

Transferring proceedings to the Koori Court

An accused's task of persuading a Magistrate to transfer their case to a Koori Court is likely to be significantly easier after a Supreme Court decision last week.

Introduction

In *Cemino v Cannan* [2018] VSC 535 ('*Cemino*'), Ginnane J held that when deciding an application to transfer proceedings to the Koori Court Division of the Magistrates' Court ('Koori Court'), a Magistrate must consider the purposes of the Koori Court and the rights under ss 8(3) and 19(2)(a) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('the Charter'), and must not treat the traditional principles for determining proper venue as decisive.

Facts

Zayden Cemino is a Yorta Yorta man who lives in Echuca in northern Victoria.¹ He was charged with 25 criminal offences allegedly committed in or near Echuca over a six-month period from 27 July 2016. Echuca is not presently a venue at which the Koori Court can sit and act.²

Mr Cemino applied to the Magistrates' Court at Echuca to have all charges transferred to the Koori Court at Shepparton, pursuant to s 4F of the *Magistrates Court Act 1989*. The Magistrate refused the application, deciding that the case should be heard at the Magistrates' Court at Echuca, as the locality in which the offences allegedly occurred.³ His Honour relied heavily on *Rossi v Martland* ('*Rossi*'), in which Mandie J held that 'generally speaking, serious indictable offences should be dealt with in the locality at which they occur, especially when the defendant's address was in that locality'.⁴

Mr Cemino sought judicial review, arguing that the decision was affected by:

1. Jurisdictional error and error of law on the face of the record because the Court applied the finding from *Rossi* in making its decision.
2. Error of law on the face of the record because the Court acted unlawfully under s 38(1) of the Charter or, alternatively, contravened s 6(2)(b) of the Charter.⁵

Decision

Ginnane J found the Magistrate failed to properly exercise his discretion and ordered a differently constituted Magistrates' Court at Echuca to rehear the application.

¹ For a detailed description of the facts and the Magistrate's reasons, see *Cemino* [13]–[25]. The relevant legislative provisions are set out at [33]–[35]. Ginnane J outlines the background and establishment of the Koori Court at [36]–[54].

² *Cemino* [52].

³ *Cemino* [21].

⁴ *Cemino* [21]–[24], [57]; *Rossi v Martland* (1994) 75 A Crim R 411 (Mandie J). Ginnane J summarises the relevant principles in *Rossi* at [57]–[58].

⁵ *Cemino* [1]–[3], [25]. Ginnane J summarised both parties' submissions at [59]–[65].

Application of the Principles in Rossi

Mr Cemino met the jurisdictional requirements in s 4F(1). The Magistrate therefore had a discretion to transfer proceedings. Ginnane J held that this discretion must be exercised ‘in accordance with the scope, purposes and objects of the Koori Court legislation and the creation of the Koori Court as well as other relevant considerations’.⁶ In determining those considerations, ‘attention must *primarily* be given to the subject-matter, scope and purpose of the Koori Court legislation’.⁷ Potential considerations include:

- Greater participation of the Aboriginal community in sentencing through the role of Aboriginal Elders and Respected Persons in the Koori Court.
- Whether the Elders or Respected Persons likely to participate in the proposed Koori Court hearing are from the same nation as the accused.
- Distance of the Koori Court from the accused’s residence and the location of the alleged offences.
- The nature of the offences.
- Previous sentencing of the accused by the Koori Court or General Division of the Magistrates’ Court and the accused’s conduct after sentencing.
- Rights under ss 8(3) and 19(2)(a) under the Charter.⁸

The fact that the accused allegedly reoffended after previously being sentenced by the Koori Court does not, by itself, prevent the proceedings being transferred.⁹

Ginnane J held that the Magistrate erred in giving primacy to the *Rossi* principles.¹⁰ The traditional ‘proper venue’ considerations should generally be given less weight than the purposes of the Koori Court.¹¹

Though the Magistrate referred to the Koori Court’s benefits, Ginnane J held that he did not meaningfully consider its purposes.¹² The Magistrate erred in placing such weight on the ‘proper venue’ as discussed in *Rossi* and not considering that ‘proper venue’ may be less important, and altered by transfer, under the Koori Court legislation.¹³

⁶ *Cemino* [67] (citations omitted), [69].

⁷ *Cemino* [72] (emphasis added).

⁸ *Cemino* [73], [78].

⁹ *Cemino* [73].

¹⁰ *Cemino* [74].

¹¹ *Cemino* [74].

¹² *Cemino* [76].

¹³ *Cemino* [77].

Application of the Charter – s 38

Ginnane J found the exercise of the discretion in s 4F(2) was a judicial, rather than administrative, power as the refusal was a ‘binding determination of the rights of the plaintiff’.¹⁴ The Court was therefore not a ‘public authority’ bound by Charter rights in this case.¹⁵

Application of the Charter – ss 6(2)(b), 8(3) and 19(2)(a)

Ginnane J adopted the ‘intermediate construction’ of s 6(2)(b) of the Charter that the Court’s function is to directly enforce only rights that relate to court proceedings.¹⁶ The third limb of s 8(3) of the Charter on ‘the right to equal and effective protection against discrimination’ relates to court proceedings, but only to court procedure, not substantive decisions.¹⁷

The Court applies the rights in the third limb of s 8(3) and in s 19(2)(a) through its obligation to consider those rights in properly exercising the discretion under s 4F(2) of the Act.¹⁸

Ginnane J found that the Magistrate erred because he did not consider the functions of the Court under ss 8(3) and 19(2)(a) when refusing to transfer the proceeding to the Koori Court.¹⁹

Commentary

Cemino emphasises the significance of the Koori Court and recognises the importance of hearing proceedings against Aboriginal accused in a culturally appropriate court. Magistrates must consider a range of factors in determining transfer applications, including those that favour transfer, such as the purposes, scope and objects of the Koori Court legislation, the right to equal and effective protection against discrimination in s 8(3) of the Charter and the Aboriginal cultural rights under s 19(2)(a) of the Charter. Combined with the obligation to give less weight to traditional methods for determining proper venue, an accused’s task of persuading the Court to transfer their case to a Koori Court is likely to be significantly easier post-*Cemino*.

¹⁴ *Cemino* [96].

¹⁵ *Cemino* [95], [99], citing *Slaveski v R* (2012) 40 VR 1 (Nettle and Redlich JJA) [99]; *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 4 (definition of ‘public authority’), 38.

¹⁶ *Cemino* [105], citing *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1, 80 [246], [250] Tate JA), [110] (citations omitted).

¹⁷ *Cemino* [142], [144].

¹⁸ *Cemino* [146]–[147]. Section 8(3) states: ‘every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination’. Section 19(2)(a) states: ‘Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community, to enjoy their identity and culture’.

¹⁹ *Cemino* [150].