SUPREME COURT OF QUEENSLAND

CITATION:	*Graves v Duroux & Anor* [2014] QSC 198
PARTIES:	**KELVIN DOUGLAS GRAVES** (applicant) **v** **TERRENCE DUROUX (MAGISTRATE)** (first respondent) and **KAI N VAUGHAN-JOHNSON** (second respondent)
FILE NO/S:	BS 11527 of 2012
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	22 August 2014
DELIVERED AT:	Brisbane
HEARING DATE:	18 August 2014
JUDGE:	Philip McMurdo J
ORDER:	**Application is refused.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – REVIEWABLE DECISIONS AND CONDUCT – REVIEW OF PARTICULAR DECISIONS – where a magistrate made a decision to commit the accused for trial for three charges under the *Drugs Misuse Act* 1986 (Qld) – where the items seized from the accused's premises were purportedly analysed by the Queensland Health Forensic and Scientific Services - whether the items seized were in fact those which were analysed – whether the magistrate erred in law by concluding that the evidence presented at the committal could support a finding of guilty at a trial – whether the magistrate was apparently correct in deciding to commit the accused for trial. *Drugs Misuse Act* 1986 (Qld), s 128. *Judicial Review Act* 1991 (Qld), s 20. *Batemberski v Fitzsimon* [2000] QSC 185, cited. *Chen v ASM* [1999] QSC 181, cited. *Lamb v Moss* (1983) 49 ALR 533, applied.

Leahy v Barnes [2013] QSC 226, cited.
Sankey v Whitlam (1978) 142 CLR 1, cited.

COUNSEL: A Vasta QC, with K Payne, for the applicant
No appearance for the first respondent
PJ McCafferty for the second respondent

SOLICITORS: McMillan Criminal Law for the applicant
QPS Solicitor for the second respondent

[1] On 14 November 2012, the first respondent, a magistrate, committed the applicant to trial on three charges under the *Drugs Misuse Act* 1986 (Qld). The applicant challenges that decision, seeking a statutory order of review under the *Judicial Review Act* 1991 (Qld). He says that the magistrate erred in law by concluding that the evidence presented at the committal could support a finding of guilty at a trial.

[2] This proceeding was commenced in 2012 but for some reason was not set down for hearing until recently. The magistrate has not contested the application. The contradictor is the second respondent, who was an arresting officer in this case.

[3] As is conceded for the second respondent, the magistrate's decision is of a kind for which there is jurisdiction to grant relief under Part 2 of the *Judicial Review Act*. However, in cases such as this, (although an apparent ground for review is demonstrated), generally the court will exercise its discretion to refuse relief. In *Lamb v Moss*,[1] Bowen CJ, Sheppard and Fitzgerald JJ said:

> "The power to make an order of review under the [*Administrative Decisions (Judicial Review) Act* 1977 (Cth)] in respect of committal proceedings should be exercised only in most exceptional cases, especially in respect of a decision in the course of proceedings."

The court there discussed a number of cases in which declaratory relief had been sought in respect of committal proceedings. In particular, the court referred to *Sankey v Whitlam*,[2] where Gibbs ACJ said:[3]

> "[T]he procedure [to grant declaratory relief] is open to abuse, particularly in criminal cases, and if wrongly used can cause the very evils it is designed to avoid. Applications for declarations as to the admissibility of evidence may in some cases be made by the accused persons for purposes of delay, or by a prosecutor to impose an additional burden on the accused, but even when such an application is made without any improper motive it is likely to be dilatory in effect, to fragment the proceedings and to detract from the efficiency of the criminal process. … For these reasons I would respectfully endorse the observations of Jacobs P. (as he then was) in *Shapowloff v Dunn* [1973] 2 NSWLR 468 at 470, that a court will be reluctant to make declarations in a matter which impinges directly on the course of proceedings in a criminal matter. Once criminal proceedings have begun they should be allowed to follow their ordinary course unless it appears that for some special reason it is necessary in the interests of justice to make a declaratory order."

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1 (1983) 49 ALR 533 at 564.
2 (1978) 142 CLR 1.
3 Ibid at 25-26.

In the same case, Stephen J, with whom Aickin J agreed, said that in many cases in this context, relief should be refused, as an exercise of discretion, "so as to avoid interference with due and orderly administration of the law and with the proper exercise by magistrates of their functions in committal proceedings".[4]

[4] This reluctance to exercise the court's civil jurisdiction to interfere with the course of criminal proceedings has been recognised in a number of decisions in this court: see eg *Chen v ASM*;[5] *Batemberski v Fitzsimon*;[6] *Leahy v Barnes*.[7] But in the last of those cases, Henry J was persuaded to make a statutory order of review to set aside a decision of a coroner to commit the applicant for trial, where "the approach of the learned Coroner involved an exceptional deviation from legal principle in respect of an aspect of the evidence which must have had a significant bearing upon the question of whether there was sufficient evidence to commit the applicant for trial".[8]

[5] In the present case, there is no suggestion that the magistrate's decision involved an "exceptional deviation from legal principle". Rather, the argument is that the magistrate erred in law in deciding that the evidence which was tendered at the committal hearing presented a case upon which the applicant should be committed for trial. Cases in which courts will judicially review such conclusions by magistrates, as administrative decisions affected by legal error, will be rare. Were it otherwise, the course of criminal proceedings would be unduly hampered and delayed by civil proceedings, brought either by the prosecution or the defendant and there would be a risk that such proceedings routinely would be brought as a rehearing of committal proceedings. Therefore, at least where it is arguable that a magistrate was correct in deciding to commit a defendant for trial, this court should not exercise its discretion to grant relief under the *Judicial Review Act*.

[6] Still it is necessary for me to consider the applicant's argument, in order to see whether the magistrate was not at least arguably correct.

[7] The applicant was committed for trial upon three offences: the (aggravated) supply of methylamphetamine, the possession of methylamphetamine and the possession of cannabis. Ultimately, the applicant's argument here addressed only the first and second of those charges.

[8] The evidence at the committal hearing was as follows. When police searched the applicant's house and his car in December 2011, they found certain items which they believed were illegal drugs. The first item, which became the subject of the supply charge, was an Express Post package which was found in the applicant's car. Within it was a heat sealed bag which contained a clip seal bag and a brown coloured liquid substance. The package was addressed to a Post Office box in Victoria. Police also found a number of mobile phones in the applicant's house, on one of which there was an SMS message to the effect that "it" should be sent to that address.

[9] The items which became the subject of the second charge were two bags found in a desk drawer in the applicant's house. They contained a crystal like substance.

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4 (1978) 142 CLR 1 at 80.
5 [1999] QSC 181.
6 [2000] QSC 185.
7 [2013] QSC 226.
8 Ibid at [92].

According to a statement by one of the police officers who was present as these items were found, the applicant said that this substance was methylamphetamine.

[10] According to the second respondent's statement, he took possession of these three items, together with cannabis seeds which had been found in a clip seal bag and which became the subject of the third charge, and delivered them to the Surfers Paradise District Police Station. They were handed to another police officer who "lodged" these items and other things which had been seized at the applicant's house. They were deposited in the "drug room" of the station, within a bag which was labelled with "occurrence number QP1101100982".

[11] Subsequently, the items the subject of these three charges were given "tag numbers" by an officer working in the property section of that station. According to her statement, she also "packaged" the items in order to send them for scientific analysis and in accordance with the normal practice, she then placed a bar code number on each item. She also completed a form described as a QP127, which she said was the "Submission of Articles for Forensic Examination form", which is sent with items to be analysed by QHFSS. She placed a sticker with the same bar codes upon that form.

[12] On the same day, another police officer removed the items from the police station in order to take them to Queensland Health Forensic and Scientific Services ("QHFSS") for analysis. However, he promptly returned them to the police station without taking them to QHFSS.

[13] According to the second respondent's statement, he took the items from the police station on 14 February 2012. He took them at first to another place where they were photographed before delivering them to QHFSS. Two days later he collected the items which are the subject of the first and second charges, together with an analyst's certificate, and returned them to the police station.

[14] The analyst's certificate forms the basis of the applicant's argument, which is that the items described in the certificate (or at least two of them) could not have been the items taken from his house and car. The certificate contained a description of each item which corresponds with the descriptions given by the police officers in their statements. It also contained a statement of the "weight of substance" within each item. And in the case of the two bags the subject of the second charge, it specified certain numbers as the identifying bar codes. The certificate stated that in each case "methylamphetamine was detected".

[15] The applicant's argument was and is that the details of each of the items within the certificate were so different from that which would be expected from the evidence of the police officers, that no jury could be satisfied that the items which were the subject of the certificate were those which had been seized from his house and car.

[16] The bag which is the subject of the supply charge was shown in the certificate as having a "weight of substance" of 25.408 grams, as distinct from a weight of 40 grams which had been put against that item when received at the police station on the day on which it was seized. Further, under the heading "Bar Codes", no bar code number was shown for that item but instead there was only a dash, indicating that there was no bar code, contrary to the evidence discussed above at [11].

[17] One of the bags the subject of the second charge was shown on the certificate as having the bar code "524093327", which was different from the bar code which the relevant witness had said she attached to the item, which was "5240993327". And for that item, the certificate showed a weight of 0.835 grams, compared with a weight of 1.2 grams in the record at the police station. For the third item, the certificate showed a weight of 0.730 grams as against 1.25 grams recorded at the police station.

[18] Upon the basis of these differences, the applicant argues that a jury could not conclude that the items which were seized were those which were the subject of the analysis recorded in the certificate. But that question would have to be considered by reference to the whole of the certificate.

[19] The certificate was addressed by the analyst to the second respondent and stated that the items had been received by her on 14 February 2012 (the date upon which the second respondent said that he delivered them). She certified that:

> "Laboratory records show that on 14 February 2012, [the second respondent] delivered to [QHFSS] one heat sealed plastic bag with one QP127 form attached and holding QPS documentation, stating in part occurrence #:QP1101100982 and contents …"

The certificate stated that "the abovementioned submission contained, inter alia, the following things …". The certificate then set out the descriptions of the items, including the references to bar codes and weights which I have described.

[20] The certificate thereby identified the items not only by their weight and (in two cases) bar code numbers, but also as items which had been delivered by the second respondent in relation to the applicant. It referred to the QP127 form and to the "occurrence number" which had been given to the bag containing the items seized when they were brought to the station.

[21] Section 128 of the *Drugs Misuse Act* 1986 (Qld) provides that in any proceedings for an offence defined in that Act, the production of a certificate purporting to be signed by an analyst with respect to an analysis shall be evidence (if stated in the certificate) "of the identity of the thing analysed", as well as of "the quantity of the thing" and the "result of the analysis". It further provides that in the absence of evidence to the contrary, that evidence should be conclusive. For present purposes, it may be accepted that the differences in the weights and the absence of or difference in a bar code would provide some evidence to the contrary of statements in the certificate, and in particular the statements by the analyst as to the identity of the things analysed. Nevertheless, the certificate would constitute some evidence that the items the subject of that analysis were indeed the items delivered by the second respondent, in relation to the applicant, as his statement related.

[22] Therefore, the magistrate was apparently correct to conclude that a jury could find that the items as analysed were the items which were seized from the applicant's house and car and that the applicant should be committed for trial.

[23] I should note another submission which was foreshadowed by the written argument for the applicant but not pursued at the hearing. On the first day of hearing before the magistrate, after the presentation of what was said to be the entirety of the prosecution evidence, the solicitor appearing for the applicant submitted that there was no case upon which the applicant could be committed. In essence, the

argument was that the evidence to that stage had not established that the items seized were those which had been the subject of the analyst's certificate. The prosecution persuaded the magistrate to adjourn the hearing so that it could obtain further evidence. The hearing was adjourned for a week and then further adjourned to meet the convenience of the applicant's counsel. When the hearing resumed, counsel for the applicant submitted to the magistrate that the prosecution should not have been permitted to reopen its case. In the written submissions filed in this proceeding, the same contention was made and it was said that the decisions of the magistrate to adjourn the hearing and to admit that further evidence involved other errors of law, warranting a statutory order of review. However, at the hearing, counsel for the applicant effectively abandoned that argument.

[24] The outcome is that this application must be refused.