

# SUPREME COURT OF QUEENSLAND

CITATION: *Kerr v Mack & Anor* [2011] QSC 313

PARTIES: **Regina Beth KERR**  
(Applicant)  
**and**  
**Magistrate Ross MACK**  
(First Respondent)  
**and**  
**QUEENSLAND POLICE SERVICE**  
(Second Respondent)

FILE NO/S: S916 of 2010

DIVISION: Trial

PROCEEDING: S916/10

ORIGINATING COURT: Supreme Court, Townsville

DELIVERED ON: 21 October 2011

DELIVERED AT: Townsville

HEARING DATE: 11 August 2011

JUDGE: North J

ORDERS: **1. Application dismissed.**  
**2. The parties are to have 14 days in which to deliver written submissions on the question of costs.**

CATCHWORDS: ADMINISTRATIVE RULE - JUDICIAL REVIEW -  
DECISION OF AN ADMINISTRATIVE CHARACTER -  
where application made for review of a directions order of a  
Magistrate sitting in summary jurisdiction - where order  
made ancillary to summary trial jurisdiction - whether a  
direction made pursuant to s.83A of the Justices Act 1886  
(Qld) - whether decision of an administrative character within  
s 4(a) of Judicial Review Act 1991 (Qld.)

Justices Act 1886 (Qld) s 87A

Judicial Review Act 1991 (Qld), s 4(a),20

*Emanuele v Cahill & Anor* (1987) 71 ALR 320

*Lamb v Moss & Ors* (1983) 49 ALR 533

*Coco v Shaw* [1994] 1 QdR 469

*Higgins v Mr Comans, Acting Magistrate & DPP (Qld)*

[2005] QCA 234

*Director of Public Prosecutions v Shirvanian & Ors* (1998)  
44 NSWLR 129

COUNSEL: D Honchin for the applicant  
W Kelly for the respondent

SOLICITORS: ATSILS for the applicant  
Queensland Police Service for the respondent

- [1] The applicant seeks to statutorily review a decision of the first respondent pursuant to section 20 of the *Judicial Review Act* 1991 ("*JRA*"). There is a preliminary jurisdictional issue raised by the second respondent that should be addressed before the merits of the application are considered.
- [2] The applicant is facing three summary drug related charges before the Townsville Magistrates Court<sup>1</sup> and at a directions hearing under section 83A of the *Justices Act* 1886 ("*JA*") the applicant applied under section 83A(5)(b) for a direction for an order that she be psychiatrically examined.
- [3] His Honour declined to make the order and refused the application. It is from that order that the application for statutory review is made.<sup>2</sup>
- [4] The second respondent contends that his Honour's decision was not "of an administrative character" within section 4(a) of the *JRA*, that his Honour was sitting as a judicial officer exercising a judicial function, with the consequence that the statutory order for review under section 20 of the *JRA* is not available.
- [5] The applicant contends that as the application that had been made to his Honour had not declared or determined existing rights for the parties, it was administrative, not judicial in character.<sup>3</sup> The applicant sought to derive support from the decision of Neaves J in *Emanuele v Cahill & Anor*<sup>4</sup> where his Honour said<sup>5</sup>:

"In my opinion, the application is to be regarded as one ancillary to the proceedings then pending against the applicant, **proceedings which, in my view, are properly described as committal proceedings.** It is now well established that some decisions made in the course of such proceedings are reviewable under the *Judicial Review Act*: *Lamb v Moss, supra*. In my opinion, the decision made in the instant case is so reviewable. It is not of significance that a decision by the Supreme Court to stay committal proceedings indefinitely may not be reviewable under the *Judicial Review Act*, yet one made by the Magistrates Court in the course of such proceedings is reviewable. It is not unknown for the same language to confer an administrative power on one tribunal and judicial power on

<sup>1</sup> Applicant's supplementary outline para 2.3.

<sup>2</sup> It might be noted that section 83A(7) prohibits an interlocutory appeal from a direction but that it provides that it may be raised as a ground of appeal against conviction or sentence.

<sup>3</sup> Applicant's supplementary outline para 2.2.

<sup>4</sup> (1987) 71 ALR 320.

<sup>5</sup> 71 ALR at 318-319.

another: see *Farbenfabriken Bayer Aktiengesellschaft v Bayer Pharma Pty Ltd* (1959) 101 CLR 652 at 659-60. Nor, in my opinion, does it assist the case made by the second respondent to concede that, if the proceedings before the Magistrates Court were by way of summary trial, a decision upon an application to grant an indefinite stay would not be reviewable under the Judicial Review Act.

In any event, I am not satisfied that the making of a decision by the Magistrates Court to stay committal proceedings either for a time or indefinitely incontestably has the hallmarks of an exercise of a judicial function so as to take it out of the category of a decision of an administrative character. While the effect of the decision would be that the hearing of the committal proceedings could not continue, the decision would not declare or determine existing rights conclusively or otherwise." (Emphasis added.)

In the passage quoted above Neaves J referred to the well known passage from *Lamb v Moss & Ors*<sup>6</sup> where the Full Court of the Federal Court observed<sup>7</sup>:

*"Administrative Character*

Senior counsel for the appellant was not concerned to question the nature of the proceedings before the magistrate. He conceded that they were ministerial or administrative in character. .... But he claimed that the magistrate's decision to find a prima facie case was nevertheless of a judicial character. That was because the magistrate, although acting administratively, was required in the discharge of his functions, to act judicially; .....

What is presently in issue is only whether or not the particular decisions now sought to be reviewed are administrative in character. There is no call to consider here the proper characterization of other decisions which a magistrate may be called upon to make beyond those actually sought to be reviewed even though the power to make such other decisions may be connected, or ancillary, and such decisions may be called for in the same proceedings.

We are clearly of opinion that the fact that the magistrate was bound to act judicially, ie justly and fairly, provides no reason why the conclusion should be drawn that decisions made or to be made by him in the course of administrative proceedings were or would be of a judicial, rather than an administrative, character for the purposes of the Act. **The decision as to whether there is, or is not, a prima facie case and, if there is, the further decision as to whether or not to commit an accused person for trial are the central steps in the administrative process which is involved. To say that a magistrate hearing committal proceedings is bound to act judicially is to do no more than to describe how he must perform his administrative function. It does not turn his decision into a judicial one, nor does it make his decision judicial in character.**

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<sup>6</sup> (1983) 49 ALR 533.

<sup>7</sup> 49 ALR at 558-559, per Bowen CJ, Sheppard and Fitzgerald JJ.

Indeed, this is clearly established by authority: see, eg *R v Davison* (1954) 90 CLR 353, per Kitto J (at 373); *R v Trade Practices Tribunal*; *Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 373; *Sankey v Whitlam* (1978) 142 CLR 1 at 80. For that reason alone the appellant's first submission should be rejected.

But there is a more particular reason connected with the operation of the Act itself which leads one to the same result. The Act recognizes that many of the decisions which may be the subject of review pursuant to its provisions will be decisions of persons, bodies or tribunals that are bound to act judicially. This is most clearly seen from a consideration of the grounds upon which the court may grant relief, particularly the ground provided for in s 5(1)(a) of the Act which is that a breach of the rules of natural justice occurred in connection with the making of the decision. The rules of natural justice apply primarily to persons or bodies bound to act judicially whether in the discharge of administrative or judicial functions. So the Act was intended to expose decisions to review when a person or body acting administratively was bound to act judicially and thus afford to persons likely to be affected by a decision natural justice. The acceptance of the appellant's submission would be seriously restrictive of an important provision of the Act. To adopt it would run counter to the plain intendment of the legislation."

(Some citations omitted and emphasis added.)

- [6] *Lamb v Moss* is authority for the proposition that magistrates presiding at a committal hearing, that is in determining whether to commit an alleged offender for trial in a higher court, is performing an administrative function. That the role requires a magistrate to conduct himself or herself judicially does not alter the character of the function as administrative. *Lamb v Moss* is also authority for the proposition that in making orders ancillary to the committal proceedings a magistrate, although bound to act judicially, also performs an administrative function. I understand Neaves J in the passage quoted above to be following the authority of *Lamb v Moss*.
- [7] Authority in this State also recognises that committal proceedings in the Magistrates Court are primarily, if not exclusively, ministerial in character rather than judicial in character.<sup>8</sup> But in the instant proceedings the magistrate was not conducting a direction hearing under section 83A of the *JA* ancillary to committal proceedings. The proceedings on foot in the Magistrates Court were summary charges for offences. In that circumstance his Honour was exercising a jurisdiction "as a Court of trial" and jurisdiction ancillary thereto.<sup>9</sup> The magistrate was exercising a judicial power in the case management of a pending matter awaiting determination by trial in that Court. In the premises the decision of the magistrate was not "administrative in character" but, being ancillary to judicial proceedings was not within section 4(a) of the *JRA*. Consequently, and not without some misgiving, I uphold the preliminary jurisdictional objection raised by the second respondent. I mention

<sup>8</sup> See *Coco v Shaw* [1994] 1 QdR 469, 483-4, 499-500 and *Higgins v Mr Comans, Acting Magistrate & DPP (Qld)* [2005] QCA 234 (28 June 2005) at [5], [34]-[36].

<sup>9</sup> See *Higgins v Mr Comans, Acting Magistrate & DPP (Qld)* [2005] QCA 234 (28 June 2005) at [37] and also *Director of Public Prosecutions v Shirvanian & Ors* (1998) 44 NSWLR 129 at 136-137.

misgivings because it does appear to me, as it appeared to his Honour, that there would be benefit in having the applicant psychiatrically assessed for the purposes of the proceedings before him and there is some attraction in the applicant's contention that his Honour may have taken an irrelevant consideration into account in the exercise of his discretionary power to decline the application.

- [8] I order that the application be dismissed.
- [9] I will hear the parties on the question of costs and direct that the parties are to have fourteen days in which to deliver written submissions on the question of costs.