in the prosecution case, in the form of inconsistencies inherent in witness statements or as between witnesses, it was unnecessary to disclose any part of the defence.

[32] But assuming that it was necessary to reveal a line or lines of defence, the question is whether the magistrate should then have refused to admit the further statements on the basis that the prosecution's response was repugnant to the legislative scheme. The solicitors' letter actually objected to two things: disclosure to prosecution witnesses of the information provided and the obtaining of further statements. As to the former, there might be a concern that the evidence of the lay witnesses would be influenced by

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9 (1993) 31 NSWLR 412 at 420-424.
10 (1993) 31 NSWLR 412 at 420-424.

learning that there was contention as to what they said. (That could not be true of Constable Ablett, self-evidently, since her evidence did not go to the alleged offending but to its investigation, and the objection in relation to her receiving the information could only relate to her use of it to obtain the further statements.) But there was no evidence that the applicant's information was furnished to any of those witnesses or even that they were advised that he had made contrary assertions, as opposed to their being asked to elaborate on matters to which he had, unknown to them, adverted. The magistrate enabled exploration of the question of what the witnesses were told, directing that the two investigating officers be made available for cross-examination on their investigation, particularly in relation to their contact with the witnesses. But in the absence of any evidence that the applicant's information was passed on to the lay witnesses, there can be no suggestion that the magistrate should have considered disclosure of it as an aspect of police conduct relevant to her exercise of the discretion to receive the statements.

[33] What is really in issue is the magistrate's view, formed in the course of deciding to receive the addendum statements, that it was permissible and appropriate for Constable Ablett to obtain those statements to meet some of the points raised by the defence. The complaint of the applicant was that it amounted to using the disclosure of his defence required by s 110B(3) against him by obtaining the statements and thus rendering the proposed cross-examination of A, B, C and D unnecessary. He correctly pointed out that there is no express abrogation of the right of silence in the relevant provisions of the *Justices Act*.

[34] Section 110B(3) requires a defendant who seeks to cross-examine to advise the prosecution of the general issues relevant to the making of the application and the reasons to be relied on to justify the calling of the relevant witness. To do so may reveal, perhaps very generally, or possibly in specific terms, a contemplated line of defence. The right not to disclose one's defence may be regarded as falling under the umbrella of the right of silence, which is not a single principle but a group of rules of varying origin.[11] A person who chooses to exercise the right of silence may face adverse consequences as a result; which led Gleeson CJ in *Azzopardi v The Queen* to point out that it was better characterised as an immunity than as a right.[12] Section 110B(3) has some similarity in its effect to the requirements that a defendant give a notice of alibi and disclose expert evidence in advance of trial; the defendant may have to choose whether to retain the advantage of what Gleeson CJ described as an immunity or to relinquish it by volunteering information in order to achieve a different advantage; in this case, the opportunity to cross-examine prior to trial.

[35] Counsel for the applicant suggested, on the strength of the statement in *Accident Insurance Regional Holdings v McFadden,* that any waiver of the right to silence in provision of the information should be regarded as limited to provision for the sole purposes of consideration of the cross-examination application. But it seems to me that *McFadden* is concerned with the effect of a waiver of the right of silence in a particular context: the provision of information in that context is not to be taken as indicating that the right is to be foregone in other contexts. It is not concerned with the use which may be made of the information provided when the right is waived. So in the present case,

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[11] *Cameron's Unit Services v Whelpton* (1984) 4 FCR 428 at 422; *Azzopardi v The Queen* (2001) 205 CLR 50 per Gleeson CJ at 57; *Lee v NSW Crime Commission* (2013) 251 CLR 196 per Gageler and Keane JJ at 313.

[12] *Azzopardi v The Queen* (2001) 205 CLR 50 per Gleeson CJ at 58.

for example, the applicant could not be taken to have abandoned his right to refuse to answer police questions simply because he had been prepared to provide information indicating the nature of what he might say in his own defence. But that says nothing as to whether and how the prosecution could use the information provided.

[36] The question is whether anything in the *Justices Act* operates to restrict the use which the prosecution may make of information obtained under s 110B(3). The statute is silent as to any such constraint; the argument the applicant makes is that permitting the use of the information to obtain further statements is in some way so inimical to the reasons for which the regime was introduced that it should be regarded as implicitly prohibited. Section 14B(1)(c) of the *Acts Interpretation Act* 1954 permits consideration of extrinsic material

> "… to confirm the interpretation conveyed by the ordinary meaning of the provision".

The ordinary meaning of s 110B(3) is that the applicant, if he or she wishes to convince the prosecution or the court of substantial reasons for allowing cross-examination must provide the necessary information. The applicant must contend for a different reading, which adds an implication as to a limit to be placed on the use of that information. That is a very difficult argument to make and it is not one which seems to me to be supported by anything in the statute itself, or looking further afield, pursuant to s 14B, the explanatory notes or second reading speech for the Bill.

[37] In the second reading speech for the 2010 *Civil and Criminal Jurisdiction Reform and Modernisation Amendment Bill* which brought about the relevant amendments to the *Justices Act*, the Attorney-General said of committal hearings that

> "… used appropriately they can help to clarify issues, refine charges, negotiate pleas and identify weak cases. However, unfettered access in all cases cannot be sustained because it is inefficient and ineffective".

He went on to observe that the reforms were designed to make committals "more useful and productive" and that requiring justification for committal hearings could

> "… ensure that parties turn their minds to issues at an early stage".

[38] The Explanatory Notes to the *Civil and Criminal Jurisdiction Reform and Modernisation Amendment Bill* 2010 give as one of its objectives "[to] streamline the committal process". It is noted on the basis of High Court authority that the principal purposes of the committal hearing are to ensure that the defendant is not put on trial without sufficient cause, to allow the defendant to learn the case against him or her; and to marshal the evidence into written form.[13] Reference is made to the fact that the Bill is based on the New South Wales legislation and to the principles set out in respect of that legislation in *Sim v Magistrate Corbett & Anor*,[14] in which Whealy J identified some matters which might amount to substantial reasons. They include, that cross-examination may result in the applicant's discharge or a "no bill"; that it may substantially undermine the credit of a significant witness; that it is necessary to avoid the defendant being taken by surprise at trial; or that it concerns a matter which could

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13 Explanatory Notes at 5.

14 [2006] NSWC 665 at [20].

give rise to a discretion to reject evidence at trial. The judgment is quoted at length in the Explanatory Notes, including this passage:

> "The reasons advanced must have substance in the context of the committal proceeds, having regard to the facts and circumstances of the particular matter and the issues, which critically arise or are likely to arise in the trial".[15]

[39] Nothing in the second reading speech description of the aims of the legislation, of achieving greater efficiency, effectiveness and an early focus on the issues, or the Explanatory Notes' identification of the objective of streamlining the committal process, the purposes of a committal hearing, and the matters which may constitute substantial reasons, suggests that obtaining further statements which might obviate the need for cross-examination is inconsistent with the statutory regime. To the contrary, the obtaining of such statements may reduce the matters at issue and clarify the case the defendant has to meet, in a way consistent with the stated aim of streamlining the process. The extrinsic material supports giving the amending provisions their ordinary meaning.

[40] And the amendments to the *Justices Act* regarding applications for s 83A(5AA) directions do not suggest that the magistrate's ability to receive statements is to be curtailed by considerations of whether they have been produced against the defendant's expressed wishes in a context such as this. Section 110A makes it clear that, in the normal course, a magistrate must admit a statement tendered by the prosecution; the exception is where a s 83A(5AA) direction has been made. Such a direction is given requiring the calling of

> "… the maker of the written statement which has been tendered or is to be tendered by the prosecution".

It is difficult to see how a magistrate could properly determine the issue of whether the maker of a written statement ought to be called to attend before the court to give evidence or be cross-examined on his or her statement without being apprised of the content of that statement. The fact that s 83A(5AA) is premised on a witness' having made a statement and requires consideration of whether he or she should be cross-examined on it warrants the conclusion that the magistrate was not only entitled to receive the addendum statements, but in order to make a determination of whether substantial reasons existed for the calling of the witnesses, needed to receive them.

[41] The applicant argued, however, that the magistrate erred in deciding to receive the statements by taking into account a consideration which was said to be irrelevant, that there was no property in a witness. In my view, the magistrate was doing no more than indicating that the defence had no right to say what might or might not be asked of a witness. If I am wrong about that, the observation in any event appears to have been entirely inconsequential. There was no legal basis for the applicant to place limits on the use of the information. The magistrate's comment that the amendments to the *Justices Act* "… support[ed] the use of addendum statements" seems to be an over-statement. It is not completely unfounded: those amendments do not preclude the use of addendum statements, and on the view I have taken, given the focus in s 83A(5AA) on the calling of the "maker of the written statement", they support the placing of all relevant

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15 At [20], quoted in the Explanatory Notes at 7.

statements before the magistrate. However, assuming there to have been a misreading of the relevant provisions by the magistrate, it was still the case that the statements were appropriately received by her in order to consider the application. I would conclude that the decision to receive the statements should not be set aside because it was the inevitable and correct decision.

The application to cross-examine

[42] Before the magistrate, counsel indicated that the substance of the application for a s 83A(5AA) direction was contained in the solicitors' letters, saying that they revealed exactly what the applicant sought to cross-examine about, and the reasons for the application. The magistrate adjourned to consider the material and on resuming court, observed that from her reading of it, the main concern of the applicant was there might be some collusion between the witnesses or between the witnesses and police. She could not see evidence of collusion, but rather that there were different versions of various events which were jury issues and exploration of them would merely be fishing. Counsel demurred and, invited to address on the subject, referred to the recorded conversation with C, in which she offered to speak to D and the police agreed to her doing so.

[43] As to the subject matter of cross-examination, counsel submitted that it was not limited to collusion and invited the magistrate to look at the detailed contents of the two solicitors' letters. He identified various examples of areas for cross-examination, such as the apparent inconsistency between A and B as to whether there had been a conversation about their experiences with the applicant. He suggested that cross-examination of D about the mask might undermine her credit and it might also enable the applicant to properly understand the case against him. At this point, the magistrate observed that none of these matters went beyond what was contained in the original letter and queried whether there were new points. Counsel answered in the negative and continued to outline other areas of cross-examination to which his instructing solicitors had adverted in their letter.

[44] Counsel then turned to the decision in relation to the two investigating officers. He sought to cross-examine Constable Melit about any conversations with B, from whom he had taken a statement, and to establish the terms of her complaint. The magistrate suggested that the matter might best be resolved by counsel writing down the questions he wished to ask. She observed that he was struggling to formulate the question he wanted to ask Melit. Counsel reiterated that he wanted to ask about the terms of the complaint and other conversations with B, and also whether they were recorded in writing or electronically. He went on to point out that the statute did not require him to identify actual questions, to which the magistrate responded that it would assist in clarifying matters, because the letter did not.

The decision to refuse the application for cross-examination of A, B, C and D

[45] In her decision, the magistrate outlined the content of the relevant witness' statements. Her Honour noted that the applicant had written what she (fairly) described as, "a very lengthy and cumbersome letter" to the prosecution, seeking extensive cross-examination. She went on to say that she understood the principal concern of the defence to be that there might be some collusion between witnesses to have the applicant prosecuted or some failure in the police investigation to deal with that

concern. Her Honour acknowledged that more recent conversations between C and D might give rise to such a concern as to collusion between them but the likelihood was reduced by the fact that before they had occurred the investigation had already been conducted and statements taken, with the applicant charged. There was no evidence of collusion between C and A. The only evidence which could point to collusion was a matter of inference arising from the hostility between the appellant and C, but the question was whether it was necessary to permit cross-examination at the committal stage to ensure a fair trial.

[46] The magistrate noted that the applicant wanted to cross-examine the witnesses on a large amount of detail. Her Honour gave examples: the timing of the alleged indecent assault on A; his presence at her flat; the details of the assault on D in the kitchen; the use of nitrous oxide; the termination of nurses' employment and the blacklist threat made to A; the layout of the applicant's dental practice; various comments the applicant was said to have made to the complainants; possible connections between the witnesses and other potential witnesses; and the dental nurse uniform. She concluded, however, that the statements provided sufficient detail of the case that the applicant faced. Extraction of further detail of the complaints through cross-examination would not raise any reasonable prospect of a tenable submission that the evidence was insufficient to put the applicant on trial and would not assist in narrowing issues at trial.

[47] Nor did her Honour consider it likely that the proposed cross-examination would be likely significantly to undermine the credibility of the witnesses, or raise information that could otherwise take the applicant by surprise if it were not discovered before the trial. Her Honour continued:

> "The best cross-examination would achieve is to merely test the witness' versions of events and opportunity for a full dress rehearsal for the trial. I find the declared intentions of the applicant are really a fishing expedition based on speculation about possible collusion between the witnesses. The application insofar as it relates to these witnesses has not clearly defined the purpose or purposes of the cross-examination it seeks or what would be achieved by cross-examination. I pressed counsel for the defence a number of times to positively identify some purpose or purposes to cross-examination here, and he was unable to do so."

Her Honour declined to permit cross-examination of A, B, C and D, but did conclude that, given a vacuum in the evidence as to how the investigation was undertaken and whether police had endeavoured to prevent collusion, cross-examination of the two investigating police officers should be allowed.

The challenge to the refusal of the application

[48] The applicant identified what he said were the following errors in the magistrate's decision to refuse to make a direction requiring cross-examination. The first was that her Honour had limited her consideration of the possible purposes of cross-examination which might amount to substantial reasons for allowing it, and failed to recognise that in a historical case it was "often only in the detail of the allegations" that a defence could be identified. Thus, if the prosecution brief did not provide sufficient details about matters such as the layout of the practice, how the nitrous oxide was administered and whether the complainants were known to each other, he was entitled to cross-examine

in order to learn what the prosecution case was. The magistrate had not alluded specifically to some matters identified in the case law, the one relied on being the defence entitlement to gain "a proper understanding of the prosecution case".

[49] Next, it was said that the magistrate had erred in her conclusion that the application had not clearly defined the purpose of the proposed cross-examination or what it would achieve; particular reference was made to her remark that although she had pressed counsel a number of times to identify the purpose, he was unable to so. The magistrate had not in fact asked counsel to identify a purpose but complained instead that he had not asserted the purpose beyond those identified in the letter and would not tell her what specific questions he intended to ask. To the contrary, the applicant said, the solicitors' letter had articulated the purposes of the proposed cross-examination. The magistrate's view that the purpose was not clearly defined amounted to an irrelevant consideration.

[50] Then, it was said, the magistrate had erred in characterising the applicant's principal concern as the possibility of collusion, when in fact he had identified as a more significant concern the virtual absence of notes or recordings of conversations between police and A, B, C and D. Finally, the applicant contended that for all those reasons the decision constituted an improper exercise of power because the magistrate had failed to take into account all relevant factors.

Conclusions as to the decision to refuse the application

[51] It was not incumbent on the magistrate to set out an exhaustive list of matters which might amount to substantial reasons. It was however, necessary for her to identify and deal with those matters actually relied on. Her Honour addressed matters raised: the prospective effect of cross-examination on witnesses' credibility, narrowing the issues, and eliminating the risk of surprise or providing the basis for a submission against committal. Articulating specific matters on which the defence sought to cross-examine, she concluded, in light of the detail already provided in the statements, that the desire to explore those matters further did not amount to substantial reason; a view which was open to her. The particular purpose for cross-examination which it was said she had failed to address was the applicant's entitlement to gain a proper understanding of the prosecution case. But her Honour did deal with it in practical terms, deciding that the witnesses' statements gave him sufficient detail of the case he faced. The claimed error in that regard is not made out.

[52] The magistrate's statement that the applicant's counsel had not identified purposes for cross-examination of A, B, C and D may be a reference to the fact that he had not, as he acknowledged, advanced anything beyond what was contained in the solicitors' original letter. That letter was not particularly helpful in this regard. It was a recitation of very specific areas of proposed cross-examination, with a separate identification of the purposes for it in the most general of terms, and with no attempt to relate the two. The magistrate was entitled to take the view that it did not clearly define the purposes for which cross-examination was sought. If her Honour was wrong in saying that she had asked for identification of a purpose or that counsel had been unable to identify one that would really amount to no more than a factual error as to what had passed between them in the course of argument. Whether the applicant had identified a proper purpose was a relevant consideration, but a factual error as to what counsel had said about it was not a reviewable error.

[53] The magistrate identified as distinct concerns the possibility of collusion and the unsatisfactory documentation of the police interaction with the witnesses. The question of collusion certainly did loom very large in the solicitors' letters. If the magistrate incorrectly characterised it as a principal concern, rather than a major concern, that was not a reviewable error. The absence of recording or notes of police conversations with witnesses was dealt with by requiring the two relevant police officers for cross-examination.

[54] The catch-all ground of improper exercise of power was based on those arguments, none of which have substance. The applicant has not demonstrated error in the decision to refuse the direction for the witnesses to be made available for cross-examination.

Observation

[55] This judgment is not intended to be an endorsement of any practice of defeating a proper request for cross-examination of witnesses by the means of obtaining further statements. It is not unreasonable to address obvious gaps in the evidence, but the prosecution remains obliged to give real and serious consideration to whether the defence ought to have the opportunity to test the evidence of a witness on a doubtful area or a point not previously raised. In some instances, the very fact that evidence has not previously emerged, requiring the obtaining of further statements, will itself warrant cross-examination. Although the applicant in this case could not establish any legal barrier in the statutory regime to the course of action adopted here, his counsel was correct in making the point that the legislative intent will be defeated if prosecutors do not act in good faith. It would be unfortunate, and indeed unethical, if prosecutors were to adopt a default position of reflexively denying applications.

Orders

[56] The application for review is refused. I will receive written submissions from the parties as to costs.