

GRAND JURY AUTHORITIES

1. re Davies and Millidge 1893:

“An application for a Grand Jury may be made ex parte. It is sufficient if the affidavit in support of such an application discloses a state of facts which if true amount to the committing of an indictable offence. Such facts need not necessarily be sworn to by the deponent as being within his own knowledge.”

2. re Dungey and Bromley (1899)

“The application for a warrant for the apprehension of a defendant against whom a bill of indictment has been found by a grand jury, should be made in the first instance to a Justice of the Peace under section 33 of the Justices Act 1890, and not to a judge of the Supreme Court.”

3. Byrne v Armstrong (1899) 25 VLR 126

“An application for a Grand Jury under Section 389 of the Crimes Act 1890 may be made ex parte, and upon the application complying with requirements of that section the Full Court has no discretion but is bound to grant a rule directing the sheriff to summon a Grand Jury.”

4. R V McInnes, Erskine and Calwell 1940 VLR 416 (at 420)

a) “The law is very jealous to see that justice shall be done and it has provided a special procedure where justices for any reason fail to commit a person who is charged or if justices have

committed a person against whom a charge is made and the Crown authorities for any reason refuse to go on with that committing and present the man for trial before an ordinary jury.

- b) “The function of the Grand Jury is not to determine the guilt or the innocence of the person against whom a charge is made, but to determine on the **evidence of the prosecutor alone** whether the case is such that they think that the person charged should be put upon his trial in the ordinary way.” (at 420)
- c) “In order to constitute perjury a man who swears what is false must know at the time he swears it that it is false, or at any rate not believe it to be true.” (at 424)
- d) The form of oath administered to the witnesses was as follows:
“I swear by Almighty God that the evidence I shall give on all matters before the Grand Jury upon these bills of indictment and each of them shall be the **truth, the whole truth, and nothing but the truth.**”

5. **R V Parker 1977 VR 22**

- a) “The qualification of a **prosecutor for the Queen** to make presentment at the court must exist on the day on which the presentment is filed. “ (at 22)
- b) “The answer to the question must depend upon the proper interpretation of Section 353 of the Crimes Act which **authorises a prosecutor for the Queen** to make presentment of a person for an indictable offence.” (at 23)
- c) “It is therefore in my view consistent with judicial authority and consonant with the literal meaning and purpose of S353 and its

historical background that the prosecutor for the Queen does not, ‘make presentment at the ...County Court,’ until the presentment is filed, and that to authenticate such ‘presentment’ he must be **qualified to act as a prosecutor for the Queen** at the time of making presentment.” (at 41)

- d) In England the Queen prosecutes, a county may prosecute, or a single individual, but still in every case, the Crown really prosecutes, and **even the Grand Jury prosecutes for the Crown**, after information is filed, if a **private prosecutor comes into court**, he may be permitted to prosecute for the Crown. It appears to me to be quite clear that once presentment is made anyone may take up prosecution in the Court. (at 42)

6. Lorne Campbell 1986 (BC8600228)

- a) The Practice under S354 of the Crimes Act, and its predecessor has been quite clear since at least 1899 **when ‘six judges’ of this court** assembled to consider whether, if the conditions in the section were made out to the court’s satisfaction it had any discretion whether to direct the sheriff to summon a grand jury. In a consideration decision, reported as *Byrne V Armstrong* (1899) 25 VLR 126, the court held that it had no such discretion.
- b) “Numbers of applications have been made and each one has been *exparte*. In the one case cited it was held that it must be *exparte* and it was to decide whether that was the correct practice that ‘this specially constituted court was called together.’ Accordingly, I think that the application should be *ex parte* and was properly made *exparte*.

- c) “The Crimes Act has been frequently amended. S354 has been itself amended in quite recent times in two respects: one to accommodate this abolition of the distinction between felonies and misdemeanours and the other to insert the Director of Public Prosecutions in the Section in place of the Attorney-General.”
- d) “I would draw attention also to an observation made by Lower H when His Honour was addressing the grand jury which was summoned in:

R v McInnes & Ors (1940) VLR416. His Honour said to the grand jury (at p420).

“The law is very jealous to see that justice shall be done and it has provided a specific procedure where justices ‘for any reason’ fail to commit a person who is charged or if justices have committed a person against whom a charge is made and the ‘Crown authorities for any reason’ refuse to go on with that committal and present the man for trial before an ordinary jury.”

- e) **“We must not assume the position of law-makers and we cannot redress grievances contrary to the intention of the Statute Law.”**
- f) “We shall accordingly proceed with the matter exparte and consider the one matter which I earlier reserved, viz whether the affidavits disclose indictable offences.”

7. **McArdle V Lorne Campbell (Sept 1986)**

- a) “Such a formulation of the principle is clearly too wide for it would enable a person liable to be indicted by a Grand Jury to

require this Court to hear his defence to the alleged offence. If the course were to follow that course **it would be usurping the function of the Grand Jury** which is not to pronounce upon the guilt or innocence of the accused, but upon whether the bill of indictment discloses a true bill, that is to say, whether the offence appears to be sufficiently proved to put the offender on his trial. **A Grand Jury never hears the defence.”**

- b) “For the purpose of dealing with this application we find it unnecessary to determine the limits of the Court’s power to set aside an order obtained *ex parte* or to attempt to define the occasions upon which the Court would exercise the jurisdiction to set aside an order obtained under S354 of the Crimes Act. **A proper understanding of the procedure prescribed by S354 however, will demonstrate that this is not a proper case for the exercise of the power.”**
- c) “The Section (354) **does not place upon the Full Court the task of examining the evidence.** Nor of determining whether the prosecutor has established a true bill. The section bearing the interpretation, which was placed upon it many years ago, which has never been questioned by Parliament, **gives the Full Court a limited role which is no more than we have described. It requires no more than an affidavit complying with the section, disclosing an indictable offence.”**
- d) “The reason that led the Court in *re Davis & Millidge*, *supra*, to require the depositions which had been filed in this Court to be removed before the Court would make an order for a Grand Jury

was no doubt because the function of the court is not to review the committal. **It is simply to act upon the section.**”

- e) “The second observation which we wish to make concerns the whole concept of the grand jury procedure. The procedure was re-introduced in Victoria in 1874 by S21 of the Judicature Act of that year to provide for cases where the **“Crown Law Officers” refused to present for trial** an alleged offender against whom a complaint had been made.”
- f) “Much has changed since 1940 and in particular the Office of Director of Public Prosecutions has been established by Act No 9848 of 1982. Under that Act the Director of Public Prosecutions is charged with preparing, instituting and conducting criminal proceedings on **‘behalf of the Crown.’** The Director is responsible **to the Attorney General** for the due performance of his functions and he is given the power to enter a nolle prosequi in criminal proceedings. But the Attorney-General’s power to enter a nolle prosequi is preserved in these circumstances, now that the responsibility for instituting criminal proceedings has been taken out of the hands of the Attorney-General, it may be that there is not the same need to have an alternative method of instituting proceedings. When the Office of Director of Public Prosecutions was established S354 of the Crimes Act was amended to substitute the words ‘the Director or Public Prosecutions’ for the words ‘a law officer.’ The **section therefore now operates where the Director declines to present.**”

g) “We must not assume the position of law makers and we cannot redress grievances contrary to the intention of the Statute Law.”

8. Indictments: Section 354 Crimes Act 1958

a) “Upon the application of ‘any person’ supported by an affidavit disclosing an indictable offence”

b) “It shall be lawful” for the Full Court to order the sheriff to summon a grand jury.

c) Not less than twenty three men (23)

d) Execute all things which on the part of ‘the Queen.’”

9. Julius v Bishop of Oxford (1880) 5 APP CAS 214 House of Lords.

a) “The words in a Statute ‘it **shall be lawful**’ of themselves merely make that legal and possible which there would otherwise be no right or authority to do. Their natural meaning is permissive and enabling only.” (at 214)

b) “**Enabling words are always compulsory where they are words to effectuate a legal right.**” (at 214)

c) “The words in the Statute, ‘it shall be lawful’ have not, and never could have been intended to permit such a result. They are words which declare the possession of power, of which the rules and the principles of law require the exercise.” (at 216)

d) “The power of the Bishop was derived from the Crown.” (at 217)

e) “But when a complaint was made to him, he was bound to put the law in motion.” (at 217)

- f) As to Statutes conferring, by such words, powers on the courts of law, the course of the decisions had been uniformly in accordance with the principle that permissive words in the creation of a power which was created for public purposes, must be construed as directory.” (at 218)
- g) When a Statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorised to exercise the authority when the case arises, and its exercise is duly applied for by a party interested, and having the right to make the application.” (at 218)
- h) “And the principle plainly is that where there is **any public interest, or ‘right involved’** the words must receive a construction of obligation and not of discretion.” (at 218)
- i) “In public Statutes words only directory, promissory, or enabling, may have a compulsory force where the thing to be done is for the **public benefit, or in advancement of public justice.**” (at 219)
- j) “A capricious refusal to institute an inquiry under the Statute **prevented a public benefit, and interfered with the administration of public justice.**” (at 219)
- k) “When a Statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorised to exercise the authority, when the case arises, and its exercise is duly applied for by a party interested, and having the right (**that is having by statute the right**) to make the application.” (at 224)
- l) “That where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are

specifically pointed out, and with regard to whom a definition is supplied by the legislature of the conditions **upon which they are entitled to call** for its exercise that power ought to be exercised and the court will require it to be exercised.”

10. **Commission of State Revenue (Vic) v Royal Insurance Aust. Ltd 1993 182 CLR 51**

“Where in such an Act the word ‘**shall**’ is used in conferring a power, it shall be construed as meaning that the power must be exercised.” (at 98)

11. **Samad J District Court of NSW 2000, 50 NSWLR 270**

a) “The words undoubtedly are only empowering, but it has been so often decided as to have become an axiom, that, in public Statutes, words only directory, permissive or enabling any have a compulsory force where the **thing to be done is for the public benefit or in advancement of public justice.**” (at 280)

b) “The word ‘**may**’ is merely used to confer the authority, and the **authority must be exercised**, if the circumstances are such as to call for its exercise.” (at 282)

12. **Re Hamilton Byrne 1995 1 VR 129**

“Perhaps the cardinal reason for the preservation in Victoria of the **Common Law offence of conspiracy to defraud** is that it enables planned substantive offences to be intercepted in aid of the **preservation of the Queen’s peace** – the good of society, is threatened within Victoria (at 129)

13. **Byrne V Armstrong (1899) 25 VLR 126**

“That section contemplates an ex parte application founded upon an affidavit disclosing an indictable offence, and that a justice has refused to commit. The court has no discretion once those conditions are complied with. Section 386 shows **that so far as Treason is concerned it must be prosecuted by indictment. The Attorney General could not start such a prosecution. It must be by grand jury.**” (at 126)

14. **Byrne v Armstrong (1899) 25 VLR 126**

“**If the full court were to hear both sides and ‘to examine into the facts of the case they would be usurping the functions of the grand jury,’** and further, if the full court, after hearing both sides, sent the case to the grand jury it would be prejudicial to the person accused. The words ‘it shall be lawful’ are mandatory.” (at 127)

15. **Byrne v Armstrong (1899) 25 VLR 126**

- a) “The common law is subject to some degree of variation as circumstances arise, and through changes of society, **but so far as statute law is concerned,** we have no right to act except according to well known canons of constitution.” (at 128)
- b) “It has long been the rule in this court and in other English courts that when the words ‘it shall be lawful’ are used for the purpose of conferring a new jurisdiction upon courts of justice that these words are usually at all events **read as mandatory** and mean that that jurisdiction shall be exercised.” (at 128)

- c) “It also decided that enabling words are always compulsory where they are **words to effectuate a legal right.**” (at 129)
- d) “We have here to deal with a statute relating to the **general administration of the criminal law, ‘which affects everybody.**” (at 129)
- e) “It may be laid down as a general principle of our law that where any person thinks upon reasonable grounds that another person has been guilty of a criminal act, then he may prosecute such person for such act. There are certain limitations as to the conditions on which he may take steps, **but as a general rule anyone may prosecute anyone else for a breach of criminal law.**”(at 131)
- f) “The this statute is enacted **as a remedy against possible miscarriages of justice,** and consequently it applies to a case where the justices have declined to commit, although an indictable offence has been shown or where no presentment has been made by the Attorney General – **that is, where the Attorney General declines to present.**” (at 131)
- g) “Of course it is possible that justices may err in their judgment or from whim, and so may the Attorney General and it was thought desirable that no such error should have the effect of saving one person from prosecution when another might not be so saved, and therefore the Full Court was brought into requisition.” (at 131)
- h) “The reason for requiring the highest tribunal probably is that although two constituted tribunals have failed to commit, presumably in full discharge of their duty, yet, if the Full Court

sees that they were wrong, the **Full Court must send the defendant to the grand jury.**" (at 132)

- i) **"It is provided now that all the prosecutions shall be by presentment, but preserving the prerogative of the Crown through the Attorney General to proceed by information, except in case of 'treason' which has to be by indictment. Now indictment means by Grand Jury and therefore, inasmuch as the statute provides that Treason shall be tried by indictment only. That means that it must be by Grand Jury and no other means is provided for bringing it before a Grand Jury." The finding of the Attorney General is equivalent to the finds of the Grand Jury, but in the case of Treason it must be the finding of the Grand Jury.**" (at 132)
- j) "Then when the offence is committed by some **body corporate** the application is made under this section and there is no other way of proceeding." (at 132)
- k) "In England where both processes existed at all times from the institution of the Grand Jury system anyone might prosecute, and **the application was always exparte** and the defendant was never heard at all." (at 133)
- l) "The information was introduced because **it was a prerogative of the Crown** and under its prerogative it commanded the Attorney General to prosecute." (at 133)
- m) "If either the justices or the Attorney General fails to send it on for trial, **so that the Grand Jury will do what the Attorney General is supposed to do.**" (at 134)

- n) “It has been urged against the view which I consider correct that if the matter is to be debated before the Full Court there would be no need for the Grand Jury.” (at 137)
- o) “No class is specified for whose benefit it might be supposed that the legislation was intended, and **anyone may apply**, even though not a party to the previous proceedings.” (at 138)
- p) “The affidavit may be made by any person, and apparently, according to the decision of this court, the facts need not even be sworn to as of the deponent’s own knowledge.” (at 138)
- q) “**No security for costs is required**, nor can any terms of any sort be imposed.” (at 138)
- r) “In place of the previous procedure prosecution by indictment or presentment was substituted. **Treasons must be prosecuted by indictment.**” (at 139)
- s) “I can see nothing in this alteration itself or in the history of it to justify the conclusion that the discretion which the court formally possessed has been taken away or to show that the court now not only must make an order **but must also make it exparte.**” (at 139)
- t) “I think that a consideration of this instance, and of all the others enumerated in the section, leads strongly to the conclusion that the full court and the Grand Jury are interposed on the one hand to protect the accused, and on **the other to prevent the abuses prevalent in the English system.** (at 140)
- u) “It was found, however, that **there were occasionally miscarriages of justice** arising from non committals or non presentments, or from the legal difficulties surrounding offences

by corporations and it was to remedy these that the new procedure was created.” (at 140)

- v) “Even where the court clearly has a discretion its power ought to be exercised in aid of public justice, because a discretion vested in a legal tribunal is to be exercised according to law and reason, and **must not be used in an arbitrary or fanciful manner.**” (at 142)
- w) “So that whatever this reference to public justice may mean no help can be derived from it in determining whether there is a discretion or not, because **in both cases the power must be used if justice require it.**” (at 142)
- x) “That discretion has been left unfettered by the legislature, and **should only be exercised where there has been a miscarriage of justice**, or where there is no other adequate remedy for some apparent wrong. For these reasons I am unable to concur in the judgment of the court, and I have stated my views at length, as the matter seems to **me to be one of the utmost importance to the public.**” (at 143)
- y) “I concur with the chief justice is saying that we are **interpreters of the law and not law makers and that we should not be law breakers to meet out own individual views as to what should be the meaning of the statute.**” (at 143)
- z) “Because in that case **the particular persons had a right to come** and ask for it, and that right was given to them. It was urged in that case that there had been breaches of the law relating to the great national church, and **the interests of the great national church is the interest of the nation, and the breaches**

of the law relating to it are matters of public importance, and that therefore this power should be read as a right.” (at 147)

aa) “The applicant need not be the individual who had seen the offence committed, and **may be dealing with the case ex relatione.**” (at 147)

bb) “As the applicant has fulfilled the conditions required by section 389, and an indictable offence is disclosed by the affidavit, the rule will go **rule granted.**” (at 148)