THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION

SMART J

21 May 1993

11333/93 - PERRY v FORBES & STOREY

JUDGMENT

Therese Jean Perry was charged by the second defendant, a police officer, with an offence under s.154A of the Crimes Act 1900 of stealing a motor vehicle, namely, a motor omnibus of the State Transit Authority and two summary driving offences. One of Ms Perry's difficulties is that she imagines that she is an authorised bus driver. It is alleged that she stole and drove a bus. It is not in question that about 2 am on 31 October 1992 she took a bus and drove it, while unlicensed to do so.

Ms Perry seeks an order pursuant to s.134 of the Justices Act directing the learned magistrate to consider the exercise of his jurisdiction under s.32 of the Mental Health (Criminal Procedure) Act 1990 which enables the magistrate to take a special course of action in respect of a person who is not a mentally ill person within Chapter 3 of the Mental Health Act 1900 but is suffering from mental illness.

The plaintiff appeared before Central Local Court on 31 October 1992 and before Waverley Local Court on 2 and 16 November 1992.

She was granted bail on 2 November 1992 and has been on bail since that date. From an early stage the magistrate appreciated that he was dealing with a lady with special difficulties and he had thoughtful regard to these and the public interest.

On 14 December 1992 Ms Perry's solicitor appeared before the magistrate and referred to his statement on the previous occasion that he was having some difficulty in indicating a plea because of her mental illness. He advised the magistrate that Dr Jolly, a well known psychiatrist, was not able to say whether she was fit to plead and that he was not prepared to say that he regarded her as fit to give instructions. The preliminary report of Dr Jolly of 14 December 1992, which was tendered, isolated four possible issues:

> "(a) Is Ms Perry fit to appear before a court, make a plea, instruct her defence, etc.
> (b) Bearing in mind the nature of her illness, has she an absolute defence based upon a "defect of reason"
> (c) Does she fall within the boundaries of "Section 32"
> (d) Can/have adequate measures for ongoing psychiatric care been organised, and if so, does the current situation allow for adequate protection of the community at large."

The doctor wrote:

> "I am not in a position to offer a final opinion in this case, and there is considerably more case work that I believe needs to be done. At a technical level, Ms Perry's capacity to come before a court and to form an intent, at the relevant times, needs reappraisal. At a practical level, it may be that the community needs greater reassurance and protection from Ms Perry's wayward activities than can be "guaranteed" by the present clinical plan."

The magistrate said:

> "As I say I don't mind what type of a hearing is conducted in these matters. I've had the defendant presently before the court here on two prior occasions, and she's been before the court in custody and remanded from there to here in custody. We've allowed her bail. On the last occasion the matter was before the court there was no issue that there had to be a hearing of some sort, whether it's a plea of not guilty, it's a hearing on the question of her fitness to plead or a hearing that includes provisions of section 32 of the Mental Health Criminal Procedure Act, and I don't see what we're achieving by just having the defendant come back to the court every few weeks. The last occasion I adjourned the matter on a mention basis to today to arrange for a hearing date, and whatever type of hearing was to be conducted. The doctor unfortunately, although he's a doctor in a long list of doctors who have seen the defendant, isn't able to express his opinion, although other opinions have been expressed. And that's what he says. Now I don't feel inclined to have the defendant continue to come back to the court, and I'd rather adopt a procedure of fixing the matter for hearing in whatever terms."

The magistrate noted that Dr Jolly required four weeks and adjourned the matter for hearing on 23 March 1993 to give all parties ample time. He noted that there would be some form of hearing.

On 11 February 1993 Dr Jolly made a detailed report. He thought that her future management should be "medical" as opposed to "correctional". He wrote:

> "I see her as a psychiatrically ill patient, where (insightless) behaviour arises directly from her disturbed mental states, and flows on from psychiatric illness."

At an earlier stage of his report he had expressed the opinion, on the basis of Ms Perry's assertions, that she exhibited fixed false beliefs; that it was part of her real world, not fantasy,

that she was a duly licensed bus driver. Dr Jolly saw her as "ill" not "bad". He reached these conclusions:

> "Currently, Ms Perry is fit to appear before a court, but I have the very greatest of doubts whether she is properly able to instruct her defence or make a plea. Such fitness may have to be tested.
>
> At the time of the incident at 2 am on 31 October 1992, I am of the opinion that Ms Perry did not have the capacity to form an intent.
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> She probably does fall within the boundaries of Section 32, insofar as now - meaning February/March 1993 on the basis that her mental state has not changed from December 1992 - she is not "a mentally ill person" within the meaning of the Act but mentally disordered ...
>
> I'm not certain that adequate measures for ongoing psychiatric care have been organised, insofar as that a/the need for treatment in a secure hospital unit has been sufficiently thought through and planned. For success in forensic management, there would have to be a different emphasis in agreement between attending psychiatrists, before there could be "adequate protection to the community at large" ..."

So far as I can tell the magistrate did not see this report because of the course proceedings took on 23 March 1993.

About noon on that day the matter was transferred from the general list of matters being dealt with at Waverley Court to the list of the learned magistrate. He was ready to hear the matter. Immediately upon the matter being transferred Ms Perry's solicitor told the magistrate that he had arranged for a forensic psychiatrist to be in attendance at 2 pm and that he did not have any notice until a few minutes previously that it might be possible to start sooner.

The police prosecutor stated that he believed the basis on which a plea of not guilty was being entered was the lack of intent and that was based on the evidence of the doctor. The prosecutor asked that the matter stand until the doctor was present so that he could hear all the evidence. Ms Perry's solicitor stated that from his own questions of the defendant as well as the advice of the forensic psychiatrist there was doubt as to her fitness to plead and that as her solicitor, he was not in a position to indicate her pleas. The solicitor stated that the evidence of Dr Jolly would be that she did not have the requisite intent and that Dr Jolly should hear all the evidence.

The magistrate stated that he did not have the power to conduct a hearing on the issue of fitness to plead and that the matter would have to go to trial on that issue before the District Court. The solicitor asked the magistrate to hear and determine the matter on a summary hearing and to allow the matter to stand until 2 pm when Dr Jolly would be present. The magistrate was reluctant to lose court time, it being about 12.15 pm. The solicitor was allowed to see if he could arrange for Dr Jolly to attend at an earlier time but that proved not to be possible. The magistrate stated that they did not need Dr Jolly. The solicitor again stated that it was hoped that the matter would proceed by way of a summary hearing. The magistrate stated that for that to happen a plea had to be entered. The magistrate stated:

> "There are only 2 ways you can proceed ... and you have to take the next step. You have to tell me how you want to plead."

The solicitor replied that he was not able to indicate pleas. The magistrate identified the first issue as being that there was no ability to enter a plea. The magistrate stated that under s.497 of the Crimes Act he could decline to deal with the charge summarily under s.496A, it being one which he could deal with summarily without the consent of the accused. These procedures would result in the matter being dealt with on indictment with a committal hearing before the magistrate, a "fitness to plead Inquiry" in the District Court (subject to an exception mentioned later) and, depending on the outcome of that Inquiry, a trial in the District Court on the issue of the guilt of the accused. The magistrate regarded the absence of any power on his part to determine the issue of fitness to plead as preventing him dealing with the matter summarily.

The magistrate invited submissions about the procedure he proposed but Ms Perry's solicitor had no submission to make. The magistrate said:

> "... in respect of the matter under section 154A no plea is entered based on the fact that the legal representative, Mr Dickens, indicates that he is not in a position to receive instructions ... the only way the matter can go forward from a summary court is for the court to make an order under section 497 in the discretion that is to decline to deal with the matter so that the defendant can have a trial on the issue of fitness to plead and that being the case under section 497(2) the matter be dealt with on indictment then the proceeding then is one that comes under section or is governed by section 48 and a procedure under section 41 of the Justices Act, that's the indictable proceedings, ..."

Directions were given for the service of the brief and a reply and the matter was adjourned to 2 April 1993 to fix a hearing date for the committal proceedings.

When the matter came before the Court on 2 April 1993 a representative of the DPP appeared but his office knew nothing about the matter. Ms Perry's solicitor applied to the magistrate to deal with the matter under s.32 of the Mental Health (Criminal Procedure) Act. The magistrate declined to permit such an application to proceed, stating "We've gone past all of that". There was some discussion whether s.32 had been raised previously. It was not raised on 23 March 1993 and it was only mentioned in passing on 14 December 1992 as a possibility. The solicitor submitted that even at that stage there was no barrier to dealing with the matter under s.32, despite the orders previously made. In this court counsel did not suggest that the magistrate could apply s.32 once he had embarked upon committal proceedings. The attack concentrated on errors of law allegedly made on 23 March 1993.

It was not argued before me and I reserve the question whether a Local Court having declined, in its discretion under s.497 of the Crimes Act to deal summarily with an offence under s.496A can reverse its decision. New or further facts may emerge. My provisional view is that a Local Court could do so. It is essentially an interlocutory decision and a narrow view should not be adopted as to the Local Court's powers. On occasions, Courts reverse rulings on evidence and on the inspection of

documents when questions of legal professional privilege or public interest immunity are raised.

The magistrate stated that he was not prepared to proceed with the matter under s.32. The magistrate made these comments:

> "... we had all the witnesses for the prosecution here on the last occasion but the hearing of the matter as a summary matter and no request was made under section 32 of the Mental Health Criminal Procedure Act but rather the indication was given that the defence were not able to enter any plea and that's why the matters were converted to indictable proceedings and under section 497 of the Crimes Act so that the statements could be served and the reply given and that the matter go forward for the purpose of a hearing as a fitness to plead hearing before the jury in the District Court and that was the purpose of listing the matter today."

The Mental Health (Criminal Procedure) Act 1990 contains a series of provisions dealing with criminal proceedings involving persons affected by mental illness and other mental conditions. The Act endeavours to introduce a more flexible scheme which recognises the variety of mental states which may exist and to overcome some of the rigidity which had previously existed. Some of the provisions were taken from the Crimes Act 1900 and to that extent the Statute has a consolidating operation.

Part 2 applies to criminal proceedings in the Supreme Court and District Court relating to persons affected by mental disorders. Where a question of unfitness to be tried arises either prior to arraignment or during the trial an Inquiry must be held, subject to an important exception. S.10(4) provides that if the Court is of the opinion that it is inappropriate, having regard to the trivial nature of the charge or offence, the nature of the person's disability or any other relevant matter, to inflict any punishment, the court may determine not to conduct an inquiry and may dismiss the charge and order that the person be released.

Part 2 contains detailed provisions as to the conduct of an Inquiry and what is to happen if the person is found unfit to be tried. The person is referred by the court to the Mental Health Review Tribunal. The Inquiry itself is a substantial exercise. S.10(4) of the Act is designed to stop the stress and expense of an Inquiry if it is obvious that because of the person's mental condition (nature of his disability) it would be inappropriate to inflict punishment. The same result follows if the offence is of a trivial nature.

Part 3 of the Act applies to criminal proceedings in respect of summary offences or indictable offences triable summarily being proceedings before a magistrate but does not apply to committal proceedings (S.31). Section 32 deals with developmentally disabled people and those suffering from a mental disorder falling short of mental illness within Chapter 3 of the Mental Health Act and S.33 deals with people of that high degree of mental illness.

Sections 32 and 33 contain provisions allowing a person to be dealt with in special ways appropriate to their condition and obviates the need for a court to embark upon a full hearing on the merits and to proceed to a conviction.

By s.31(2), ss.32 and 33 apply to the condition of the defendant as at the time when a magistrate considers whether to apply the relevant section to the defendant. This provision and the scheme of the Act suggest that it is incumbent upon a magistrate where there is material pointing to a mental disorder to consider whether to apply either s.32 or 33 as the case may be. The provisions of ss.32 and 33 are companion provisions to those of ss.10(3) & (4). The Supreme and District Courts may decide not to hold an Inquiry and to deal with the matter under s.10(4). The Local Courts are given broad powers to deal with matters but they do not hold an Inquiry.

Section 32, which is the applicable one, provides:

> "(1) If, at the commencement or at any time during the course of the hearing of proceedings before a Magistrate, it appears to the Magistrate:
>
> (a) that the defendant is developmentally disabled, is suffering from mental illness or is suffering from a mental condition for which treatment is available in a hospital, but is not a mentally ill person within the meaning of Chapter 3 of the Mental Health Act 1990; and
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> (b) that, on an outline of the facts alleged in the proceedings or such other evidence as the Magistrate may consider relevant, it would be more

appropriate to deal with the defendant in accordance with the provisions of this Part than otherwise in accordance with law,

the Magistrate may take the action set out in subsection (2) or (3).

(2) The Magistrate may do any one or more of the following:

(a) adjourn the proceedings;

(b) grant the defendant bail in accordance with the Bail Act 1978;

(c) make any other order that the Magistrate considers appropriate.

(3) The Magistrate may dismiss the charge and discharge the defendant:

(a) into the care of a responsible person, unconditionally or subject to conditions; or

(b) on the condition that the defendant attend on a person or at a place specified by the Magistrate for assessment of the defendant's mental condition or treatment or both; or

(c) unconditionally.

(4) A decision under this section to dismiss charges against a defendant does not constitute a finding that the charges against the defendant are proven or otherwise."

Ms Perry submitted that s.32 permits disposition, either temporarily or finally of charges where any acceptable material puts the magistrate on notice that it would be more appropriate to deal with the defendant in accordance with the provisions of that section than otherwise according to law. This may happen at the commencement or at any time during the hearing. She also submitted correctly that Part 3 of the Act has operation in

proceedings whether or not a plea is entered and whether or not a defendant is fit to plead. That is clear from s.32 and from the scheme of the Act. It was so decided in Mackie v Hunt (1989) 19 NSWLR 130 at 134 and 136 under the precursor to s.32, S.428W, Crimes Act 1900. The prosecution did not challenge either the correctness or applicability of that decision.

Ms Perry submitted that the magistrate erred:

(i) in holding that if, by reason of her mental condition, she could not give instructions, the only way the matter could proceed was by way of committal to the District Court for trial on the issue of fitness to plead;

(ii) in holding that summary proceedings could go forward (in this case) only with pleas being entered;

(iii) in ruling that he did not need to hear from Dr Jolly.

Ms Perry submitted that the conditions for the exercise of the jurisdiction under s.32 existed and were acknowledged by the magistrate but he failed to consider the exercise of the jurisdiction under s.32.

The magistrate would have been substantially assisted by the evidence of Dr Jolly even if he did not agree with all or any of Dr Jolly's views. The doctor's report deals with a number of important issues and discusses them in a helpful way.

Based on the transcript of 23 March 1993 the magistrate appears to have taken the view that if Ms Perry or her legal advisers on her behalf did not enter a plea there was only one course he could take, that is, embark on committal proceedings. That was an incorrect view. It was open to him to consider whether to deal with the matter under s.32. To have made an informed decision he would have needed an outline of the facts. It is not clear how far the bus was driven. Nor does there seem to have been an account given of the circumstances of the incident. The information communicated by Ms Perry's solicitor as to her mental condition was limited. No plan was propounded for her future management by her solicitor but he may not have been able to obtain instructions or suitable instructions.

It was common ground that the Local Court could not try an issue of fitness to plead. It was also common ground that an alleged offence under s.154A of the Crimes Act is under s.496A, a summary offence unless and until the court exercises jurisdiction under s.497 (Dargin v Simpson, Studdert J, 24 September 1990, unreported, and Court of Appeal, unreported, 7 February 1992 (Vol 2 CN109, p.200, 250 Criminal Practice and Procedure)).

Counsel for the prosecution submitted that neither Ms Perry nor her solicitor asked the Local Court to act under s.32 or for a further adjournment to enable such an application to be made. Nor did he seek to tender Dr Jolly's report of 11 February 1993. Counsel submitted that in the absence of any other application on behalf of Ms Perry, it was open to the magistrate to decline to

deal with the s.154A charge summarily. This enabled the fitness to plead issue to be tried in the District Court. Counsel further submitted that the magistrate was empowered to make an order under s.497 of the Crimes Act and s.48B of the Justices Act and that no submission was put to him that the orders should not be made. The magistrate had power to make the orders mentioned but he should not have done so without first considering whether it was appropriate to proceed under s.32. He did not need to take a plea to pursue the latter course. Ms Perry's solicitor made it plain that he wanted the matter dealt with summarily.

This is an unfortunate case. The magistrate was anxious to finalise the case. The solicitor for Ms Perry seems to have attended court on 23 March 1993 under the mistaken impression that he could litigate the issue of intent without resolving the questions of fitness to plead and to give instructions. The prosecution also seems to have been under a similar impression but perhaps the prosecution had assumed that the solicitor would have adequate instructions.

The solicitor anticipated that when the case started he would have Dr Jolly available to assist him on Ms Perry's ability to give instructions and on other matters. Both he and the prosecution wanted the matter deferred until Dr Jolly was present at 2 pm. Without his assistance the solicitor seems to have been taken by surprise at the turn of events and to have become a little non-plussed. He did not seem to have a clear idea of what to do. In the discussion which ensued the application of s.32 was not raised.

Counsel for Ms Perry submitted that it would have been wrong for the solicitor to make an application under s.32 without his client's full instructions. Not only could a disposition of the charge under s.32 be determinative of the charge without the benefit of an acquittal (or conviction for the purposes of a plea of double jeopardy) but an order under s.32 could involve a curtailment of liberty. The conditions imposed, although justified, could be quite onerous. They might require admission to a home or other rehabilitative institution for a period. Counsel submitted that having regard to such possible consequences the solicitor would have needed express and informed instructions from the client.

Cases involving an element of mental disorder or mental illness sometimes occasion difficulties for courts and the accused's legal representatives. They find it difficult to obtain informed instructions and are unable to proceed in the manner which might be expected where there are no problems relating to the capacity of their clients. Explaining and making applications to have s.32 applied may be difficult.

The magistrate was confronted with an offence of some apparent gravity and he needed to know the circumstances surrounding the taking and driving of the bus and the mental condition of the defendant. Practically, he needed to have placed before him a clear and effective treatment plan and one which was likely to ensure that there would not be a repetition of the incident in question or the occurrence of some other unfavourable incident.

Realistically, such a plan had to be organised by the solicitor acting in consultation with Dr Jolly and others as well as with Ms Perry. The Crown could not be expected to do it when it was contending that she committed the offence charged and had the requisite intent.

The solicitor for Ms Perry did not tell the magistrate of any plan or suggested course of action. He was given the opportunity to make suggestions or submissions. I do not know whether he or Dr Jolly had an acceptable plan or a proposal. Perhaps it was hoped that when Dr Jolly arrived at the Court all would become clear. Dr Jolly's report suggests that he had started to formulate a plan but had not finalised one as he was dependant on others.

The magistrate was entitled to view the course of events with some displeasure. On 14 December 1992, after previous adjournments, he stood the matter over to 23 March 1993 so that the matter could proceed. He allowed ample time for Dr Jolly to make a considered assessment and report and for action to be taken on the report including preparing a plan of treatment, discussing it with Ms Perry and making arrangements. It could, for example, have been suggested that Ms Perry be given a trial on the plan for 8 to 12 weeks and that the case be adjourned to see how she performed.

The solicitor was occupied with his own difficulties about instructions and wrongly seemed to think that the question of a guilty intent could be resolved without dealing with the

questions of fitness to plead and give instructions. The solicitor gave the magistrate no useful assistance on the s.32 point. I would have expected the solicitor well prior to the hearing to have sorted out the position on s.32 in consultation with Ms Perry and Dr Jolly and to have been able to tell the magistrate clearly what was being suggested or that nothing was being suggested.

I should add that Mr Buchanan of counsel told me that he had satisfied himself that no tutor was required to be appointed for Ms Perry in the proceedings before this court.

Ms Perry appears to be subject to some mental disorders but I express no view on their extent and severity. She appears to have been very dependent on her solicitor. He did not seem to focus on what was required, although he was trying to do his best for her.

The Crown has submitted that even if I were of the view that the magistrate had erred in law I should refuse relief based on discretionary grounds. This argument was based on the conduct of the proceedings by the solicitor for Ms Perry on 23 March 1993, the history of the matter and the apparent gravity of the charge. This is a powerful argument based on substantial grounds. I have been troubled as to the outcome of this application. On reflection, I do not think that I should refuse relief on discretionary grounds.

The magistrate does appear to have proceeded on the view that a plea was required before he could continue and not to have taken into account that without a plea it was open to him to consider dealing with the charge under s.32. There was sufficient material before the magistrate as a result of the proceedings on 14 December 1992 and 23 March 1993 to require him to consider whether it was appropriate to proceed under s.32. If he had done so and Dr Jolly's evidence had not satisfied the magistrate, the magistrate would have pointed out any gaps in the materials and what was required. The magistrate may have taken the view that the alleged circumstances of the offence were so serious that the charge should not be dealt with under s.32 notwithstanding any mental disorder or that the charge should be heard before the District Court. If the magistrate takes the view, after hearing any medical evidence, that the charge should not be dealt with under s.32 and there is still a real question of fitness to plead and to give instructions then it would be appropriate for the magistrate to exercise his discretion under s.497 of the Crimes Act and to commence committal proceedings.

It would be unfortunate for the matter to have to be dealt with in the District Court if there was an appropriate way for the magistrate to deal with the matter under s.32. It is a pity that the impressive skills of the counsel who appeared on both sides before me were not available to the magistrate.

I quash the order of the magistrate of 23 March 1993 declining to deal with the charge under s.154A of the Crimes Act 1900 by way of summary hearing and directing committal proceedings. Pursuant

to s.134 of the Justices Act, I direct the magistrate to exercise his jurisdiction in respect of Ms Perry under s.32 of the Mental Health (Criminal Procedure) Act 1990 according to law.

In accordance with the agreement between the parties I make no order as to costs.

I certify that this and the 18 preceding pages are a true copy of the reasons for judgment herein of His Honour, Mr. Justice Smart.
Dated
21 May 1993
Associate