SUPREME COURT OF QUEENSLAND

CITATION:	*Thomson v Johnstone & Anor* [2013] QSC 152
PARTIES:	**HOWARD ELVIN THOMSON** **(Applicant)** **v** **MAGISTRATE PAUL JOHNSTONE** **(First Respondent)** **and** **COMMISSIONER OF THE POLICE SERVICE** **(Second Respondent)**
FILE NO:	S224 of 2012
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Townsville
DELIVERED ON:	16 June 2013
DELIVERED AT:	Townsville
HEARING DATE:	14 February 2013
JUDGE:	North J
ORDER:	**1. The application is dismissed.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW LEGISLATION – Orders in the nature of Prerogative Writs. STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – PARTICULAR WORDS AND PHRASES – SPECIFIC INTERPRETATIONS – Where applicant is refused a committal on the basis that proceedings were not commenced before the *Civil and Criminal Jurisdiction Reform and Modernisation Amendment Act* 2010 came into effect – whether there had been an 'originating step' for the purposes of s 276 and s 277 of the *Justices Act* 1886.
LEGISLATION:	Civil and Criminal Jurisdiction Reform and Modernisation Amendment Act 2010 *Justices Act* 1886, s 42, s 83A, s 276, s 277

CASES:	*Murray v Magistrate CJ Callaghan & Another* [2011] QSC 414
COUNSEL:	Mr D Honchin for the applicant
	Mr J Greggery for the second respondent
SOLICITORS	Gun Lawyers for the applicant
	Queensland Police Service Solicitor for the second respondent

[1] The application for review raised issues similar to those considered by Ann Lyons J in *Murray v Magistrate CJ Callaghan & Another*[1] as it concerns whether, in the circumstances, the applicant is entitled to insist upon a committal hearing in the Magistrates Court. The *Civil and Criminal Jurisdiction Reform and Modernisation Amendment Act 2010* (Qld) ("CCJRM") repealed statutory provisions entitling those charged with indictable offences to a committal proceeding in the Magistrates Court at which witnesses could be examined by the defendant or legal representatives. Under the legislation that now applies a defendant is only entitled to apply under s 83A(5)(AA) of the *Justices Act 1886* (Qld) ("JA") for a direction allowing limited examination of witnesses.[2]

[2] At the heart of the controversy before me is whether an "originating step" (within the meaning of s 276 of JA) was taken after 1 November 2010.[3] Relevantly s 277 of the JA provides:

> "**277 Particular amendments apply only to charges originated after commencement**
>
> (1) The relevant provisions, as amended or inserted by the amending Act, apply in relation to a charge for an offence only if an originating step for the proceeding for the charge is taken on or after the commencement of this section.
>
> (2) For subsection (1), it does not matter when the offence was committed."

and s 276 defines "originating step" as:

> **276 Definitions for div 5**
>
> 'In this division—
>
> ***originating step***, for a proceeding, means—
>
> a) the arrest of the defendant in the proceeding; or

[1] [2011] QSC 414.
[2] *Murray v Magistrate CJ Callaghan & Another* [2011] QSC 414 at [2].
[3] The CCJRM introduced the ss 276 and 277 into the JA and commenced on 1 November 2010 (see s 2 CCJRM and the Proclamation, Subordinate Legislation 2010 No 236.)

b) the making of a complaint under the *Justices Act 1886*, section 42 in relation to the defendant in the proceeding;

or

c) …"

[3] The foregoing requires some slight qualifications. Both ss 276 and 277 use the words "proceeding" and the composite term "originating step before a proceeding" (s 276) or "originating step for the proceeding" (s 277). In argument before me attention was paid to the meaning of the word or term and how it should be understood in the context of the word "charge" in s 277. But before addressing that further it is convenient to discuss the relevant facts and events.

[4] On 3 June 1988 one Ford ("the complainant") was assaulted at the Beachmere Bowls Club and made a complaint to the police. On 29 June 1988 the applicant was arrested and charged pursuant to s 339 of the *Criminal Code Act 1988* (Qld) ("Criminal Code") with the offence of assault occasioning bodily harm in respect of the matters the subject of the complaint. The applicant was granted bail. On 21 February 1989 the applicant failed to appear in accordance with his bail undertaking and a warrant pursuant to the *Bail Act 1980* was issued for his arrest. The applicant avoided detection for a period of approximately 23 years until he was arrested on the warrant on 23 January 2011 at Mount Isa. The applicant came before the magistrate sitting in Mount Isa where he maintained his plea of not guilty to the charge of assault occasioning bodily harm and the matter was transferred to the registry of the Caboolture Magistrates Court. Thereafter police officers at Caboolture conducted enquiries, including of the complainant who confirmed that he still wished to proceed with his complaint. The police investigation file was allocated to a police officer who then obtained fresh statements from the complainant and from witnesses including a government medical officer. An x-ray report was obtained. This fresh evidence was added to the existing brief of evidence. In the view of the then investigating police officer the fresh medical evidence established that the injuries sustained by the complainant in the assault satisfied the definition of grievous bodily harm.[4]

[5] At the relevant hearing days where the matter came before a magistrate at Caboolture the applicant was represented by solicitors in Mount Isa. The relevant police prosecutor appeared in person before the magistrate at Caboolture but the applicant's solicitors appeared by telephone. The original charge of assault occasioning bodily harm was first mentioned before a magistrate at Caboolture on 19 August 2011[5] where the matter was mentioned and adjourned. The matter was next before a magistrate at Caboolture on 21 October 2011[6] at which hearing the prosecutor informed the magistrate that it was the intention of the prosecutor to substitute the charge of grievous bodily harm for that of assault occasioning bodily harm. It is apparent from the

[4] The foregoing draws upon the affidavit of A B Murray, filed 21 August 2012 which was read before me on behalf of the second respondent. There was no challenge to the affidavit.
[5] Exhibit KTB1 to the affidavit of K T Barram filed 30 May 2012.
[6] Exhibit KTB2 to the affidavit of K T Barram filed 30 May 2012.

transcription of the hearing that it was then common ground between the prosecution and the solicitor for the applicant that when the matter ultimately proceeded it would do so by way of a committal hearing. For administrative reasons it was not possible to allocate a date for the committal hearing on that occasion so the matter was further adjourned.

[6] On 11 November 2011 the matter came before Magistrate Dwyer sitting at Caboolture. There was an appearance by Sergeant Murray as prosecutor. Before the phone connection with the applicant's solicitor could be made the following exchange occurred between the Bench and the prosecutor:-[7]

"BENCH: What's to happen with that matter?

SGT MURRAY: Look, it was mentioned a couple of weeks ago, you - I'm not sure if you perused the file. You'll see it's got some history. It goes back 23 years. The reason it didn't proceed on the last occasion – my – the colleagues or the defendant's representatives who I think -----

BENCH: Well, it's only for mention today.

SGT MURRAY: It is, it's to set a trial date

BENCH: Can you get the – this fellow on the phone.

SGT MURRAY: **And we're substituting the charge today to one of grievous bodily harm. They've advised of that, they've been provided with a copy of the Bench charge sheet.** The Magistrate who appeared on the last occasion was your brother Magistrate, Mr Wilcox. He was advised that – and the defence is well aware ----

BENCH: Mr Wilcox? Mr Wilkinson.

SGT MURRAY: Wilkinson, sorry. They're aware today that the process is for 1) for us to tender the fresh Bench charge sheet and have the defendant charged form the Bench in the – obviously in the presence of his legal counsel for GBH.

BENCH: Is he here?

SGT MURRAY: No, he's in Mount Isa where his solicitors are. They're aware of the process.

BENCH: Okay.

[7] Exhibit KTB3 to the affidavit of K T Barram filed 30 May 2012.

SGT MURRAY: And the other matter was to set a trial date. They indicated to the Court – they – it was just put on the record, there's no correspondence from them or ourselves. They just sought a hearing date, I think they gave the day in May Obviously, of course, we had no availability -----

BENCH: Well, what's the – what are you charging – changing it to?

SGT MURRAY: It – it'll be upgraded to a grievous bodily harm.

BENCH: Well, it won't be a hearing date, it -----

SGT MURRAY: A committal hearing.

BENCH: Okay. In May? I don't know if that's going to -----

SGT MURRAY: No. Well, they had May They nominated May on the last occasion, said they had the counsel engaged and that May was the only suitable date.

BENCH: Well, it'll now come under the Moynihan reforms.

SGT MURRAY: It's post – it's 23 years ago.

BENCH: But it's – that's not what -----

SGT MURRAY: Well, that's true – fresh – fresh – that's -----

BENCH: That – is that why it starts, is it?

SGT MURRAY: Yes, well -----

BENCH: **It's a fresh charge and it's only started today.**

SGT MURRAY: It is a fresh -----

BENCH: Yes. No. I consider it to be under the Moynihan -----

SGT MURRAY: Well, you are correct there, your Honour, it is a – the originating step now for the GBH is going to be well and truly -----"

(Emphasis is added).

[7] A short time later the solicitor for the applicant, Mr Pate, appeared by phone and the following exchange took place:[8]

"BENCH: Thank you. I'm pleased that you agree. Now, what –

[8] Exhibit KTB3 to the affidavit of K T Barram filed 30 May 2012.

I'm told by the sergeant here that the substantive charges in this, which is the bodily harm, is going to be withdrawn and they're going to then have him charged with grievous bodily harm, do you understand that?

MR PATE: Yes, I understand that.

BENCH: Where is Mr Thomson?

MR PATE: Mr Thomson?

BENCH: Yes. We understood he was going to be at your offices today.

MR PATE: I wasn't aware of that.

BENCH: Okay. Well, he's not there, obviously. So what do you want to do today, Sergeant?

SGT MURRAY: Sergeant – your Honour, thank you. I can indicate the – and my friend is correct, he – I believe Mr Pate was also the person who was on the – who appeared by way of telephone on the lat occasion and they're aware that the process today is that the defendant is to be charged from the Bench. The charge under section 320 of the Criminal Code, one of grievous bodily harm, Thank you, your Honour.

BENCH: Well, I can't do that because he's not there.

SGT MURRAY: Your Honour, I understand that's been done in the presence of his counsel.

BENCH: Okay. So you are formally withdrawing the bodily harm.

SGT MURRAY: And offer no evidence in relation to the existing charge of assault – bodily harm.

BENCH: Have you got any objection to that, Mr Pate?

MR PATE: No objection, your Honour.

BENCH: Okay. **That charge is struck out and the defendant's discharged. Now, I have here a fresh charge of a grievous bodily harm.** Are you in contact with Mr Thomson, are you?

SGT MURRAY: Yes, your Honour.

BENCH: I'm going to adjourn this until next week and – so he can be bought to your office so he can be charged. What day is more convenient, Mr Pate"

(Emphasis is added).

[8] It is evident from the foregoing that Mr Pate was not aware that the magistrate had earlier expressed the view in court with the prosecutor that the consequence of the steps that were to be taken would be that the applicant would not have an entitlement to seek a committal once the charge of assault occasioning bodily harm was struck out and the applicant was discharged. It is evident from the transcript that during the course of the hearing before the magistrate a fresh charge sheet was tendered to the magistrate alleging a charge of grievous bodily harm.

[9] The matter next came before Magistrate Dwyer at Caboolture on 18 November 2011. On this occasion Mr Barram appeared by phone representing Mr Thomson. Mr Thomson was present by phone with his solicitor. The following appears from the transcript of proceedings:[9]

"BENCH: Is Mr Thomson there?

MR BARRAM: He is, your Honour. I'll just put you on speaker phone.

BENCH: Thank you.

MR BARRAM: Can you hear us, your Honour?

BENCH: I CAN. Mr Thomson, can you hear me?

DEFENDANT: Yes, sir.

BENCH: You're charged that on the 3rd day of June 1988 at Beachmere in the State of Queensland you unlawfully did grievous bodily harm to Robert George Ford. What's to happen with this matter, Mr Barram?

MR BARRAM: Your Honour, given that it is a pre-Moynihan matter -----

BENCH: Yes.

MR BARRAM: ----- I am seeking that it be set down for a committal hearing.

[9] Exhibit KTB4 to the affidavit of K T Barram filed 30 May 2012.

BENCH: Well, it's not a pre-Moynihan matter at all, Mr Barram.

MR BARRAM: I was under the impression that it was, your Honour, because I understand the first step was taken back in 1988.

BENCH: I've just charged him. That's the first step that's been taken. There was another charge taken at an earlier time but not this one."

[10] After that exchange Mr Barram mentioned to the magistrate that the matter might proceed by way of "registry" committal. It is evident from the subsequent transcript of those proceedings and from the subsequent correspondence and attempts made on behalf of the applicant to raise with the court the issue of whether the applicant had an entitlement to a committal and that they neither had instructions nor did they intend to acquiesce in the course pronounced by the magistrate. For reasons that are not entirely clear nor necessary to go into no appeal was lodged in a timely way from the decision of the magistrate. Ultimately the course adopted by the solicitors for the applicant was to apply under s 83A (6) of the JA for leave to re-open the direction given by Magistrate Dwyer that the proceedings in respect of the charge of grievous bodily harm were to proceed as if the changes brought in by the CCJRM applied.

[11] The matter came before the first named respondent, the presiding magistrate at Caboolture on 27 January 2012 and 1 March 2012[10] when the solicitors for the applicant sought to obtain an order under s 83A(6) of the JA. It is from the first named respondent's ultimate refusal to give leave to re-open pursuant to that section on 1 March 2012 that the applicant seeks orders by way of certiorari quashing the order and declaratory relief.

[12] On behalf of the applicant it was submitted that the substitution of the charge of grievous bodily harm for that of assault occasioning bodily harm was not an originating step in the proceeding. It was submitted that the proceeding related to the event subject to the harm which was the alleged assault or incident that allegedly occurred on 3 June 1988 and which proceeding had formerly commenced when he was charged on 29 June 1988. The applicant submitted that nowhere in the explanatory memorandum or in the Act could it be gleaned that it was the intention of Parliament that by simply amending or substituting a new charge an accrued right to a committal hearing could be circumvented. Counsel for the applicant went so far as to submit that if the contentions of the second respondent were accepted then persons with committal rights could lose them simply by the prosecution adopting the convenient manoeuvre of offering no evidence, having the defendant discharged and then proffering a new charge sheet charging the same offence. Counsel for the applicant pointed to information obtained from the Justice Department website[11] and to the examples referred to therein. He submitted that the examples did not suggest

[10] Exhibits KTB10 and KTB14 to the affidavit of K T Barram filed 30 May 2012 respectively.
[11] Affidavit K T Barram filed 24 July 2012.

that what had occurred in respect of the applicant was a circumstance that had been envisaged by the authorities.

[13] For the second respondent Mr Greggery submitted that when the magistrate ordered the charge of assault occasioning bodily harm to be struck out and ordered that the applicant be discharged on 11 November 2011 the proceedings in relation to that charge were concluded. Referring to s 104(2) of the JA he submitted that the order of Magistrate Dwyer on 11 November 2011 was to the same effect as to a discharge under that section.[12] Mr Greggery referred to s 42 of the JA which provides:

> **42 Commencement of proceedings**
>
> (1) Except where otherwise expressly provided or where the defendant has been arrested without warrant, all proceedings under this Act shall be commenced by a complaint in writing, which may be made by the complainant in person or by the complainant's lawyer or other person authorised in that behalf.
>
> (1A) However, where a defendant is present at a proceeding and does not object, a further charge or an amended charge may be made against the defendant and be proceeded with although no complaint in writing has been made in respect thereof.
>
> (2) Where a defendant has been arrested on any charge and no complainant in writing has been made and in a case to which subsection (1A) applies particulars of the charge against the defendant shall be entered on the bench charge sheet."

[14] He submitted that in context the tender of the Bench charge sheet, which is part of the process contemplated by s 42(2) of the JA was part of the process of the commencement of proceedings however his ultimate submission was that the proceedings commenced on 18 November 2011 when the defendant, being present by phone and while not objecting, was charged with grievous bodily harm.[13]

[15] Turning to the meaning of "originating step" within ss 276 and 277 of the JA, Mr Greggery submitted that the "making of a complaint" included the charging pursuant to s 42(1A) by reason of the definition of "complaint" found within s 4 of the JA. This section defines "complaint" to include terms such as "charge" and "means an information, complaint or charge before a Magistrates Court."

[16] With respect to the concerns of the applicant that prosecutors might attempt to manoeuvre defendants with accrued entitlements to committal hearings out of that entitlement by the convenience of offering no evidence and seeking an

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[12] Mr Greggery also referred and relied upon the reasoning of the Full Court in *Re: Jenkin* [1994] 1 QdR 266 concerning a discharge under s 590 of the Criminal Code.

[13] See s 42(1A) of the JA.

order that a defendant be discharged[14] Mr Greggery of counsel pointed to s 83A(5AA) of the JA and also to s 110A (the related provision in that Act of the s 110A). He submitted that were a defendant to find himself in such a circumstance a court had sufficient power to prevent an injustice and protect the legitimate interests of the defendant by making appropriate directions for the attendance and examination and cross-examination of witnesses. It might also be observed that a magistrate, faced with such a circumstance, has inherent power to prevent an abuse of process were a magistrate to apprehend a prosecutor was proposing to proceed in such a way for no good reason other than to avoid the inconvenience of a committal hearing. Without making any final determination upon the issue it may well be that it would be within the inherent power of the magistrate to either decline to charge the defendant (see s 42(2) of the JA) or to stay the proceedings. In this case there is no suggestion that the prosecution was motivated out of an intention merely to obtain some advantage or to avoid a committal. The evidence before me points to a circumstance where the investigating police officer, having reviewed the matter and gathered further evidence formed a view that the evidence warranted charging the defendant with grievous bodily harm. In any event the record of the exchange between the magistrate and the prosecutor on 11 November 2011[15] demonstrates that the prosecutor initially was of the view that the defendant was entitled to a committal hearing. It was the magistrate who suggested that the defendant would not be entitled to the proceeding for grievous bodily harm was to commence that day or subsequently.

[17] In my view there is force in the submission made by counsel for the second respondent. Section 277 of the JA refers to the term "charge for an offence". There is a significant distinction between the offence of assault occasioning bodily harm under s 339 of the Criminal Code and the offence of grievous bodily harm pursuant to s 320 of the Criminal Code. The 1988 proceeding was terminated and the applicant was discharged in respect of that charge on 11 November 2011. The charge that came before the court when the charge sheet was tendered on 11 November 2011 was different from the charge that had commenced in 1988. In the view that I take, the second respondent's contention is correct and an originating step in relation to the charge of grievous bodily harm was taken on 18 November 2011 when, following the tender of the bench charge sheet on 11 November, the applicant was charged before the magistrate.[16]

[18] It was common ground before me that if I formed the view that a proceeding had commenced within the meaning of s 277(1) on 18 November 2011 then the application for review should be dismissed. The orders that had been sought included a declaration concerning the issue of the originating step and for an order quashing the decision of the first named respondent of 1 March 2012 refusing to re-open the decision of Magistrate Dwyer. Even if I were to take the view that the first named respondent had somehow erred in the proceedings before him in declining to entertain an application for a review, here would be no utility in so ordering if the decision that the first named respondent had declined to review was correct.

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[14] Referred to in para [12] above.
[15] Para [6] above.
[16] Consider the combined effect of s 42(1A) and (2) of the JA.

[19] One aspect of the proceedings at some of the telephone hearings is disturbing. The evidence before me demonstrates that on a number of occasions a magistrate expressed a view about the controversy before him in open court in an exchange with the prosecutor before the telephone connection with the legal representative for the applicant had been made. In other words part of the hearing occurred without the knowledge of the applicant or his legal representatives. There was at least one occasion when a pronouncement upon the issue was announced to the applicant's solicitor over the phone without giving the applicant's solicitor any indication that the matter had been the subject of discussion or comment between the Bench and the prosecutor let alone any meaningful opportunity to be heard. It should go without saying that the aspect of natural justice concerned with the right to be heard requires that there be no "private" communication between the court and one side of a controversy upon any matter of moment.

[20] Counsel for the applicant did not seek to rely upon any aspect of conduct in support of the application for review. In the circumstances this was sensible for his client's interest in the particular circumstances turns upon the question of whether he is entitled to a committal hearing or not.

[21] In the circumstances I order that the application be dismissed. I will hear submissions upon costs.