SUPREME COURT OF QUEENSLAND

CITATION:	*P v H* [2015] QSC 351
PARTIES:	**JP** (applicant) **v** **H** (respondent)
FILE NO:	8327 of 2015
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	11 December 2015
DELIVERED AT:	Brisbane
HEARING DATE:	30 November 2015
JUDGE:	Applegarth J
ORDER:	**1. That the appellant provide security for the respondent's costs on the appeal in the sum of $80,000 on or before 4 pm, 29 February 2016 in respect of the respondent's costs up to and including the first day of the hearing of the appeal.** **2. In the event it appears to a judge of this Court at a pre-hearing review of this matter that there is a substantial possibility that the appeal will extend beyond a one-day hearing, or in the event the appeal hearing extends beyond one day, then the respondent provide further security in the sum of $15,000 per day, and that such further security be provided within 48 hours of the judge so indicating or, in the absence of such an indication, by no later than 4 pm on the first**

day of the hearing of the appeal.

3. **The security must be given in a form satisfactory to the Registrar.**

4. **The appellant must as soon as practicable after giving security serve on the respondent written notice of the time when and the way in which the security was given.**

5. **If security is not given under this order, the appeal is stayed so far as it concerns steps to be taken by the appellant.**

6. **If security is not given the respondent may apply to dismiss the appeal.**

7. **There be liberty to apply.**

8. **Each party's costs of the application be reserved.**

CATCHWORDS: PROCEDURE – COSTS – SECURITY FOR COSTS – OTHER REASONS FOR SECURITY – where the respondent police officer killed the appellant's son during a confrontation in the course of the police officer's duties – where an inquest found that the appellant's son was killed in self-defence after pointing a replica firearm at the police officer – where the appellant brought a private complaint against the police officer alleging murder and/or manslaughter – where a Magistrate dismissed the complaint as an abuse of process – where the appellant appeals the decision to dismiss to the Supreme Court for a hearing *de novo* – where the respondent applies for security for its costs of the appeal – whether security for costs should be granted and if so, in what amount

Acts Interpretation Act 1951 (Qld), s 14B
Justices Act 1886 (Qld), ss 42, 53, 102A, 102C, 102D, pt 2 div 5
Uniform Civil Procedure Rules 1999 (Qld), r 672

Footscray City College v Ruzicka (2007) 16 VR 498, cited
Gouriet v Union of Post Office Workers [1978] AC 435, cited
Grey v Pearson (1857) 6 HLC 61, cited
Hambleton v Labaj [2010] QSC 124, cited
Heydon's Case [1584] EWHC Exch J 36, cited
Higgins v Mr Comans, Acting Magistrate & DPP (Qld) (2005) 153 A Crim R 565, cited
Jones v Cusack (1992) 109 ALR 313, cited
Lohe v Tate [2002] QSC 399, cited
Mbuzi v Hall [2010] QSC 359, cited
P M Sulcs & Associates Pty Ltd v Daihatsu Australia Pty Ltd (No 2) [2000] NSWSC 826, cited

Re Cameron [1996] 2 Qd R 218, cited

COUNSEL: S Di Carlo and A Fronis for the applicant
P J Davis QC and S W Zillman for the respondent

SOLICITORS: A Ace Solicitors for the applicant
Queensland Police Union Legal Group for the respondent

[1] On 17 April 2012 the respondent, Plainclothes Constable H ("PCC H"), shot and killed JP after a confrontation with him. An inquest into JP's death was held over many days in 2013 at which witnesses were examined and forensic and other evidence considered. The Coroner concluded that JP was shot and killed when he produced a replica firearm and pointed it at PCC H. When the officer ran for cover JP followed him and again pointed the replica gun at the officer in a manner which led PCC H to reasonably believe his life was at risk and could only be preserved by his firing at JP.

[2] The evidence discussed by the Coroner in his comprehensive reasons strongly supported this conclusion. An exception was the evidence of JP's long-term friend, Ms S, at whose residence the incident took place. She denied that JP had anything in his hands at the time he was shot. However, the Coroner found her evidence to be unreliable for a number of reasons, and it was inconsistent with other evidence. This included evidence that, very soon after JP was shot, a realistic replica hand gun was found on the ground near his body. The evidence was that JP had such a gun and photographs taken from his Facebook page showed him and others posing with it.

[3] Unsurprisingly, in the light of the Coroner's finding that JP produced a replica firearm and pointed it at PCC H and that PCC H acted in self-defence, no prosecution was brought against PCC H by the prosecuting authorities.

[4] On 12 January 2015 JP's father, SP, who I will refer to as Mr P, swore a complaint, charging PCC H with murder and in the alternative manslaughter. A summons was issued upon his complaint.

[5] On 2 February 2015 PCC H filed an application pursuant to s 102C(1) of the *Justices Act* 1886 (Qld) seeking the dismissal of the complaint as an abuse of process or as frivolous or vexatious. A Magistrate ordered that Mr P disclose his brief of evidence to PCC H. Later, on 27 July 2015, a Magistrate dismissed the complaint. In essence, the Magistrate considered the manner in which counsel for Mr P proposed to proceed with the calling and examination of witnesses did not meet the duties of a prosecutor to call all relevant, including exculpatory witnesses, in a prosecution case. The conduct of the prosecution in the way proposed was found to be "oppressive to the defendant". After referring to the evidence of a witness who said that he saw a black item in the deceased's hand before he was shot, the evidence of neighbours as to what they heard shouted out at the relevant time, and evidence of the presence of a replica hand gun in the vicinity of the deceased's body after he was shot, the Magistrate concluded that the prosecution was "doomed to fail", having regard to an obvious defence of self-defence. As a result, the Magistrate was satisfied that the proceeding constituted an abuse of process.

[6] On 21 August 2015 Mr P filed an application seeking orders pursuant to s 102D of the *Justices Act* that the Magistrate's decision to dismiss the complaint be reversed. Section 102D provides for an appeal from the decision of a magistrate made under s 102C to a judge of the Supreme Court "in chambers". An appeal under s 102D(1) is by way of hearing *de novo*.

[7] On 22 October 2015 PCC H filed an application pursuant to s 102D(3) for security for costs in respect of Mr P's appeal.

The issues

[8] In resisting PCC H's application for security for costs, Mr P has raised an issue about whether the provisions of s 102A to s 102G apply to the private complaint which he made. His contention raises an issue about the proper construction of s 102A.

[9] If, however, s 102A to s 102G apply to his private complaint then two issues arise:

(a) should security for costs be ordered; and

(b) if so, in what amount?

The statute

[10] The proper construction of s 102A is determined by reference to its terms, considered in its statutory context.

[11] Criminal proceedings may be commenced by complaint.[1] The complaint results in a justice issuing a summons.[2] Whilst complaints are usually sworn by a police officer or a person acting under the authority of a statute to bring a complaint, the *Justices Act* permits a private individual to swear a complaint.

[12] Special provisions apply to a "private complaint" as defined in s 4 of the Act. Part 5 Division 2 of the *Justices Act*, which contains s 102A to s 102G, governs the procedure for a private complaint, save for a private complaint that is excluded from the operation of Division 2 by virtue of s 102A. Division 2 was introduced in 1979 with this object:

> "… the prevention at an early stage of proceedings on a private complaint of an indictable offence which is an abuse of process or is frivolous or vexatious."[3]

The provisions were intended to "give an opportunity to a defendant to apply for a determination at the outset of the proceedings as to whether the private complaint is one of substance and should proceed to be heard and determined on its merits."[4] The procedure provided for in Division 2 was to "not apply to a private complaint of an

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1 *Justices Act* 1886 (Qld), s 42.
2 *Justices Act* 1886 (Qld), s 53.
3 Hansard, Queensland Legislative Assembly, 7 June 1979, p 5001.
4 Ibid.

indictable offence charging a person with an offence of which injury to the person or property of the complainant is an element."[5] This exclusion appears in the terms of s 102A:

> "**102A Application of provisions**
>
> Sections 102A to 102G apply to and in relation to a private complaint charging a person with an indictable offence, including an indictable offence a charge of which may be dealt with summarily, **other than a private complaint charging a person with an offence of which injury to the person or property of the complainant is an element**, and do not apply to or in relation to any other private complaint." (emphasis added)

[13] Private complaints charging an indictable offence which are not so excluded are subject to the Division, including s 102C which permits a defendant at any time before evidence is led as to the facts of a charge contained in a private complaint to apply for an order of a magistrate that the complaint be dismissed on the ground that it is an abuse of process, frivolous or vexatious.[6] As noted, a person aggrieved by a decision of a magistrate to dismiss a private complaint may appeal to a judge of the Supreme Court and an appeal under s 102D(1) shall be by way of "hearing *de novo*", with the decision of a judge in such an appeal to be final.

[14] Section 102D(3) provides for the Supreme Court to make an order by way of security for costs. It provides:

> "(3) Where an appeal under subsection (1) is instituted the appellant shall be required to give security, in such manner and in such amount as a judge of the Supreme Court may order, that the appellant will pay to the respondent such costs incurred by the respondent on the appeal as the judge who determines the matter of the appeal may order the appellant to pay."

The proper interpretation of s 102A

[15] Reference to s 42(1) of the *Justices Act* and other provisions of the Act makes it clear that "the complainant" is a person who brings the complaint. In most cases the complainant will be a police officer rather than the victim, if any. In this case "the complainant" is Mr P. PCC H's position is that the exclusion from the operation of Division 2 created by the words in s 102A, which I have highlighted in that section, arises where the charge is for an offence of which:

(a) injury to the person of the complainant is an element; or

(b) injury to the property of the complainant is an element.

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5 Ibid, p 5002.

6 *Justices Act* 1886 (Qld), s 102C(1).

Neither is submitted to apply here. The private complaint charging PCC H is not for an offence of which injury to the person of the complainant (Mr P Snr) is an element. The charge is the murder or manslaughter of JP. Because the exclusion contained in s 102A is not engaged, s 102A is submitted to apply Division 2 to the private complaint brought by Mr P.

[16] According to Mr P, s 102A creates an exception for a case in which a private complainant charges an offence of which injury to the person of *any* individual is an element. He submits that:

(a) the construction contended for by PCC H does not reflect the literal meaning of the section and that the section would have been worded differently if this is what the legislature intended;

(b) the construction for which he contends addresses the mischief that s 102A to s 102G sought to remedy; and

(c) PCC H's construction would lead to an absurd result.

The wording of s 102A

[17] The ordinary meaning of the words contained in s 102A supports PCC H's position. The extrinsic material in the form of the second reading speech of 7 June 1979 reflects the terms of the section itself.

[18] The section does not read "injury to the person or <u>the</u> property of the complainant". Its ordinary and natural meaning is not about injury to any person. It is concerned with an offence of which injury to the person or property "of the complainant" is an element. The words "of the complainant" define whose person or property sustains injury.

[19] I do not accept that the literal meaning of s 102A, or for that matter, its natural and ordinary meaning, is as Mr P contends. The words of s 102A reflect the legislative intent that the procedure contained in Division 2 not apply to a private complaint of an indictable offence charging a person with an offence "of which injury to the person or property of the complaint is an element". The construction that Mr P seeks to place on s 102A requires the addition of words and a comma such as "injury to the person, or <u>to the</u> property of the complainant". It is no answer to the construction contended for by PCC H that the section could have been drafted differently, for example, so as to read "injury to the person of the complainant or the property of the complainant". That would simply be a different, and more wordy, way of stating what the Parliament intended.

[20] Mr P submits that the section would have been worded differently if Parliament intended to deprive a person "of a benefit bestowed under century's [sic] old common law if certain circumstances exist". He refers to the fact that the legislature intended people to be able to start private prosecutions. The construction for which PCC H contends does not deprive a person of the opportunity to bring a private prosecution. Instead, it subjects such a private complaint to the procedures contained in Division 2 unless the private complaint is of a kind which falls within the exclusion defined by s 102A.

Mr P's "mischief rule" argument

[21] Mr P invokes the "mischief rule", also known as the rule in *Heydon's* case.[7] The purposive approach to statutory interpretation, reflected in s 14B of the *Acts Interpretation Act* 1951 (Qld) and modern authority, had its origins in the so-called "mischief rule".[8]

[22] Mr P asserts that the mischief that s 102A to s 102G was intended to suppress was that "people could bring and commonly brought private prosecutions for misconduct and war crimes against politicians or bringing [sic] various other nefarious prosecutions against any person for any reason, more often than not putting them to the expense of having to defend the frivolous or vexatious action with the accompanying disadvantages of the media attention". No extrinsic evidence supports this as the identified mischief, and the second reading speech does not suggest that the provisions were directed only to such private prosecutions.

[23] The provisions do not prevent the bringing of a private prosecution. A private complaint for an indictable offence may be brought and will not be subject to Division 2 where it charges a person with an offence of which injury to the person or property of the complainant is an element. In the case of other private complaints charging a person with an indictable offence, the Division applies. The provisions of Division 2 were intended to "strike a sensible balance between the rights of a private complainant who desires to prosecute a genuine grievance and the rights of a defendant who needs to be adequately protected from prosecution of a frivolous or vexatious complaint."[9] The mischief at which the provisions were directed was not limited to a private complaint for misconduct and war crimes against politicians or some other limited class of prosecutions. The provisions were to apply to any private complaint of an indictable offence which is an abuse of process or is frivolous or vexatious, unless the private complaint of an indictable offence charges a person with an offence of which injury to the person or property of the complainant is an element.

[24] Next, Mr P submits that the intention of s 102A to s 102G was to "make it more onerous for a citizen to start a private prosecution where it does not involve a serious crime such as an injury to a person". However, neither the terms of the provisions nor the extrinsic material makes the application of the Division and the private complaints which are excluded from its operation depend upon whether the indictable offence is for what may be described as a "serious crime". The exclusion contained in s 102A depends upon the interest of the complainant, not the seriousness of the offence which is charged. A private complaint charging a person with an indictable offence of which injury to the person or property "of the complainant" is an element is not governed by Division 2, seemingly because such a complainant was thought by the legislature to have a sufficient interest to prosecute a complaint without being subject to the protections which
Division 2 gives to a defendant. In other cases which charge an indictable offence,

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7 [1584] EWHC Exch J 36.

8 D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) 37 [2.5] – 45 [2.10] ("Pearce and Geddes").

9 Hansard, Queensland Legislative Assembly, 7 June 1979, p 5002.

there was a perceived need to provide an opportunity to a defendant to prevent at an early stage an abuse of process or a private complaint that was frivolous or vexatious.

[25] Mr P submits that any crime involving an injury to any person is sufficiently serious to enable any member of the public to have an interest in seeing the person brought to justice. However, whilst the law of Queensland may permit any person to bring a private complaint charging an indictable offence for an injury to a person, even a minor or trivial injury, that is not the present issue. The present issue is whether Division 2 is available in such a case to govern a private complaint for such an offence which is an abuse of process, frivolous or vexatious. The intent of the legislature, as reflected in its words, is that Division 2 should apply to such a case so as to permit a defendant an opportunity to apply for an early determination that the private complaint is without substance and is an abuse of process, frivolous or vexatious.

[26] The exception created by s 102A does not depend upon the seriousness of the relevant injury to the person or property of the complainant. Any injury to the person or property of the complainant which is charged as an element of the offence engages the exception. In simple terms, the exception depends upon by whom the injury was suffered, not its seriousness. Instead, the seriousness of the alleged injury to the person or property of an individual who is not the complainant may bear upon a determination of whether the private complaint is one of substance, as distinct from a private complaint which is an abuse of process, frivolous or vexatious.

[27] Mr P's arguments about the supposed mischief that the introduction of s 102A to s 102G attempted to solve are unconvincing and not supported by the terms of the section, its apparent purpose or the contents of any extrinsic material pointed to.

Does PCC H's interpretation lead to an absurdity?

[28] The so-called "golden rule" places a limitation on the literal meaning of the words of a statute in order to overcome an error or defect perceived in the text.[10] Legislation is construed so as to avoid patently unintended or absurd results.[11] Mr P submits that if PCC H's interpretation were correct it would mean:

> "a) Sections 102A – s 102G do not apply to the situation where someone is shot and survives but does apply if they die, meaning it is harder to bring private prosecutions even though the crime is far more serious.
>
> b) If a police officer decided to fire their weapon, there is a significant incentive for them to shoot and kill the target, even if it is possible to shoot only to injure. For example, a person may drop a knife if they are shot in the shoulder, but it would be better for the police officer to repeatedly shoot in quick succession with the intention of killing a person rather than to shoot once and see if the person stops or drops the weapon. On the Respondent's interpretation the deceased right's to seek justice is distinguished (sic) along with his life."

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[10] Pearce and Geddes at 36 [2.4] citing *Grey v Pearson* (1857) 6 HLC 61 at 106.
[11] Pearce and Geddes at 36 [2.4] citing *Footscray City College v Ruzicka* (2007) 16 VR 498 at 504 – 505 [16].

[29] Both Mr P's arguments about absurdity ignore the fact that in a situation in which someone is shot and dies, a private prosecution may still be brought. In such a case, a private prosecution for murder or manslaughter is subject to the procedures contained in s 102A to s 102G which provide protections, including provision for security for costs to protect against private prosecutions which are shown to be an abuse of process, frivolous or vexatious.

[30] The second of Mr P's arguments is fanciful. It is fanciful to suppose that a police officer, who makes the grave decision to fire a weapon will be influenced in a decision to "shoot to kill" as distinct from shooting "only to injure" by some view about the differential effect of their action on procedural aspects of a private prosecution. A police officer who, as it were, "shoots to kill" and in fact kills an individual is still subject to the risk of public prosecution as well as the risk of private prosecution.

[31] There is nothing absurd about a private prosecution for murder being subject to procedures which are intended to provide adequate protection to a defendant from a prosecution which is an abuse of process, frivolous or vexatious.

[32] It is Mr P's interpretation which is apt to produce unintended or absurd results. If accepted, his interpretation would have the consequence that any stranger or busybody who brought a private prosecution for an indictable offence in respect of a minor injury to an individual who had no interest in pursuing the matter, let alone instigating a prosecution, would not be subject to the protections of Division 2. On Mr P's approach to the interpretation of s 102A a private prosecution for some minor injury to a person other than the complainant, being a person with whom the complainant had no connection, might be pursued in proceedings before a magistrate, with no power in the Magistrates Court to dismiss the proceeding as an abuse of process. The provisions of s 102C would not apply and the Magistrates Court seemingly would lack any power to stay the proceeding.[12]

[33] The present issue of interpretation does not depend upon any view of the facts of the present case. It concerns an issue of interpretation which must be determined according to the operation of the section in respect of hypothetical cases. Mr P's argument on the point of construction, if accepted, would deprive the Magistrates Court of the power to halt a private complaint for murder under s 102C in circumstances in which the defendant is able to demonstrate that the proceeding is flawed, without merit, vexatious and in all respects an abuse of process. Instead, a defendant who is subject to such a vexatious proceeding would be required to endure the costs and consequences of a committal proceeding. By way of hypothetical example, a gangster might vex a police officer with a hopeless private prosecution for murder over the justified shooting of another gangster during an armed robbery, and the police officer would not be able to engage the protection of s 102C to halt such a vexatious and flawed prosecution.

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[12] See *Higgins v Mr Comans, Acting Magistrate & DPP (Qld)* (2005) 153 A Crim R 565 concerning the power of the Magistrates Court to grant a stay of proceeding in relation to the examination of witnesses on a committal hearing.

[34] Mr P's construction of s 102A does not achieve the purpose for which Division 2 was enacted and, if accepted, would lead to absurd and unintended results.

Conclusion on the issue of interpretation

[35] Division 2 of Part 5 of the Act does not prevent private prosecutions from being brought. Instead, it regulates the procedure by which certain private prosecutions are brought and contains protections against private prosecutions which are found to be an abuse of process, frivolous or vexatious. Private prosecutions which charge a person with an indictable offence of which injury to the person or property of the complainant is an element are not subject to the procedures and protections contained in Division 2 Part 5. In such a case the complainant is treated as having a sufficient interest in the prosecution.

[36] Where a private prosecution alleges conduct to be an offence with respect to a victim who is not the complainant, then the complainant may bring the prosecution, subject to the procedures contained in Division 2. In such a case, the interest of the complainant may be strong or slight. A strong interest is not sufficient to engage the exclusion contained in s 102A. It may, however, be relevant to a determination of whether the private prosecution is an abuse of process, frivolous or vexatious.

[37] I conclude that s 102A to s 102G apply to the private complaint brought by the complainant, Mr P. This is because the charge of murder or manslaughter is a private complaint charging PCC H with an indictable offence. The offence charged is not an offence of which injury to the person or property of the complainant (Mr P Snr) is an element. The words of the section confine the relevant exclusion to a private complaint for an indictable offence charging a person with an offence of which injury to the person or property *of the complainant* is an element. The words "of the complainant" qualify the preceding words "the person or property". The interpretation for which Mr P contends would require different words to be used in s 102A. His interpretation is inconsistent with the ordinary meaning of the section. The interpretation for which PCC H contends accords with the ordinary meaning of the words used by the Parliament, best achieves the purpose of the legislation and avoids absurd outcomes.

Is an injury an element of the offence of murder or manslaughter?

[38] My conclusion on the issue of interpretation, and the fact that the complaint does not concern injury to the person of the complainant (Mr P Snr), make it unnecessary to decide the issue of whether injury to the person is an element of the offences of murder or manslaughter. Mr P's submissions are that "arguably" an injury to the person is an element of murder or manslaughter as a person cannot be unlawfully killed without first suffering an injury. However, there is a competing strong argument. Whilst in fact most homicide cases involve an injury which causes death, injury is not itself an element of the offence.

[39] Also, whereas murder may be proved in some cases by an *intent* to cause grievous bodily harm, this does not make the suffering of injury (whether the intended injury or

some other injury) an element of the offence. Definitions of "injury" in other contexts are of no real assistance in the present context.

[40] It is unnecessary to decide the issue of whether injury to the person is an element of the offence of murder or of the offence of manslaughter.

Should security for costs be ordered?

[41] Despite the words "the appellant shall be required to give security" appearing in s 102D(3), I shall proceed on the basis that there is a discretion, at least as to the manner and the amount of the security that is ordered. In theory at least, a judge may order the amount of the security to be nil or in a nominal amount. Also, there is a good argument that the words "in such manner and in such amount as a judge of the Supreme Court may order" recognises a discretion to make no order at all.

[42] Section 102D is silent about the factors the Court should take into account in deciding whether to make an order for security and the amount, if any, that should be ordered. The discretion to make an order for security is unfettered by the statute, but must be exercised judicially, having regard to the context in which the provision appears. That context may be one in which the respondent to the appeal has a decision in his or her favour, having already proven that the complaint was an abuse of process, frivolous or vexatious. Section 102D(3) protects such a respondent against the risk that when the appeal is dismissed, and a costs order is made in favour of the respondent, it proves to be an empty costs order, leaving the successful respondent with the burden to meet the costs incurred in resisting the appeal.

[43] Whilst discretionary factors that are relevant to the decision to make an order for security for costs in other contexts, such as the factors stated in r 672 of the *Uniform Civil Procedure Rules* 1999 (Qld), may provide some guidance, those factors and similar factors governing security for costs in the context of civil litigation do not necessarily arise in the present context.

[44] PCC H submits that the obvious intention of s 102D(3) is that a respondent to an appeal should not be out of pocket for his or her costs.

[45] Mr P submits that:

(a) PCC H is not outlaying his own money for costs since the Queensland Police Union is paying his legal fees;

(b) Mr P "is an individual put in the position of bearing the financial costs of prosecuting an action on behalf of the Crown out of his personal funds"; and

(c) the Court may take into account the relative disparity of resources of the parties in deciding whether or not to grant security for costs.

[46] As to (a), I take account of the fact that PCC H is able to rely upon his union to pay his legal fees. However, that does not seem to me to be an important consideration. It seems no different in principle to any other party whose legal costs are paid by a union,

an employer or an insurance company. Many defendants in ordinary civil litigation do not outlay their own money for defence costs since they are part of an insurance indemnity. This is not a reason to decline to make an order for security for costs in favour of the defendant. The fact that a party protects itself against what would otherwise be crippling legal costs by joining a union which will provide support or by taking out insurance should not preclude an order. If security for costs was not ordered in appropriate cases then there would be nothing to secure defence costs in the event of a successful defence, leaving the union or the insurance company to have to pass those costs on through levies or increases in premiums.

[47] As to (b), Mr P is not pursuing a civil claim to vindicate his own legal rights and to obtain a remedy in circumstances in which he has been forced to litigate. He has chosen to pursue a private prosecution and he does not do so "on behalf of the Crown". The considerations which apply to a natural plaintiff in civil litigation[13] do not apply.

[48] As to (c), Mr P cites *P M Sulcs & Associates Pty Ltd v Daihatsu Australia Pty Ltd (No 2)*[14] where, in the circumstances of that case, Kirby J stated: "I cannot overlook the disparity in resources between the defendant, and the plaintiff." Whilst I do not disregard disparity in resources as a relevant consideration, frequently orders for security for costs are made in proceedings in favour of a defendant which has far greater resources than the plaintiff. Even wealthy defendants should not be deprived of the opportunity to obtain protection by way of security for costs against the risk of an empty costs order in the event of successfully defending a proceeding. The union which supports its member, PCC H, has not been shown to be a wealthy corporation. In any event, PCC H and the union which supports him should not be deprived of protection by way of an order for security for costs simply because the union's resources may be greater than those of Mr P.

[49] Next, Mr P submits that there is a "public interest element in bringing an action as it involves a shooting incident by a police officer in circumstances where an eye witness states the victim was unarmed." However, the submissions do not note that the eye witness being referred to was contradicted by other evidence, and that her evidence was rejected by an experienced judicial officer who gave a number of considered reasons for doing so. A magistrate hearing a committal in this matter would form his or her own view about the credibility and reliability of Ms S. No submissions were made to me as to why the reasons given by the Coroner for rejecting her evidence and finding her to be unreliable are wrong. I am not persuaded that there is a public interest element in bringing a private prosecution for murder against a police officer in circumstances in which one eye witness states the victim was unarmed.

[50] There may be a public interest in bringing a private prosecution where the prosecuting authorities, and the Director of Public Prosecutions in particular, have been shown to be "capricious, corrupt or biased" in a failure or refusal to prosecute.[15] However, it is not submitted, and there is no evidence to suggest, that there has been an unreasonable failure by the prosecuting authorities to prosecute PCC H for homicide.

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13 As to which, see *Mbuzi v Hall* [2010] QSC 359 at [57] – [70].
14 [2000] NSWSC 826 at [82].
15 *Gouriet v Union of Post Office Workers* [1978] AC 435 at 498.

[51] Mr P also submits that "this would be a matter that the public would be keenly interested in, as police are in charge of the safety and security of the community." The interest of the public in following sensational criminal proceedings should not be confused with the public interest. The public does have a legitimate interest in the proper investigation of shooting incidents and in the conduct of the police force. There also is a public interest in police officers (and others) not being subject to private prosecutions which constitute an abuse of process or which are frivolous or vexatious. The Parliament of Queensland, acting in the public interest, sought to protect the rights of a defendant who needs to be adequately protected from such a prosecution by enacting provisions which include the provision for security presently under consideration.

[52] I am not persuaded that there is a sufficient public interest element in the bringing of this private prosecution to warrant not making an order for security.

[53] Mr P reiterates the submission that "the legislature has intended people to be able to start private prosecutions" and that this "allows matters to be brought before the Court where the authorities are unwilling or unable to act". However, the present issue is not Mr P's right to start a private prosecution. It is the procedure which governs that prosecution, particularly in circumstances in which a judicial officer has found the prosecution to be an abuse of process. There has been no attempt by Mr P to prove an unreasonable failure by the Director of Public Prosecutions to consider a request to prosecute, let alone that any decision to not prosecute was capricious, corrupt or biased.

[54] Some of Mr P's submissions are premised on the idea that he had a right to take the case before a jury. It is unnecessary for me presently to make a precise assessment of the likelihood that a magistrate would commit PCC H to stand trial for murder, largely on the strength of Ms S's evidence. Even assuming this as a possibility would not necessarily make it in the public interest to prosecute such a case if the prosecution had no reasonable prospects of success or was otherwise contrary to the public interest.

[55] The present appeal is by way of hearing *de novo*, and the evidence and arguments upon the hearing of the appeal may be quite different to those before the magistrate. In some cases involving applications for security for costs, regard can be had to the prospects of success or merits of the proceeding. Mr P did not establish a basis in the evidence before me to show that his prospects were good. Mr P's counsel, Mr Di Carlo, said many things from the Bar table but I do not treat them as evidence. In fact, I treat them with considerable reserve in circumstances in which Mr Di Carlo's submissions to the Coroner were found to disclose a complete misunderstanding of the autopsy report and photographs and at worst to be deliberately misleading. For present purposes, it is sufficient to observe that no evidence was placed before me to dispute the essential fact that a replica hand gun was found in the vicinity of JP's deceased body after he was shot, and that other evidence, and not simply the evidence of PCC H, was that he had such a replica pistol and had it in his hand. The submissions made by Mr P's counsel, insofar as they are based on evidence before me, did nothing to undermine the conclusion reached by the Magistrate that this was a case of obvious self-defence and that the prosecution is doomed to fail.

[56] In addition, there was nothing which persuaded me that the prosecution would be conducted in a way which accorded with the duties of a prosecutor and the obligation to provide PCC H with a fair trial. In the circumstances, PCC H would appear to have reasonable prospects of having the order made by the Magistrate affirmed on appeal and obtaining an order for his costs.

[57] There is a public interest in protecting respondents to appeals under s 102D against costs orders made in their favour which prove empty.

[58] I am not persuaded that I should exercise my discretion by declining to make an order for security under s 102D(3). I consider that an order for security should be made in the circumstances. To do so is consistent with the purpose of s 102D(3).

What amount of security should be ordered?

[59] Because the appeal in this matter is by way of hearing *de novo*, PCC H acknowledges, and Mr P seemingly accepts, that PCC H has to prove his case afresh and may rely on whatever evidence is available at the time of the appeal. PCC H intends to again prove justification for the dismissal of the complaint, and intends to place substantial evidence before this Court on the appeal. Because of the importance of the matter, PCC H's solicitors have instructed both senior and junior counsel to appear on the appeal. Preparation for the hearing of the appeal will be substantial and will require a re-examination of the evidence at the inquest, research and preparation of submissions. I have had regard to the affidavit of PCC H's solicitor about his estimate of the work which will be required by him and by counsel. An experienced costs assessor has assessed the total costs up to and including a second day of the appeal to be $129,949.75, consisting of professional costs of $39,590 and outlays of $89,907.50. Most of the outlays consist of counsel's fees.

[60] Mr P's solicitor questions whether much of the material which will be briefed to counsel and which they will be required to read on behalf of PCC H will be relevant and admissible at any trial, any committal or in the present appeal. He questions whether counsel will be required to read all the evidence, including all photos, all expert reports and every witness statement. It may be that some of this material would not be admissible at an eventual trial. However, it seems appropriate for PCC H's legal team to carefully review the evidence in the interests of seeking a similar finding on appeal to that already obtained concerning the defence of self-defence and how the account of Ms S is discredited and unreliable.

[61] Mr P submits that PCC H's approach to the dismissal of a complaint on the ground that it is an abuse of process, frivolous or vexatious is misguided since s 102C applies only where "bringing the complaint itself is an abuse of process", for example, because "the complaint itself is brought for an ulterior purpose or the complaint itself is frivolous or vexatious." He submits that it is impermissible for PCC H to argue that the prosecution is foredoomed to fail or that failing to call certain witnesses is an abuse of process. I disagree. Section 102C provides for the complaint to be dismissed on the ground that it is an abuse of process, frivolous or vexatious. A complaint is likely to be of such a character if it is foredoomed to fail. It would be odd if persistence in the prosecution of

a complaint did not constitute an abuse of process, or make the complaint a vexatious one if, for example, the whole basis of the prosecution disappeared at some time between the making of the complaint and the time at which evidence was to be led. For example, if it was obvious that a complaint had been brought on the basis of a mistaken identity and the true criminal was someone other than the defendant, persistence in the matter would constitute an abuse of process and be vexatious. The Act allows for a complaint to be dismissed if its prosecution (as distinct from the formal complaint document itself) is an abuse of process, frivolous or vexatious. This is apparent from the extrinsic material which refers to an early determination of whether the matter is one of substance.

[62] The institution and prosecution of a proceeding may be vexatious in the absence of an improper purpose. As Toohey J stated in *Jones v Cusack*,[16] the issue is whether the proceeding is vexatious, not whether it was instituted vexatiously. It is not the respondent's belief in the correctness of his arguments with which the Court is concerned. Such a party may have an actual belief in the correctness of his cause which is entirely misplaced. This does not make a proceeding that is hopeless any less vexatious. In analogous contexts, a broad test has been applied in determining whether a proceeding is vexatious and factors include the existence or lack of reasonable grounds for the claim sought to be made.[17] No narrow view should be taken of the term "vexatious" in s 102C(1). Section 102C(1) should be construed in the light of its purpose which was to give an opportunity to a defendant to apply for a determination "whether the private complaint is one of substance and should proceed to be heard and determined on its merits."[18]

[63] In the circumstances, it is and was permissible for PCC H to seek to demonstrate that the intended prosecution is a hopeless one, or at least so lacking in prospects of securing a conviction at any trial that no prosecutor acting in accordance with his or her duty would persist in it. I also consider that it is open to PCC H to seek to establish that the prosecution will not be conducted fairly because of the manner in which Mr P's counsel intends to conduct any committal. Mr P submits that this Court should have confidence that if there is a failure to conduct the trial fairly then a Magistrate or Judge has the power to take action when that happens. However, there are limits upon the power of a Magistrate conducting a committal hearing to stay it on the grounds of an abuse of process. Moreover, PCC H should not be placed in jeopardy of waiting for a trial at which a zealous prosecutor, who acts unfairly in respect of the calling of witnesses and eliciting evidence from them, or in other respects, is stopped from conducting an unfair prosecution. It should be open to PCC H to establish that the complaint will not be prosecuted fairly and that, as a consequence, it should be dismissed on the grounds of an abuse of process. PCC H should not have to wait for complaints about the course of the prosecution to be addressed to a Magistrate on committal. He may rely upon the proposed course of the prosecution on a hearing under s 102C and on an appeal under s 102D.

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[16] (1992) 109 ALR 313 at 315, followed in *Lohe v Tate* [2002] QSC 399 at [21] and *Hambleton v Labaj* [2010] QSC 124 at [11].

[17] *Re Cameron* [1996] 2 Qd R 218 at 220.

[18] Hansard, Queensland Legislative Assembly, 7 June 1979, p 5001.

[64] In deciding whether to order security, and deciding the amount of security that should be ordered, regard may be had to the fact that an order for security for costs might stifle the appeal. This, in itself, is not a ground for refusing an order for security for costs where, upon a consideration of all the circumstances, such an order should be made. The fact that an order for security will stifle a proceeding may assume significance, particularly where the proceeding is a meritorious one or involves a matter of public importance.

Mr P does not submit that any order for security of a substantial amount of costs would stultify his appeal. Instead an order to provide the amount of security that PCC H seeks, being about $130,000, would compel him to have to borrow money from his family and his family would have to have "a fire sale of their business machinery". This would cause great hardship for the family and their business. I take this fact into account. The effect of a substantial order for security for costs upon Mr P needs to be taken into account, along with the consequence to PCC H and those who support him of ordering inadequate security. I have no reason to doubt the sincerity of Mr P in wishing to pursue a prosecution. However, his sincerity and apparent belief in the correctness of the cause which he wishes to pursue does not prevent the prosecution constituting an abuse of process or being vexatious.

[65] The point is made that the amount of security sought is far greater than the costs sought by way of security in the Magistrates Court. However, PCC H is entitled, within reasonable limits, to adopt a different approach to the conduct of the appeal to that of the hearing before the Magistrate. Given the seriousness and complexity of the matter, he is entitled to engage senior counsel, and there is no submission by Mr P that it was unreasonable for him to do so. He is entitled to give careful attention to the evidence that will be relied upon by him at the hearing of the appeal and how it will be presented. Even if the relevant and admissible material does not extend to all the material briefed to counsel, counsel should be in a position to respond, if required, to the kind of allegations made from the Bar table in the hearing before me about the adequacy of the police investigation.

[66] Leaving that aspect to one side, there appears to be a substantial amount of evidence which will need to be reviewed by PCC H's legal advisers in order to present his case on appeal. The fact that PCC H's junior counsel has previously been involved in the matter, both at the committal and at the s 102C hearing, may reduce the time required by him to prepare the matter, compared to a junior counsel who came to the matter afresh. However, substantial preparation will be required by both counsel and by PCC H's solicitors. The rates at which the costs assessor has assessed these and the hourly rates and charges of solicitors and counsel do not appear excessive.

[67] Ultimately, in arriving at an appropriate amount by way of security, I have to balance the interest of Mr P in pursuing an appeal against the interest which the statute promotes, namely the protection of a defendant from prosecution of a complaint which is an abuse of process, or which is frivolous or vexatious. I have to guard against an order for security being oppressive and stultifying a meritorious appeal. However, this is not a case where Mr P has attempted, by evidence, to address what appears to be the reasonably good prospects of PCC H in having the appeal dismissed for essentially the same reasons that persuaded the Magistrate to make an order pursuant to s 102C.

[68] This is not a case where the amount of security ordered should be discounted to reflect the fact that the appeal has good prospects or involves public interest considerations. For example, the decision, if any, of the prosecuting authorities to not prosecute PCC H for homicide cannot be said to be unreasonable, let alone capricious, corrupt or biased. If
Mr P and his family business endures hardship in providing security, then it will be a consequence of his persistence in pursuing a prosecution which, in the light of the Coroner's findings and the assessment of the Magistrate, has no real prospect of resulting in a conviction at trial. Of course a committing magistrate and a jury are not bound by the Coroner's findings. However, the Coroner's findings and the reasons for them are relevant in the present context because they reflect the view of a highly-experienced judicial officer who considered a large body of evidence and had the advantage of hearing and seeing witnesses. To simply say, as Mr P's counsel does, that there is a public interest element because the matter involves a shooting incident by police where an eye witness states the victim was unarmed, neglects to address the reasons why the Coroner found that eye witness' evidence to be unworthy of acceptance.

[69] I do not consider that the amount of security should amount to a complete indemnity of PCC H's costs. I have read the costs assessor's affidavit and report, and am not persuaded that certain items, such as an advice on prospects on appeal, should be reflected in the amount. However, the assessment is not unreasonable, given the complexity of the matter and the appropriateness of having two counsel.

[70] Much depends upon the manner in which the appeal hearing is conducted and the extent and duration of cross-examination of witnesses. Because the appeal is a hearing *de novo* and is expected to involve evidence which is presented in a different way to the manner in which evidence was presented before the Magistrate, the duration of the hearing before the Magistrate does not provide much of a guide to the duration of the appeal. The costs assessment upon which PCC H relies assumes a two-day hearing. Mr P's counsel submits that the appeal is unlikely to take more than half a day. However, I doubt whether this will be the case. I cannot be confident that the appeal will end in one day. In circumstances in which I cannot accurately predict the length of the appeal, it would be potentially oppressive to Mr P to fix an amount of security on the assumption of a two-day hearing. Instead, I propose to order an amount of security for costs up to and including the first day of the appeal. If at a pre-hearing review it appears to a judge of this Court that there is a substantial possibility that the appeal will go beyond one day, or in the event the appeal does not finish within a day, then further security will need to be provided.

[71] In all of the circumstances, I consider that security should be set in the amount of $80,000 up to and including the first day of the appeal, and that the orders should provide for further security to be provided of $15,000 per day in the events which I have outlined above.

[72] The manner in which security is to be given will be by way of a payment into Court, the provision by a bank guarantee or some other security given in a form satisfactory to the Registrar.

Proposed orders

[73] Subject to hearing the parties as to the form of order, I propose to order:

1. That the appellant provide security for the respondent's costs on the appeal in the sum of $80,000 on or before 4 pm, 29 February 2016 in respect of the respondent's costs up to and including the first day of the hearing of the appeal.

2. In the event it appears to a judge of this Court at a pre-hearing review of this matter that there is a substantial possibility that the appeal will extend beyond a one-day hearing, or in the event the appeal hearing extends beyond one day, then the respondent provide further security in the sum of $15,000 per day, and that such further security be provided within 48 hours of the judge so indicating or, in the absence of such an indication, by no later than 4 pm on the first day of the hearing of the appeal.

3. The security must be given in a form satisfactory to the Registrar.

4. The appellant must as soon as practicable after giving security serve on the respondent written notice of the time when and the way in which the security was given.

5. If security is not given under this order, the appeal is stayed so far as it concerns steps to be taken by the appellant.

6. If security is not given the respondent may apply to dismiss the appeal.

7. There be liberty to apply.

8. Each party's costs of the application be reserved.