CITATION: *Stephen Graham Gibson v Kieren Niel Peckham-Hunter, Leroy O'Shea, Daniel Ingui and Daniel Gibson* [2014] NTMC 021

PARTIES:	Stephen Graham Gibson v Kieren Niel Peckham-Hunter and Leroy O'Shea and Daniel Ingui and Daniel Gibson
TITLE OF COURT:	Court of Summary Jurisdiction
JURISDICTION:	Darwin
FILE NOs:	21411189, 21411583, 21411580, 21411191
DELIVERED ON:	13 October 2014
DELIVERED AT:	Darwin
HEARING DATE:	10 October 2014
JUDGMENT OF:	JMR Neill
CATCHWORDS:	*Requests for particulars in preliminary examinations*

REPRESENTATION:

Counsel:

Prosecution:	Ms McNamee
Defendants:	Mr Adams, Ms Bennett, Mr Brock, Mr McMaster

Solicitors:

Prosecution:	DPP
Defendants:	NAAJA, Louise Bennett, NTLAC

Judgment category classification:	B
Judgment ID number:	
Number of paragraphs:	24

IN THE COURT OF SUMMARY JURISDICTION
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

Nos. 21411189, 21411583, 21411580 and 21411191

BETWEEN:

Stephen Graham Gibson
Informant

AND:

Kieren Niel Peckham-Hunter and
Leroy O'Shea and
Daniel Ingui and
Daniel Gibson
Defendants

REASONS FOR DECISION

(Delivered 13 October 2014)

Mr John Neill SM:

1. The four accused, three adults and one youth, are jointly charged with five counts, namely:

1) aggravated assault of Jeremy Musgrave,

2) unlawfully causing serious harm to Jeremy Musgrave,

3) stealing food and drink to the value of $20 from Woolworths, Casuarina,

4) aggravated robbery of Hayden Egan-Connelly; and

5) unlawfully caused serious harm to Vaughn Hendricks.

2. The four Defendants will face a joint oral preliminary examination in relation to all five counts, commencing Monday 20 October 2014 at 10.00am, to be heard for up to three days.

3. Ms Louise Bennett represents the youth Leroy O'Shea. She requested particulars of each charge against her client. Ms McNamee for the prosecution by email dated 3 September 2014 particularised each count other than the count of stealing from Woolworths, by stating that O'Shea was one of a group of young men who formed a common intention to commit each offence.

4. Mr John Adams represents the adult Defendant Kieren Peckham-Hunter. Mr Adams made a similar request and received the same response. Mr Adams by email dated 12 September 2014 then requested further and better particulars of the formation of the common intention, as follows:

    1) was the agreement by words, conduct or both?

    2) who were the parties to the agreement?

    3) what were the terms of the agreement?

    4) where was the agreement made?

5. Ms McNamee for the prosecution has taken the position that particulars are not required to be provided of charges for the purpose of preliminary examination, as opposed to trial or hearing. She nevertheless provided the particularisation of common intention and she has declined to provide anything further.

6. On 10 October 2014 I became the magistrate to whom these matters are now allocated for the oral preliminary examination commencing on 20 October 2014. All four files had been adjourned by a previous magistrate to 09.00am on 10 October 2014 for submissions on this contested particulars issue. On 10 October 2014 I was also the magistrate with the conduct of the hearing

list so I could not allow much time for submissions by the parties. I heard from Mr Adams and Ms McNamee and I received copies of some relevant cases and citations for others. Ms McNamee subsequently filed written submissions by email. I apologise to all four parties and to Ms McNamee for being unable fully to hear all appropriate submissions on 10 October. I said I would deliver my written ruling by email to each party on Monday 13 October 2014, and this is that ruling.

Particulars in Preliminary Examination (Committal) Matters Generally

7. In *Moss v Brown and Anor* [1979] I NSWLR p.114 the NSW Court of Appeal considered the provision of particulars in relation to committal proceedings, also referred to in that Decision as an Inquiry, and in any event equivalent to a preliminary examination in the Northern Territory pursuant to Division 1 of Part V of the *Justices Act*.

8. The Decision of the Court of Appeal was delivered by Moffitt P. on behalf of the Court so that it was a unanimous Decision of all three judges. At page 128.3 the Court said:

> "It is beyond debate that a person charged has no *right* to particulars as such, in relation to committal proceedings".

9. The Court quoted from Walsh J.A. in *Ex parte Donald; Re McMurray* (1969) 89 W.N. (Pt. 1) (NSW) 462 where he said:

> "I think that in any case in which it appears that the giving of particulars is necessary for a proper performance of the duty to 'take the evidence', including as it does, the duty to allow the defendant to examine and cross-examine witnesses and to give evidence himself, the magistrate has an inherent power to order the giving of particulars".

The Court of Appeal held at page 128.8 that this was a correct description of a magistrate's discretion to order particulars, although it was noted that the purpose for so ordering was limited.

10. In passing, I note that the reference by Wash J.A. quoted above to a magistrate's "inherent" power is more correctly to be described as an "implied" power – see *Grassby v The Queen* (1989) 168 CLR at para 21.8.

11. The Court of Appeal went on at page 129.10 to say:

> "The function of particulars to confine issues, and hence the evidence to be given, is inappropriate, or almost so, at an inquiry… the magistrate has the power, and indeed the duty, in the end to consider whether the evidence is sufficient to warrant the defendant being put on his trial for '*an* indictable offence' ".

The Court of Appeal on page 130 of its Decision considered the manner in which evidence might emerge in committal proceedings and limited the discretion of a magistrate to order particulars to ensure defendants are aware of the Crown case as it emerges, sufficient to facilitate cross-examination, leading evidence in reply and making final submissions – p. 130.5.

12. In *Briot and Ors v Riedel and Castles* (1989) 44 A Crim R 29 Einfeld J. sat as a single judge of the Federal Court considering an application for judicial review of a magistrate's Decision to commit the Applicants for trial on six counts of conspiracy. On pages 35 to 39 inclusive Einfeld J. was critical of the Decision of the Court of Appeal in *Moss v Brown*, disagreeing with its concept of the purposes, functions and effects of committal proceedings which he described as "being of another era" – page 36.8. He also disagreed with the conclusion of the Court of Appeal that other than a limited role for the exercise of some discretion, there is no entitlement to particulars in committal proceedings.

13. Einfeld J. considered that this restrictive view failed to appreciate the problems in modern conspiracy and corporate criminal cases. He pointed to a ruling by the Court of Criminal Appeal (NSW) in *Mok* (1987) 27 A Crim R L 38 that conspiracy charges should be particularised. He also quoted from Murphy J in *Gerakiteys* (1984) 153 CLR 317, to the effect that criminal charges generally must be expressed with precision so that an accused

person truly knows what allegations he must meet. Murphy J had used the example of a conspiracy trial to illustrate this point.

14. What is notable however is that neither *Mok* nor *Gerakitys* involved committal proceedings – they both involved trials. In *Briot* there was no dispute about providing particulars, which had in fact been provided in that case, and Einfeld J's comments about the approach taken by the NSW Court of Appeal in *Moss* v *Brown* were not only *obiter dicta*, they formed no part of his ultimate Decision in that case to quash the committal Decision.

15. Indeed, Einfeld J's expressed concerns about the value of, and even the necessity for particulars in complex modern conspiracy and corporate criminal cases, at the committal stage, may well be consistent with the limited discretion approved by the Court of Appeal in *Moss* v *Brown*, where in such cases there might indeed arise a failure to present the Crown case in advance sufficiently to facilitate cross-examination, leading evidence in reply, and making final decisions.

16. The Decision in *Briot* did not overrule the Decision in *Moss* v *Brown*, and that Decision remains good law and of persuasive authority in the Northern Territory.

17. In a later Decision, the Full Supreme Court of Western Australian in *Christianos v Young* (1990) 3 W.A.R. 303 followed *Moss* v *Brown*, and held that a defendant prior to committal has no right to particulars but does have a right to a fair hearing, and any particulars required to be given in the interests of fairness will depend on the nature of the inquiry, so as to be sufficient to enable cross-examination of witnesses, calling of witnesses and making of submissions.

18. In the Northern Territory, Division 1 of Part V of the *Justices Act* ensures that a defendant is supplied with the full prosecution committal brief at least 28 days prior to the committal date, and the prosecution must continue to

serve late received documents or statements after service of the committal brief – sections 105C to 105F inclusive.

19. From the foregoing consideration of the case law I conclude that the circumstances in which a magistrate might exercise the discretion to order particulars in committal matters are limited and that the mischief to which that discretion might be directed will arise only rarely in the Northern Territory provided there is compliance by the prosecution with Division 1 of Part V of the *Justices Act*.

Common purpose

20. All the charges in the four matters before me have been particularised as involving a common intention. Section 8 of the Criminal Code Act provides as follows:

> *1) When 2 or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another and in the prosecution of such purpose an offence is committed by one or some of them, the other or each of the others is presumed to have aided or procured the perpetrator or perpetrators of the offence to commit the offence unless he proves he did not foresee the commission of that offence was a possible consequence of prosecuting that unlawful purpose.*
>
> *2) Two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another when they agree to engage in or concur in engaging in any conduct that, if engaged in, would involve them or some or one of them in the commission of an offence or a tort.*

21. In *Knight* v *The Queen* and *Cassidy* v *The Queen* [2010] NTCCA 15 the Court of Criminal Appeal in the Northern Territory considered the issue of common purpose. In paragraph [66] it said as follows:

> "The understanding to engage in a common criminal purpose need not be express and it need not have been committed at any time before the crime is committed. The circumstances in which two or more persons are participating together in the commission of a particular crime may themselves establish an unspoken understanding

amounting to an agreement formed between them then and these to commit a crime".

22. I am satisfied on the material before me that in the context of the statements and materials disclosed by the prosecution in these four cases the particularisation of "common intention" is sufficient to enable the parties and their counsel to understand the cases against them and to cross-examine witnesses, call any evidence themselves if they so wish, and make any submissions at the conclusion of the evidence, for the purpose of the preliminary examination.

23. I am satisfied that the nature of the charges and the evidence in the Crown brief to support those charges does not involve any equivalent of complex modern conspiracy or corporate criminal activity. One might argue that issues of conspiracy and common purpose/intention share some common features, but an essential element for the exercise of the Court's discretion to order particulars prior to committal is complexity. In my view, that element is not present in these four matters before me.

24. I dismiss the applications for further and better particulars made on behalf of each of Leroy O'Shea and Kieren Peckham-Hunter and supported by their co-accused Daniel Ingui and Daniel Gibson.

Dated this 13th day of October 2014.

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John Neill
STIPENDIARY MAGISTRATE