

1 F I N D I N G

2 HIS HONOUR: The informant in this case, Doug Smith, has
3 charged the defendant, Theo Theophanous, with one charge
4 of rape namely that at Melbourne on 10 September 1998 the
5 defendant did rape the complainant by intentionally
6 penetrating her without her consent while being aware she
7 was not consenting or might not be consenting.

8 This case has lasted 15 days.
9 Unfortunately much of it seems to have been played out by
10 both sides for the benefit of the media as much as this
11 court. However, the matter will be decided by a court
12 of law.

13 Although it is proper that the public has a healthy
14 interest in judicial proceedings and no doubt because it
15 involved a minister of the Crown alleged to have
16 committed a serious offence in Parliament House, it has
17 attracted much notoriety.

18 The allegation is made that on the Thursday night,
19 10 September 1998, effectively the defendant lured the
20 complainant to Parliament House on the pretext of showing
21 her areas of parliament. The prosecution allege that his
22 real intention was to have some form of sexual activity
23 with the complainant, consensual if she was willing but
24 prepared to go further if she was not consenting.

25 After showing her the legislative council chambers,
26 it is alleged by the prosecution she was eventually led
27 to his chambers into which there was a red leather couch.
28 His chambers faced onto Spring Street. Whilst in there,
29 it is alleged by the prosecution that he asked her for a
30 hug and was rebuffed with the complainant requesting to
31 go.

1 It is said by the prosecution that the defendant
2 would not accept this refusal and commenced to fondle her
3 breast region and placed his hand towards her genital
4 region as well as undoing her jacket and undoing her bra.
5 It is said by the prosecution that he then pushed her
6 towards and onto the chaise lounge and forcibly raped her
7 placing his hands over her face and mouth to prevent her
8 screaming.

9 The outline thereafter, in relation to this matter,
10 was outlined by the prosecutor in her opening this case
11 15 days ago. I do not need to go through those
12 particulars again in relation to these matters. They have
13 been a source of much contention during the course of the
14 running of this committal hearing.

15 I, as the magistrate, perform an administrative
16 function namely to consider the case and if I am of the
17 opinion that the evidence is of sufficient weight to
18 support a conviction for the offence to commit the
19 defendant for trial, if not, it is my duty to discharge
20 him. The authorities relating to magistrate's role and
21 the task of the committing magistrate have been both
22 documented and have been referred to by both counsel
23 during the course of their careful and thorough
24 submissions to me.

25 The task really of a committing magistrate is
26 eventually to sift the wheat from its chaff, cases so
27 weak that a jury properly instructed could not possibly
28 convict the defendant and cases where it could. Moreover
29 in performing that task, a committing magistrate is
30 empowered to make some assessment of credibility of the
31 witnesses called by the prosecution. In my view, this is

1 not a case of one of competing inferences or hypotheses.
2 It is not a circumstantial case requiring the drawing of
3 inferences from a number of possible inferences, it is a
4 credit case and stands or fall on some assessment by me
5 of the complainant's evidence as well as all the other
6 evidence presented in this committal hearing.

7 The test is whether a jury properly instructed
8 could convict the defendant. I must take the prosecution
9 case at its highest and must consider the totality of the
10 evidence. It is not my role to supplant a jury or to
11 reach any verdict in this particular case.

12 Having said all that, both sides have outlined my
13 role. In this particular case, the complainant in my
14 view, does deserve sympathy and compassion. She gave
15 evidence over a number of days and clearly in my opinion
16 she is a very emotionally damaged person. I have to say
17 I am very concerned personally for her welfare and
18 clearly the last 10 years of her life have been unhappy
19 leading to a very obvious decline in her condition both
20 physically and emotionally. One hopes that she can
21 recover from her obvious problems.

22 She appeared to me at times to be clinging to
23 reality if not her sanity at times during this committal.
24 Clearly in my assessment of her demeanour, she appeared
25 to be under the influence of something, most likely a
26 prescribed drug at times during the course of this
27 hearing over a number of days. I am sure she is
28 convinced that this event occurred in her own mind.

29 No doubt at some stage she has been to parliament
30 and there may have some flirtation going on between the
31 parties, however, in my opinion, at the conclusion of her

1 evidence, she was an entirely unreliable witness in so
2 many aspects of her evidence. I could place little if
3 any credence of her allegation of rape in this matter.

4 On many occasions she refused to answer many
5 questions, she prevaricated and argued and could not give
6 a proper account really of the circumstances or explain
7 so many inconsistencies relating to various explanations
8 or versions of events that she gave. For example: namely
9 the day of the event changed from Thursday to Monday; the
10 months of the event from September to October; the time
11 of the year from winter to spring; the year in which the
12 event occurred, in the year 2000, 1999, 1998.

13 When she allegedly complained to two witnesses who
14 were her friends about these matters, [REDACTED] and
15 [REDACTED], neither supported her claim, in fact
16 they positively refute her claim in relation to these
17 matters. Her account of whom she phoned was wrong in
18 relation to these matters on occasions.

19 Two witnesses whom she did not claim initially were
20 of any significance in any way connected to the rape,
21 name [REDACTED] and [REDACTED], her brother, became
22 significant observers of the complaint namely the
23 complaint by [REDACTED] and an observation of injuries
24 by [REDACTED]. Later, it was alleged that the first
25 complaint, evidence of her two friends initially did not
26 support, their evidence, [REDACTED] and [REDACTED] reached
27 concoction it was entirely unreliable and most likely
28 untrue in many significant aspects.

29 [REDACTED] in her statutory declaration of 2006
30 was of the belief at that particular stage that the
31 purported complaint made to her was six years earlier in

1 the year 2000. According to her statutory declaration it
2 really places her in London in my view about these
3 matters at the time of the alleged complaint.

4 This information, in my view, had to be supplied to
5 her by the complainant who also, at that particular
6 stage, maintained at that time a rape occurred in the
7 year 2000. Despite her brother's evidence, [REDACTED],
8 that they had worked out the month and the year already
9 by that particular stage as being September 1998, when
10 the complainant ultimately settled on 10 September 1998,
11 [REDACTED] made a statement it was at that time that
12 she reside in Melbourne.

13 This led to a farcical situation of her evidence of
14 receiving a call on a public phone because of a flat
15 battery in which coins being fed in a public phone for a
16 local call. It clearly, in my mind, demonstrates that if
17 anything had been said about sexual misconduct to her at
18 some stage she has little or no memory in which any
19 reliability can be placed at all, similarly with the
20 evidence of [REDACTED] in relation to the red marks on
21 the neck of the complainant.

22 The medical evidence in this case clearly does not
23 support in any way the complainant's dependence on this
24 prescribed medication in relation to this event. Clearly,
25 she is addicted to prescribed medication and probably
26 alcohol but it was rather in relation to a disastrous
27 relationship that she had, not this allegation of rape.

28 The one reference in the medical material that
29 relates to an allegation of rape is not made until the
30 summer of 2008 to Dr Lazarou, a psychiatrist in Greece.

31 Her explanation for refusing to disclose to medical

1 authorities which she says is the real reason in my mind
2 rings very hollow when she was prepared to relate the
3 events to a journalist in 2006 whom she was really just
4 an acquaintance of at that time and also to a solicitor
5 possibly to commence a civil action in 2006.

6 The alleged telephone calls of complaint to her
7 friends are of little assistance to the prosecution in
8 this case. They simply show she made calls to Lisa but
9 not to Julie but in fact to a former boyfriend, Andrew,
10 whom she was clearly in my view harassing by making
11 numerous phone calls at that time inconsistent with her
12 alleged view of him at that time.

13 The subsequent lengthy or numerous communications
14 between the complainant and the defendant over a number
15 of years in the context of an alleged rape do little in
16 my mind to advance the prosecution case at all. If
17 anything, to the contrary. They simply show an ongoing
18 communication that was going both ways and was
19 non-threatening. Inconsistent in my view of any
20 allegation of rape occurring.

21 The alleged propensity evidence of the
22 parliamentary intern, which I did allow in I have to say,
23 is in my view of such slight weight, pointing to
24 flirtation, possibly a sexual harassment in the office or
25 workplace is so far removed from this allegation of rape
26 and at night-time in Parliament House is of little or no
27 help to the prosecution.

28 It is clear that possible coercion was placed on
29 witnesses to support the complainant. It seems to me to
30 have been incurred by her, the complainant, herself and
31 it seems that the evidence was if not manufactured,

1 concocted, at the very least, done recklessly in an
2 endeavour to garnish support for her allegation. All of
3 this in my view was not assisted by an investigation.

4 It took 15 months to obtain a final statement from
5 the complainant. It appears to also, in that situation,
6 have benign acceptance of her allegations of complaint
7 without any objectivity. I cannot believe it could take
8 15 months to obtain a statement from a complainant in a
9 rape case. It seems to me highly improbable and totally
10 unsatisfactory. It places everybody at a difficult
11 situation, the complainant, the police officer involved,
12 the defence.

13 It seems these days the role of an informant is a
14 difficult one. Not only is the police officer supposed
15 to be objective as an investigator but apparently under
16 the victim's charter he also has to offer support to the
17 complainant. There seems to be an underlying tension
18 between these roles.

19 Criticism has been made of Chief Investigator
20 Smith's role in this case. There seems to be an
21 extraordinary amount of communication between him and the
22 complainant before the completion of the final statement,
23 something which may lead to a potential compromising
24 situation for the police officer in his independent role
25 that is required of an investigator. I am not saying he
26 was compromised but such a situation leaves that open to
27 the allegation. I could go on in greater detail in my
28 summation of the evidence of witnesses called in this
29 committal. Mr Richter has pointed out many inaccuracies
30 of witnesses and deficiencies in the informant's case.

31 I have heard the submissions of both sides and I

1 have concluded in this particular case that the
2 prosecution case is not sustainable on the evidence at
3 any level. It is inherently weak, it lacks credibility,
4 reliability and truthfulness. In my view, no reasonable
5 jury properly instructed could convict the defendant on
6 this evidence.

7 Finally, in this particular case, I mention the
8 complainant, as I already mentioned, I doubt whether she
9 could possibly give evidence in a trial in any event in
10 which she would have to give evidence-in-chief as well as
11 be subject to cross-examination. This was not a
12 consideration in my decision-making but simply an
13 observation and in my opinion it would be merciful for
14 her as well that the matter should not proceed further.

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1 HIS HONOUR: Accordingly, Mr Theophanous, can you stand please?

2 In relation to the charge of rape you are discharged.

3 MS WILLIAMS: If Your Honour pleases.

4 MR RICHTER: Your Honour, we would seek an order for costs to
5 be agreed upon in default to apply back to the court.

6 HIS HONOUR: Yes. Do you agree with that, Ms Williams?

7 MS WILLIAMS: I do, Your Honour, yes.

8 MR RICHTER: Thank you, Your Honour.

9 MS WILLIAMS: Thank you, Your Honour.

10 HIS HONOUR: Yes, nothing else, Mr Richter from your point of
11 view?

12 MR RICHTER: No, Your Honour.

13 HIS HONOUR: Nothing else from your point of view, Ms Williams?

14 MS WILLIAMS: No, Your Honour, no.

15 HIS HONOUR: The exhibits will be returned to the respective
16 parties. Mr Theophanous, you're free to go. Yes, thank
17 you.

18 MR RICHTER: Thank you, Your Honour.

19 HIS HONOUR: In relation to the media, my written remarks, I
20 can't because it's in handwriting but I will authorise if
21 necessary a transcript of it if necessary.

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