SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General for the State of Queensland & Anor v Wands* [2019] QCA 125
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (appellant) **COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS** (appellant) **v** **WANDS, Jarred Lee** (respondent)
FILE NO/S:	CA No 265 of 2018 CA No 268 of 2018 DC No 73 of 2018 DC No 190 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Appeal from Interlocutory Decision
ORIGINATING COURT:	District Court at Toowoomba – Unreported, 20 September 2018 (Shanahan DCJ)
DELIVERED ON:	25 June 2019
DELIVERED AT:	Brisbane
HEARING DATE:	2 May 2019
JUDGES:	Sofronoff P and Morrison JA and Davis J
ORDER:	**The appeal be allowed and the order set aside.**
CATCHWORDS:	CRIMINAL LAW – PROCEDURE – ADJOURNMENT, STAY OF PROCEEDINGS OR ORDER RESTRAINING PROCEEDINGS – STAY OF PROCEEDINGS – GENERALLY – where the primary judge at first instance stayed further prosecution on indictments presented against the respondent until the Crown paid the respondent $2,400 for costs thrown away – where the primary judge was concerned that due to a fault in the way the prosecution authorities progressed the matter it had resulted in lost costs for the respondent – where the primary judge was of the opinion that the lost costs would impact on the respondent's ability to properly fund his trial – where the primary judge was of the view there had been a fundamental unfairness in the trial proceeding – where the indictments which were stayed involved alleged offences under both Commonwealth and State statutory provisions – where the Attorney-General of Queensland and the Director of Public Prosecutions (Cth)

have lodged appeals pursuant to s 669A(1A) of the *Criminal Code* (Qld) – where it is contended that the primary judge erred in the exercise of his discretion to order that the indictments be stayed – where it was submitted that the primary judge erred in not considering whether the circumstances justified the conclusion that the matter was such as to justify the granting of a conditional stay – whether the primary judge erred in his discretion to stay the indictments

Civil Proceedings Act 2011 (Qld), s 15
Criminal Code (Qld), s 210(1)(e), s 218A, s 228D, s 669A(1A)
Evidence Act 1977 (Qld), Part 2 Division 4A
Supreme Court Act 1995 (Qld), s 221

Attorney-General of Queensland v Holland (1912) 15 CLR 46; [1912] HCA 26, cited
Barton v The Queen (1980) 147 CLR 75; [1980] HCA 48, cited
Dietrich v The Queen (1992) 177 CLR 292; [1992] HCA 57, cited
Jago v District Court (NSW) (1989) 168 CLR 23; [1989] HCA 46, cited
Johnson v Miller (1937) 59 CLR 467; [1937] HCA 77, cited
Petroulias v The Queen (2007) 176 A Crim R 302; [2007] NSWCCA 154, cited
R v Ferguson; Ex parte Attorney-General (Qld) (2008) 186 A Crim R 483; [2008] QCA 227, cited
R v Fisher (2003) 56 NSWLR 625; [2003] NSWCCA 41, cited
R v GVM (No 2) [2013] QDC 70, cited
R v GVM (No 3) [2013] QDC 109, cited
R v His Honour Judge Kimmins; Ex parte Attorney-General [1980] Qd R 524, cited
R v Issakidis [2015] NSWSC 834, cited
R v Johannsen & Chambers (1996) 87 A Crim R 126; [1996] QCA 111, cited
R v Morex Meat Australia Pty Ltd and Doube [1996] 1 Qd R 418; [1995] QCA 154, cited
R v Mosely (1992) 28 NSWLR 735, cited
R v Seebag, unreported, New South Wales Criminal Court of Appeal, Hunt CJ at CL, Smart and James JJ, 16 February 1993, cited
R v TAM (No 2) [2011] QDC 141, cited
R v Ulman-Naruniec (2003) 143 A Crim R 531; [2003] SASC 437, cited
S v The Queen (1989) 168 CLR 266; [1989] HCA 66, cited

COUNSEL: M R Byrnes QC, with N W Needham, for the appellants
I A Munsie for the respondent

SOLICITORS: Director of Public Prosecutions (Queensland) and Director of Public Prosecutions (Commonwealth) for the appellants
MacDonald Law for the respondent

[1] **SOFRONOFF P:** I agree with the reasons of Davis J and the order his Honour proposes.

[2] **MORRISON JA:** I have read the reasons of Davis J and agree with those reasons and the order his Honour proposes.

[3] **DAVIS J:** In 1992, in *R v Mosely*[1] Gleeson CJ, while Chief Justice of New South Wales sitting in the Court of Criminal Appeal, held that where in a proceeding upon indictment the Crown conducted itself in such a way as to disadvantage an accused, the court[2] had jurisdiction to stay the indictment until the Crown paid costs thrown away by the Crown's conduct.

[4] Since *Mosely*, orders have been made in various jurisdictions staying prosecutions on indictment until the Crown paid money to an accused to compensate for expense incurred through fault of the prosecuting authority or agencies associated with the prosecution. For convenience I will refer to such orders as "Mosely orders".

[5] On 20 September 2018 Shanahan DCJ sitting in the District Court made a Mosely order. His Honour stayed further prosecution on an indictment presented against the respondent until the Crown paid the respondent $2,400. This Court was informed during argument that his Honour's order was the first Mosely order made by a Queensland Court.

[6] The indictment which was stayed alleged offences against both Commonwealth and State statutory provisions. Each of the Attorney-General for the State of Queensland and the Director of Public Prosecutions of the Commonwealth appeal the ruling. The respondent did not dispute that s 669A(1) of the *Criminal Code* (Qld) (the Queensland Code) gave a right of appeal to both appellants.

Background

[7] The respondent was a school teacher and is resident in Queensland.

[8] Over a period of a little over two weeks in mid-2016 the respondent communicated with a thirteen year old girl living in Scotland. It was alleged that he had sexually explicit communications with her, sent her indecent photographs and during some of these conversations (which were by video call) had masturbated in front of the camera so that she could see those images.

[9] The offending came to light in Scotland. Police there investigated, those police contacted police in Queensland, and an investigation was commenced here.

[10] As part of that investigation the respondent's computer was seized. He was also interviewed by police.

[11] The respondent was initially charged with four offences, three against provisions of the Queensland Code and one against the *Criminal Code* (Cth). I shall refer to the Commonwealth Criminal Code as "the Commonwealth Code", offences thereunder as "Commonwealth offences" and offences against the Queensland Code as "State offences".

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1 (1992) 28 NSWLR 735.

2 Both the trial court and the Court of Criminal Appeal.

[12] Analysis of the respondent's computer revealed further offending and he was charged with an additional 71 offences. Some of those were State offences and some were Commonwealth offences.

[13] On 21 November 2017 the respondent was committed to the District Court for trial on all 75 charges.

[14] On 8 May 2018 an indictment was presented in the District Court sitting in Toowoomba. That indictment alleged six counts. Five of those[3] charged State offences and one charged a Commonwealth offence.[4] For some reason which is unclear, the prosecution held the view that the respondent would plead guilty to the counts on the indictment. Although only containing six counts, the indictment was designed to reflect all the acts allegedly committed by the respondent which were the subject of the 75 charges laid by police. An indictment drawn in that way is liable to challenge on the basis that the counts are duplicitous.[5] The Crown evidently did not expect such a challenge given that a guilty plea was anticipated.

[15] Whatever view was held by the Crown as to the respondent's intentions, he did not plead guilty. He made application to have some parts of his police interview excluded. That application came before Kefford DCJ on 30 July 2018 and the appellant was successful on that issue.

[16] On 14 August 2018 the indictment was mentioned in the District Court. As evidence of the child was to be received, that evidence had to be recorded before the trial commenced.[6] The date for taking that evidence was set as 27 August 2018 and the trial itself was listed for hearing in the District Court sitting in Toowoomba commencing 10 September 2018.

[17] Also on 14 August 2018 the Crown prosecutor emailed the respondent's legal representatives to advise that she was intending to present a new indictment. Over the following week there were communications between the Crown prosecutor and defence counsel concerning various matters but importantly:

(i) Defence counsel sought assurances that full disclosure had been made;

(ii) The Crown prosecutor indicated that she would be conferring with the child on the afternoon of 22 August;

(iii) Objection was taken to that conference occurring based on some decisions in the District Court.[7]

[18] Conferences between the Crown prosecutor and the child were conducted by video link from Scotland on both 22 and 23 August 2018.

[19] On 24 August 2018 the Crown prosecutor provided defence counsel with a draft indictment which she intended to present, and also provided records of the conferences held with the child over the preceding two days.

[20] The new indictment contained thirty-six counts. One of those[8] charged an offence against s 474.19 of the Commonwealth Code; using a carriage service for child

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3 Counts 1, 2, 4, 5 and 6.
4 Count 3.
5 *Johnson v Miller* (1937) 59 CLR 467, *S v The Queen* (1989) 168 CLR 266.
6 *Evidence Act* 1977 Part 2 Division 4A.
7 *R v TAM (No 2)* [2011] QDC 141, *R v GVM (No 2)* [2013] QDC 70 and *R v GVM (No 3)* [2013] QDC 109.
8 Count 3.

pornography material. The other thirty-five counts all alleged State offences; one count of using an electronic communication to procure a child under 16 to engage in a sexual act,[9] one count of possessing child exploitation material[10] and thirty-three counts of indecent treatment of a child under the age of 16.[11] Some of those thirty-three counts alleged exposing the child to an indecent photograph. Some of the counts alleged that the respondent procured the child to commit indecent acts. Two alleged that the respondent exposed the child to indecent acts.

[21] During the conferences on 22 and 23 August 2018 the Crown prosecutor took up with the child various aspects of her earlier police statement. In that statement she said that the respondent requested that she send him a photograph of her genitals. She said that she refused to do so and that she had never sent a picture of herself to the respondent.

[22] Analysis of the respondent's computer revealed that, contrary to the child's assertions, she had sent him photographs of her vagina and in at least some of the photographs she can be seen touching her vagina. When confronted with this in the conference the child admitted that she had sent the photographs and that she had lied in her statement as she felt ashamed.

[23] An application was filed on behalf of the respondent seeking the following orders:

> "1.1 A disclosure obligation direction;
>
> 1.2 An order preventing the Respondent from presenting a further indictment;
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> 1.3 An adjournment of the pre-recording of the evidence of the child, listed for hearing on 27 August 2018;
>
> 1.4 An adjournment of the trial;
>
> 1.5 A temporary stay of the proceedings until costs were paid."

[24] The application came before Judge Shanahan on 27 August 2018 in Toowoomba. Both the prerecording of the evidence and the trial were adjourned.

[25] In the course of the hearing of the application, counsel for the respondent complained that it was inappropriate, within the legislative regime for the presentation of children's evidence, for the Crown prosecutor to have conferred at all with the child. After hearing argument, his Honour rejected those submissions.[12] No complaint is made about that ruling for the purposes of this appeal.

[26] The learned judge accepted the new indictment.[13]

[27] His Honour heard submissions about disclosure. During the course of argument a consensus was reached after the Crown prosecutor offered further disclosure and the provision of further statements.[14] No disclosure orders were made.

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9 *Criminal Code* (Qld) s 218A.
10 *Criminal Code* (Qld) s 228D.
11 *Criminal Code* (Qld) s 210(1)(e).
12 ARB 43/44.
13 ARB 49.
14 ARB 34.

[28] On the application for a stay pending payment of costs, his Honour first identified fault as a precondition to the discretion arising. His Honour then found the Crown at fault, finding that any conference with the child ought to have been conducted well before the date set for taking the pre-recorded evidence of the child. That left three issues:

(i) Whether the discretion arose.

(ii) Whether the discretion should be exercised.

(iii) If so, a calculation of the sum to be paid by the Crown.

[29] Two affidavits were relied upon by the respondent in support of the application; an affidavit by the respondent himself and one by his solicitor Mr MacDonald.

[30] The respondent swore, relevantly:

> "4. I am a teacher by education. I studied for 5 years and obtained a bachelors degree in education. I became qualified as a teacher and worked for approximately 4 years. As a consequence of these charges I have not been able to continue my employment as a teacher. This is due to a suspension from my employment as a consequence of these charges.
>
> 5. I have managed to obtain employment as a manager at Bunnings."[15]

And then later:

> "10. I have been privately funding my solicitors, MacDonald Law, to represent me in the hearing of the indictment before the Court.
>
> 11. My legal fees have cost me $6,600.00 to date, and I understand that the estimate of fees is between $25,000.00 and $30,000.00. This estimate was contained in a client agreement I received.
>
> **Assets and Liabilities:**
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> 12. I have the following assets and liabilities:

Asset/Liability:	**($)**
House [redacted] (Half Share)	$165,000.00
Car: Mahindra Ute	$30,000.00
Credit Card	(-)$5,000.00 (Approx)
Mortgage:	(-)$133,000.00
Car Loan:	(-)$33,000.00
Savings:	$8,000.00
Total:	**$32,000.00**

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15 ARB 185.

13. I have made investigations with my bank and I am only able to re-draw $8,000.00 from my mortgage. I cannot re-draw any further amount. Further, I am unable to sell my house without my wife's consent, nor would this yield any great amount of available funds. The cost of sale alone is likely to be at least $20,000.00. As this is our marital home I am not in a position to sell this house.

14. I am unable to fund my solicitors for the entirety of the trial as a consequence of the costs thrown away by the late disclosure of the Crown."

[31] Mr MacDonald swore, relevantly:

"3. The Applicant has privately funded his case from the initial instructions to our office.

4. A client agreement was provided estimating that the Applicant's legal fees to trial would amount to $25,000.00 to $30,000.00, depending on the conduct of the case. When this quote was provided, we were not anticipating a separate day of legal argument or the large amount of disclosure. As a consequence I verily believe that the legal fees for the matter would amount to the higher end of the range of fees.

5. To date the Applicant has paid $6600.00 in total. This can broken [sic] down to:

   a. $2200.00 for committal (Counsel and solicitor advice and review);

   b. $2200.00 for Solicitor for the pre-trial argument preparation and attendance;

   c. $2200, for Counsel for the pre-trial argument preparation and attendance.

6. The preparation deposed above at (4)(b)[16] is solely in relation to the exclusionary argument of the field recording/interview. This preparation did not include the general review of the evidence and brief, and conferences on the pre-recording of evidence, issues to be decided at trial and the state of the evidence.

7. I conservatively estimate, that I or other representatives of my firm, have spent 2 days and 1.5 hours of time on the matter, or 17.5 hours at a rate of $330.00 per hour. I come to this estimate by considering the following:

   d. 3 hours reviewing the brief of evidence (CEM[17] and interview excluded).

   e. 1 hour preparation for conferences;

   f. 1 hour of conference on 21 November 2017 (committal preparation);

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16 Which should be a reference to paragraph 5(b) of the affidavit.

17 A reference to "child exploitation material".

g. 1 hour spent in conference with the client on 10 May 2018 (discussing conduct of the matter, general instructions, providing advice on pre-trial and trial);

h. 1 hour spent in conference with the Applicant on 11 May 2018 (discussing conduct of the matter, general instructions, providing advice on pre-trial and trial);

i. Various conversations with counsel on multiple dates to discuss the evidence/trial plan: 1.5 hours.

j. 1 day, or 8 hours of pre-trial argument into the admissibility of evidence (court time and waiting time).

8. Of this time, I exclude the pre-trial and committal work, leaving an amount of 4 hours or half a day of time that has been thrown away. This is time that was spent preparing for the trial/pre-record on the first indictment or on the basis of the previous 93a provided by the Complaint.[18] The late disclosure of the evidence by the Crown will mean that I have to review this evidence and re-obtain instructions. In addition, half a day of time has been thrown away by the de-listing of the pre-record due to the late disclosure of the evidence by the Crown. This is a total of 1 day or 8 hours of time. At a rate of $330.00 per hour (GST included), this comes to $2640.00.

9. I have been informed by Counsel, and verily believe, that Counsel has spent 1.5 days of time in preparation for the matter. This included reviewing the relevant brief of evidence, CEM,[19] and obtaining instructions on same. Counsel has further spent 1 day of court time for the pre-trial argument and had half a day of time set aside for the pre-record. I have been informed that 1 day of preparation and half a day of court time has been thrown away by Counsel. As a consequence, Counsel has thrown away 1.5 days of time."[20]

[32] During argument on 27 August 2018 his Honour expressed the view that a stay should be granted but did not at that stage give reasons for that conclusion. After hearing argument as to the sum to be paid, his Honour said this to counsel:

> "HIS HONOUR: But it seems to me that it's really the costs of the pre-recording that you're entitled to, not for the costs of today, quite frankly."[21]

[33] By the time of that comment his Honour had declined to grant much of the relief sought by the application filed by the respondent, but had accepted that the recording of the child's evidence and the trial should be adjourned.[22] What was wasted were any costs thrown away by the adjournment.

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18 A reference to the child's electronically recorded interview with police which is admissible pursuant to s 93A of the *Evidence Act* 1977.

19 A reference to Child Exploitation Material.

20 ARB 115-117.

21 ARB 59.

22 ARB 35 and 40.

[34] His Honour then heard argument as to how the costs should be calculated. Ultimately the application was adjourned to 7 September 2019 to allow the parties to negotiate and, if possible, agree on that sum.[23]

[35] The matter came back before his Honour on 7 September 2018 in Toowoomba. No agreement had been reached. Various itemisations of the costs had been prepared by the respondent's solicitors. On one calculation the costs totalled almost $9,000[24] and on another calculation, $4,840.[25] After hearing further argument his Honour ruled as follows:

> "A pre-recording in the matter was listed for 27 August 2018 in Toowoomba. The Crown conferred with the complainant in the matter, who is a resident of Scotland, some days prior to that pre-record. During the course of that conference, the complainant was taken through a volume of recordings of the communications over the internet. That material was discovered on the defendant's seized computer equipment that had been in the possession of the police for many months.
>
> I have already ruled that the Crown was entitled to hold its conference with the complainant in the way in which it did and noted that full disclosure had been made of that in terms of an addendum statement and notes of the conference. I found also that there was fault in the Prosecution authorities in not clarifying the position sooner. There were major differences in the complainant's account when shown the record of the conversations; that was only disclosed to the Defence late in the piece. As a result, that pre-recording was adjourned.
>
> I was also satisfied, on the material placed before me, that the defendant had lost costs as a result. He is privately funded and I am satisfied that the loss of those costs thrown away would impact on his ability to properly fund his trial. In that regard, I am of the view that there would thus be a fundamental unfairness in the trial proceeding at present.
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> In *R v Mosely*, a New South Wales case, the Court was of the view that there was a power in a Court to stay proceedings temporarily until the Crown paid costs. That is *R v Mosley* (1992) 28 NSWLR 735. I am informed, in previous cases, the Director of Public Prosecutions Queensland has conceded there is jurisdiction to make such an order.[26] The order is different from the Court making an order that the Crown pay costs, which is precluded by the Criminal Code.
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> I am thus satisfied that there has been fault in the Prosecution authorities in not clarifying the position sooner. There are costs lost to the defendant as a result and I am satisfied that that would impact upon his ability to properly fund his trial. Thus, I am of the view that

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23 ARB 60.
24 ARB 273, 274 AND 275.
25 ARB 276.
26 Apparently no Mosely orders were made in those cases.

> there is a fundamental unfairness in the trial proceeding. There has been dispute about the appropriate amount that should be ordered as part of this stay. It seems to me the costs are the costs thrown away by counsel and solicitor for the one day's hearing. As I have noted already in argument along the way, the preparation for the pre-record are not costs thrown away as presumably, at some stage, the pre-recording will take place.
>
> In order to bring a resolution to the matter, I am of the view that I should set the costs which I regard as fair. I intend to allow costs of $1200 each for solicitor and counsel for costs thrown away. My order is that the indictments presented on 8 May 2018, which is Toowoomba indictment number 73 of 2018, and on 27 August of 2018, which is Toowoomba indictment number 190 of 2018 against Jarred Lee Wands be stayed until the Crown undertakes and pays the applicant's costs thrown away on the 27th of August 2018 in the sum of $2400."[27]

The appeal

[36] Both appellants appeal pursuant to s 669A(1A) of the Queensland Code which is in these terms:

> "**669A Appeal by Attorney-General**
>
> (1A) The Attorney-General may appeal to the Court against an order staying proceedings or further proceedings on an indictment."

[37] This Court has previously held that s 669A(1) bestows upon both the Attorney-General of Queensland and the Director of Public Prosecutions Commonwealth a power to appeal against sentence.[28] Mr Byrne QC the Director of Public Prosecutions of Queensland appeared for both appellants. The appellants submitted that s 669A(1A) enables the Commonwealth Director of Public Prosecutions to mount an appeal against an order staying an indictment prosecuting Commonwealth offences. The respondent does not resist that submission. The submission is correct and ought to be accepted.

[38] Each of the appellants raise one ground of appeal namely:

> "(i) the primary judge erred in the exercise of his discretion to order that the two indictments be stayed".[29]

[39] The ground of appeal, while asserting that the judge erred in the exercise of discretion does not identify what that error is.[30] The alleged errors were particularised in the appellants' outline of submissions as follows:

> "i. His Honour erred in not considering whether the circumstances justified the conclusion that this was such an exceptional case (or similar nomenclature) such as to justify

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27 ARB 74/75.

28 *R v Morex Meat Australia Pty Ltd and Doube* [1996] 1 Qd R 418 and 443.

29 ARB 2 and 4.

30 In terms of *House v The King* (1939) 55 CLR 499 at 505, *Norbis v Norbis* (1986) 161 CLR 513, 520.

the granting of a conditional stay. In fact, this matter does not have the features necessary to justify such a conclusion.

ii. His Honour erred in considering that fault alone on the part of the prosecution was sufficient to consider the granting of the conditional stay, without considering the relevance of the nature of that fault.

iii. In light of all the evidence and circumstances available for consideration, his Honour erred in concluding that the costs lost to the defendant impacted upon his ability to properly fund the trial, and caused a fundamental unfairness in the trial proceeding."

[40] A good part of the oral submissions made by Mr Byrne QC were to the effect that the discretion does not arise except in very exceptional or rare cases.

[41] The respondent's submissions were summarised in his counsel's written outline as follows:

> "5.2 There was sufficient evidence before Shanahan DCJ at first instance to establish that:
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> 5.2.1 the Respondent's costs were thrown away by the Appellants' conduct;
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> 5.2.2. as a result of the costs thrown away, the Respondent was unable to properly fund his trial causing fundamental unfairness in the trial proceeding;
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> 5.2.3. his Honour properly considered all relevant circumstances; and
>
> 5.2.4. in all of the circumstances, the case was exceptional."

[42] Both parties accepted that the right of appeal granted by s 669A(1A) was as explained in *R v Ferguson; Ex parte Attorney-General (Qld)*[31] as follows:

> "Rather, the right of appeal created, without elaboration by s 669A(1A), must be understood as an appeal in the strict sense. Such an appeal is not in the nature of a rehearing, and the Court has no power to receive further evidence. Such an appeal is available only to correct demonstrated errors in the decision below. The orders which the Court may make do not extend to exercising the discretion afresh based on its own view of the facts."[32]

The principles governing the making of a Mosely order

[43] The Crown submission that a Mosely order may only be made in "exceptional circumstances" is argued to be based on two principles:

(i) The making of such an order is an exception to the Crown's prerogative not to pay costs.

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31 (2008) 186 A Crim R 483.

32 At [20].

(ii) Stays of criminal proceedings are only granted in exceptional cases.

[44] While the Courts of Chancery exercised a power to award costs, the common law courts did not recognise such power although damages were often calculated so as to include a costs component. By the *Statute of Gloucester* in 1278 a power to award costs in damages cases was bestowed on common law courts.[33]

[45] By the *Judicature Acts* of 1873 – 1875 a broad jurisdiction to award costs was expressly granted but because of doubts expressed in *Re Mills' Estate*,[34] as to the proper construction of the provisions, the position was clarified by s 5 of the *Judicature Act* 1890 (UK) which provided that; "… the costs of and incidental to all proceedings in the Supreme Court … shall be at the discretion of the Court or Judge and the Court or Judge shall have full power to determine by whom and to what extent such costs are to be paid".[35]

[46] The history of the development of the law concerning costs shows that any power to award costs must be based on a statutory provision. In *Queensland Fish Board v Bunney; Ex parte Queensland Fish Board*[36] Connolly J said, "It must be remembered that there is a well-established principle that apart from the inherent jurisdiction of the court of chancery, costs are entirely the creation of statute …".[37]

[47] Statutes in Australia vest the various courts with broad jurisdiction to award costs at least in civil cases. In Queensland, the source of power was s 221 of the *Supreme Court Act* 1995 which provided:

> "The Supreme Court shall have power to award costs in all cases brought before it and not provided for otherwise than by this section."[38]

[48] That section has been repealed and the *Civil Proceedings Act* 2011, by s 15 now provides:

> "**15 Power to award costs**
>
> A court may award costs in all proceedings unless otherwise provided."

[49] The reference to "court" in s 15 of the *Civil Proceedings Act* includes the District Court.[39]

[50] The fact that the general grant of jurisdiction to award costs is now contained in a statute dealing with civil proceedings is, for reasons which follow, unsurprising.

[51] The general jurisdiction to award costs is subject to statutory modification. For example, bail applications in Queensland are brought in the civil jurisdiction but s 10B of the *Bail Act* 1980 provides that no costs may be awarded in a bail application.

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33 Hullock, The Law of Costs, Clarke and Sons Limited (1810) pages 1-5, Gray, The Law of Costs, Edward Lumley (1853) pages 454-455 and Dal Pont, Law of Costs, Lexis Nexis Butterworths 2018 paragraph 6.2.

34 (1886) 34 Ch D 24; pages 33 and 42-43.

35 Dal Pont at 6.3.

36 [1979] Qd R 301.

37 At page 303 and see *Wyatt v Albert Shire Council* [1987] 1 Qd R 486 at 488 and *Re Feez Ruthning's the Bill of Costs* [1989] 1 Qd R 55 at 90.

38 A provision in exactly the same terms appeared as s 58 of the *Supreme Court Act* 1867.

39 s 5. See also *Uniform Civil Procedure Rules* r 681.

[52] Any question as to the jurisdiction of a court to make a costs order is resolved by the construction of any statute granting jurisdiction to award costs and any statute limiting that jurisdiction. Two principles have emerged relevant to that construction exercise. They are:

(i) A presumption that the Crown neither pays nor obtains costs.

(ii) That costs are not payable in a criminal proceeding by either party.

[53] In *Attorney-General of Queensland v Holland*[40] the High Court was concerned with a claim for costs by the Attorney General of Queensland who had intervened in proceedings under the *Matrimonial Causes Act* 1864 which received Royal assent in March 1865. In that context Griffith CJ said:

> "In 1865 the rule that the Crown neither pays nor receives costs was generally accepted and recognized, although it might be excluded by necessary implication. As Lord Campbell CJ had said in 1859, in *Moore v Smith*,[41] if it is clear that the legislature when authorizing an award of costs meant to include every case, whether the Crown were interested or not, the Crown by giving assent to such legislation is bound."[42]

[54] Cases such as those cited below show that the continued existence of Crown immunity against costs cannot be doubted. However, given broadly drawn provisions bestowing jurisdiction to award costs (including against the Crown), in many, if not most circumstances, the rule has no practical impact.[43]

[55] The presumption that costs are not awarded in criminal proceedings is well entrenched. In *R v Whitworth*[44] and *R v Martin*[45] the High Court, while holding that on an application for special leave to appeal by the Crown there was jurisdiction to award costs against the Crown, still confirmed the general rule. In *R v His Honour Judge Kimmins; Ex parte Attorney-General*[46] Douglas J stated:

> "Counsel for the prisoners argued that, at least in regard to interlocutory proceedings, the learned District Court judge had power to award costs. From my part I see no difference between interlocutory and final proceedings so far as the right to costs is concerned. At no level is there any right to costs".[47]

[56] In *ABC v Director of Public Prosecutions (Qld)*[48] a person charged with offences against the *Drugs Misuse Act* 1986 made application in the civil jurisdiction for a stay of proceedings which had been commenced in the Magistrates Court. The application was based on the court's supervisory jurisdiction over inferior courts and tribunals.[49] The application was unsuccessful and the Director of Public Prosecutions applied for costs. White J (as her Honour then was) held that despite the

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40 (1912) 15 CLR 46.
41 1 El & El 597.
42 At page 49; see also *Attorney-General (Qld) v Barnes* [2014] QCA 152 at [41] and *Re Powell* (1894) 6 QLJ 36 at 38 and *Affleck v The King* (1906) 3 CLR 608 at 630.
43 *R v Goia* (1988) 19 FCR 212 at 219.
44 (1998) 164 CLR 500.
45 (1984) 58 ALJR 217.
46 [1980] Qd R 524.
47 At page 525 and see also the analysis by Forster and Pincus JJ in *R v Goia* (1988) 19 FCR 212.
48 [2008] 2 Qd R 101.
49 *Barton v The Queen* (1980) 147 CLR 75 at 94-95 and *Walton v Gardiner* (1993) 177 CLR 378.

form of the proceedings[50] the application was a criminal matter and s 221 of the *Supreme Court Act* 1995[51] would be construed so as not to authorise an award of costs.

[57] There are statutory provisions granting jurisdiction to award costs in criminal proceedings in some circumstances. Magistrates Courts and local courts in various Australian jurisdictions have the power to award costs both for and against the prosecuting authority in summary proceedings.[52] There is a limited jurisdiction to award costs against an accused provided by s 660 of the Queensland Code.

[58] In *R v Mosely*[53] the Crown had successfully applied, on the morning of trial, to have the trial adjourned. A judge of the District Court ruled that he had jurisdiction to grant an order that the Crown pay the costs of the adjournment. His Honour so ordered. The Crown did not pay the costs and a second judge granted a stay until the costs were paid. After finding that there was no power in the District Court to make a costs order against the Crown, Gleeson CJ[54] said:

> "This Court should signify its disapproval of the Crown's delays, and also its unwillingness to leave the respondent to bear the burden of the original unfairness that was regarded as being visited upon him. We were informed that Johnston DCJ[55] intimated that he would have been prepared, if asked to do so, to assess a fair amount to represent the costs thrown away by the original adjournment. There being no valid order for costs, there is no procedure for enforcing the order, or taxing the costs. However, there is no reason why this Court cannot, in the exercise of its own discretion, modify the order made by Herron DCJ[56] in such a way as to give practical effect to a view that, in the special and unusual circumstances of this case, and in the light of the events that have occurred, the trial of the respondent should not proceed until the Crown compensates him for the costs thrown away by the original adjournment.
>
> I would propose that the order made by Herron DCJ should be varied to provide that the stay of proceedings therein referred to be until the costs thrown away as a result of the adjournment granted by Johnston DCJ on 20 May 1991 be paid to the respondent; such costs to be agreed or, failing agreement, to be in such amount as is assessed by a judge of the District Court."[57]

[59] There was no examination by his Honour of the source of jurisdiction to grant the stay but its existence could not have been doubted.[58] There was no finding by his Honour that the prosecution of the accused without paying the costs would constitute an abuse of process and there was no finding that in the absence of the payment of the costs a trial of the accused would be unfair. The stay was justified

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50 A civil application.
51 Then in force and set out as [45] of these reasons.
52 *Latoudis v Casey* (1990) 170 CLR 534 see the analysis of Dawson J commencing at 547 with a reference to the Queensland provisions at 551.
53 (1992) 28 NSWLR 735.
54 With whom Kirby P and Mahoney JA agreed.
55 The judge who made the costs order.
56 The judge who granted the stay.
57 At 741.
58 *Jago v District Court (NSW)* (1989) 168 CLR 23, *Barton v The Queen* (1980) 147 CLR 75.

by the unfairness of the accused bearing the costs thrown away by the conduct of the Crown. While his Honour referred to "the special and unusual circumstances of [the] case" there is nothing in the judgment to suggest that a precondition of the exercise of the jurisdiction to grant a stay until costs are paid is that the case is "exceptional" or that circumstances are extreme. The only feature giving rise to the discretion is "unfairness".

[60] The reason the costs order in *Mosely* made in the District Court of New South Wales was set aside was because there was no jurisdiction to make the order. In the present appeal no party submitted that there was a power to make a costs order against the Crown for the costs thrown away. There is no power to award costs against either the Crown or the accused on a proceeding on indictment in these circumstances. Consideration of the Crown prerogative not to pay costs is therefore irrelevant. The real task here is to identify the considerations relevant to the grant of a stay of proceedings on indictment conditional upon the payment of costs of the accused thrown away through some fault of the Crown.

[61] The Crown referred to a number of decisions where either permanent or conditional stays had been granted in order to establish that stays are only granted in exceptional or rare circumstances. The submission was that it therefore follows that a Mosely order may only be made in exceptional or rare circumstances.

[62] The first of these was *Barton v The Queen*[59] in which an *ex officio* indictment was presented and a stay was sought until committal proceedings were undertaken. The Crown relies on the passage in the judgment of Stephen J as follows:

> "An accused also loses the opportunity of gaining relatively precise knowledge of the case against him and, as well, of hearing the Crown witnesses give evidence on oath and of testing that evidence by cross-examination. A court, in exercise of its power to ensure a fair trial, can do much to reduce the deleterious effect of the first two of these losses by ensuring that the accused is furnished with particulars of the charge and proofs of evidence. But the loss of the opportunity to cross-examine Crown witnesses before the trial will be irremediable. How serious this will be to the accused will depend upon the nature of the offence charged and of the Crown's evidence. It is likely to be the most serious detriment which absence of prior committal proceedings imposes upon the accused.
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> The considerations which, on an evaluation, weigh on the other side of the scales, lending weight to the Crown's opposition to a stay, will no doubt be as various as are the circumstances of each case. Each will require separate assessment, their combined weight then being balanced against the detriments to the accused. However in the balancing process the existence of the Attorney-General's right to file an ex officio indictment without prior committal proceedings must not be lost sight of. Its existence means that the mere absence of committal proceedings, although necessarily involving loss of the opportunity to cross-examine Crown witnesses before the trial, will not of itself suffice as grounds for a stay. However, circumstances

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59 (1980) 147 CLR 75.

> which make that loss particularly prejudicial to the accused must weigh heavily in favour of a stay."[60] (emphasis added)

[63] The Crown submitted that the use by his Honour of the term "particularly prejudicial" gives rise to some legal principle that special prejudice is a requirement for a conditional stay order.[61] What was established was that, where there is a right in the Attorney-General to present and proceed upon an *ex officio* indictment, an order of the court preventing that course must be justified. In *Barton* it was justified by the prejudice judged in the circumstances of that particular case likely to be caused by the absence of a committal.

[64] Cases concerning permanent stays of criminal prosecutions contain statements that such orders are only given in exceptional circumstances and as a last resort. In *Jago v District Court (NSW)*[62] it was said that a permanent stay will only be awarded in an extreme case.[63] In *Barton v The Queen*[64] Wilson J[65] spoke of the circumstances justifying a stay being "of such a nature that nothing that a trial judge can do in the conduct of the trial can relieve against its unfair consequences".[66] Similar observations are made in *R v Glennon*,[67] *Williams v Spautz*[68] and *Walton v Gardiner*.[69] These cases all concern applications brought where the accused alleged that a fair trial cannot be achieved.

[65] The consequence of a permanent stay is that there will be no prosecution. In *R v Johannsen*[70] Fitzgerald P considered an appeal from a refusal of an order to grant a stay in circumstances where it was clear that evidence which may have exculpated the accused had been lost over the two decades since the commission of the alleged offence. In the course of allowing the appeal and staying the prosecution his Honour said:

> "Nonetheless, regard to a number of modern cases has left me in some doubt concerning whether this is such an 'exceptional or extreme' case as to warrant a stay; there is a strong predisposition toward permitting prosecutions to proceed, with procedural and other rulings and directions moulded to achieve a fair trial which produces a result free of the taint of risk of miscarriage of justice. See, eg, *Barron v A-G (NSW)* (1987) 10 NSWLR 215; 29 A Crim R 230; *Wagner* (1993) 66 A Crim R 583, 594 ff; *Drozd* p 115; *cf Sandford* (1994) 33 NSWLR 172, 180-181; 72 A Crim R 160 at 190-191; *DPP (Cth) v Bayly* (1994) 63 SASR 97. A stay should not be granted if the prosecution can proceed, uninfluenced by improper purpose, without unfairness to the accused, with a legitimate prospect of success and, in the event of conviction, no significant risk, that

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60 Pages 105-106.
61 Appeal transcript 1-13.
62 (1989) 168 CLR 23 at 34.
63 At page 34.
64 (1980) 147 CLR 75.
65 Although *Barton* was a case of a conditional stay pending committal.
66 At page 111.
67 (1992) 173 CLR 592 at 605-606.
68 (1992) 174 CLR 509.
69 (1993) 177 CLR 378.
70 (1996) 87 A Crim R 126 at 135.

> because of delay or other fault on the part of the prosecution, an innocent person will have been convicted."

[66] As explained by his Honour, in cases of a permanent stay, an important policy consideration balancing against making such an order is the desirability and "strong predisposition" to criminal trials proceeding to conclusion. In circumstances of Mosely orders the prosecution will proceed provided money is paid to the accused.

[67] It is not a proper approach to artificially limit a discretion by requiring, as a condition of its exercise, that the case be characterised as "exceptional" or "rare" as the appellants seek to do here. It is true that many judgments that concern the exercise of discretion, as well as other areas of the law, contain statements of the kind that "such cases will be rare" or "the discretion will be exercised this way only in exceptional cases". However, statements about the rarity and exceptionality are not statements about legal conditions. They are sometimes statements about the past frequency of particular kinds of cases arising. They are sometimes predictions about the probability that cases containing certain factors will arise in the future.[71] The exercise of the discretion to grant a stay must be informed by the purpose to be served by its exercise. This is illustrated by *Williams v Spautz*.[72] There, a private prosecution was laid against various persons alleging criminal conspiracy. A stay was obtained by the defendants on the basis that the prosecutor was improperly motivated. The New South Wales Court of Criminal Appeal allowed an appeal as there was no basis to hold that the resulting trials would be unfair. On appeal to the High Court a majority reinstated the stay. It was held that the stay was necessary to protect the integrity of the trial court which is necessarily undermined by entertaining improperly motivated prosecutions.

[68] In *Dietrich v The Queen*[73] an impecunious man, unable to fund counsel or attract a grant of legal aid appeared unrepresented at his trial and was convicted of importing heroin into Australia which was then an offence against the *Customs Act* 1901 (Cth).[74] He appealed submitting that he had a common law right to legal representation. That argument failed but his conviction was quashed by a majority.[75] Without representation, he did not receive a fair trial.

[69] Mason CJ and McHugh J held:

> "For the foregoing reasons, it should be accepted that Australian law does not recognize that an indigent accused on trial for a serious criminal offence has a right to the provision of counsel at public expense. Instead, Australian law acknowledges that an accused has the right to a fair trial and that, depending on all the circumstances of the particular case, lack of representation may mean that an accused in unable to receive, or did not receive, a fair trial. Such a finding is, however, inextricably linked to the facts of the case and the background of the accused.

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71 And the predictions are sometimes wrong: eg *Re: Wakim; ex parte, McNally* (1999) 198 CLR 511 at 560 per McHugh J and *cf. K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501; *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319; *South Australia v Totani* (2010) 242 CLR 1; *Momcilovic v The Queen* (2011) 245 CLR 1 *etc. etc*.

72 (1992) 174 CLR 509.

73 (1992) 177 CLR 292.

74 Now an offence against the Commonwealth Code.

75 Mason CJ, Deane, Toohey, Gaudron and McHugh JJ; Brennan J (as his Honour then was) and Dawson J in dissent.

> A trial judge faced with an application for an adjournment or a stay by an unrepresented accused is therefore not bound to accede to the application in order that representation can be secured; a fortiori, the judge is not required to appoint counsel. The decision whether to grant an adjournment or a stay is to be made in the exercise of the trial judge's discretion, by asking whether the trial is likely to be unfair if the accused is forced on unrepresented. For our part, the desirability of an accused charged with a serious offence being represented is so great that we consider that the trial should proceed without representation for the accused in exceptional cases only."[76]

[70] A Mosely order may be made even if the subsequent trial will not necessarily be unfair.[77]

[71] In *R v Issakidis*[78] Beech-Jones J made an order staying further prosecution on an indictment until payment by the Director of Public Prosecutions of the sum of $624,000. His Honour found fault by the prosecution[79] and identified the unfairness in these terms:

> "[69] Mr Issakidis does not fall within the principle in *Dietrich* although he comes close. He faces a trial of serious charges. The second trial will be lengthy and complex. Even having regard to his "background" as a solicitor, such a trial is likely to be unfair if he is forced on unrepresented (*Dietrich* at p 311). He is relevantly indigent. However, he has not yet exhausted his efforts to obtain legal aid such that the Court is not yet satisfied that he will be unrepresented at the second trial through no fault of his own."[80]

[72] His Honour then stated the relevant principles as follows:

> "[81] While the existence of fault is a necessary condition to the granting of a temporary stay in these circumstances it is not necessarily sufficient. The test is ultimately one of unfairness. All the circumstances must be considered including those noted in [69]. Having regard to those matters the result is that, as was the case in *Fisher*, Mr Issakidis is now "deprived of [the] opportunity [to have private representation] by reason of error on the part of the Crown" (*Fisher* at [47])."[81] (emphasis added)

[73] One case in which it was said that Mosely orders will be made only in rare cases was *R v Fisher.*[82] There Santow JA said that the granting of a stay conditionally upon payment of wasted costs "is to be used only for the rare and extreme case of gross unfairness on the part of the Crown".[83] His Honour's statement must be considered in context. The relevant passage is:

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76 At 311, to similar effect Deane J at 335, Toohey J at 353 and 357 and Gaudron J at 374.
77 *Jago* pages 31 and 58, *R v Fisher* (2003) 56 NSWLR 625 at [31] to [35].
78 [2015] NSWSC 834.
79 Paragraph [80].
80 Paragraph [69].
81 Paragraph [81]. The reference to Fisher is a reference to *R v Fisher* (2003) 56 NSWLR 625. A similar approach was taken by Fullerton J in *R v Selim* [2007] NSWSC 154 at [59].
82 (2003) 56 NSWLR 625.
83 At [7].

> "While it might be argued that the distinction between imposing an order for costs and staying a trial until costs are paid is a narrow one, nonetheless the distinction is real and important. It respects the prohibition upon a court imposing a cost order upon the Crown, a constraint recognised in *Dietrich v the Queen* (1992) 177 CLR 292. It remains a matter for the Crown as to whether it ultimately chooses to proceed and pay the wasted costs, or decline to proceed.
>
> It may nonetheless be argued that the effect of the stay ordered in the present case is, in a practical sense, to force the Crown to pay the wasted costs, while eschewing an order compelling it to do so. The argument proceeds that the practical effect of such an order is to force the Crown to make the payment, as otherwise the Crown would be prevented from vindicating the public interest, here in holding directors to account for alleged breaches of their directorial duties.
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> But the Crown is under no duty to conduct the prosecutions in a grossly unfair fashion. The power of granting a stay against the Crown until wasted costs are paid is to be used only for the rare and extreme case of gross unfairness on the part of the Crown. That is to say, unfairness which, exceptionally, can override the public interest in pursuing a criminal prosecution, though to be weighed against what is the urgency of bringing the case to trial. It is nonetheless certainly not against the public interest that the Crown, as a model litigant, pursue its criminal prosecutions with proper fairness. But to abort a second re-trial in the circumstances of the present prosecution by reason of the Crown's own failure to produce a document, even accepting inadvertence, and then ignore the consequence for the defendant in further wasted costs in so proceeding to a third trial, is unjust and unfair, meriting the description of exceptional circumstances."[84] (emphasis added)

[74] *Fisher* was a case in which the jury in the first trial had been discharged because the accused and two jurors became ill. The second trial was aborted after about three weeks and a third trial was contemplated. His Honour joined in the granting of a stay.

[75] Simpson JA in the same case said this:

> "Having considered all matters, I am of the view that a *R v Mosely* order should also be made in this case. The applicant has (or his parents have) incurred very substantial expense in privately funding his legal representation. While the availability of legal aid is a relevant consideration, it does not undo the unfairness that had accrued by reason of the discharge of the jury at a very late stage in the trial. I accept that an accused person is not necessarily entitled to counsel of his or her choice, particularly when legal representation is funded by legal aid. But here the applicant had made a considered choice to be represented privately and he is now deprived of that opportunity by reason of error on the part of the Crown. In my opinion, in these unusual circumstances, fairness demands that he

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84 At [5].

retain the opportunity of having the representation of his choice."[85] (emphasis added)

[76] In *Petroulias v The Queen*[86] Ipp JA described the circumstances under which a stay should be granted as "only in the most exceptional circumstances".[87] Again, this has to be considered in context. The entire passage is:

> "17. In determining whether a stay should be granted in the exercise of this power, the focus will be on the misuse of the court's process by those responsible for law enforcement. As a general proposition, default or impropriety on the part of the prosecution can, depending on the circumstances, be so prejudicial to an accused that the trial is made an unfair one. The touchstone in every case is fairness. The power is to be exercised only in the most exceptional circumstances. These propositions are taken from *Jago v The District Court of New South Wales* (1989) 168 CLR 23, in particular, the judgment of Mason CJ at 25 and following, Brennan J at 45 to 47, Deane J at 56 to 58, Toohey J at 71 to 72 and Gaudron J at 74 and 77."[88] (emphasis added)

[77] The passages from *Jago*, cited by his Honour, are all statements relevant to the granting of a permanent stay. The amount being sought by Mr Petroulias was in the order of $785,000.00. It is easy to conclude that the requirement for the payment of that sum might mean that the trial not proceed at all.

[78] That different considerations arise in applications for a permanent stay and applications for Mosely orders became evident in *R v Ulman-Naruniec*.[89] There a trial judge had refused an accused's application for a permanent stay but made a Mosely order. Both the Crown and accused appealed. Both appeals were unsuccessful.

[79] In dismissing the Crown's appeal and thereby upholding the Mosely order Bleby J said:

> "[49] In respect of this appeal we are not concerned with the principles which might govern a permanent stay, but merely with a stay pending redress of what the Court has found to be an injustice caused by an unnecessary failure to disclose. It is the unfairness of the third trial that is to be cured, in part, by the payment of the costs of the two trials which can be said to have miscarried. In my opinion the entitlement is not diminished by virtue of the fact that those trials failed for reasons not connected with the non-disclosure. Had the non-disclosure been revealed before either of the previous trials, the accused would have been entitled to a stay of proceedings until full disclosure was made. It is because that non-disclosure was not revealed that the trials went ahead. I would dismiss the DPP's appeal against the order staying proceedings

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85 At [47].
86 [2007] NSWCCA 154.
87 [17].
88 [17].
89 (2003) 143 A Crim R 531.

> until the Crown pays or undertakes to pay the reasonable costs of the accused of the two earlier trials."[90]

[80] Bleby and Besanko JJ agreed with Sulan J as to the dismissal of the Crown's appeal.[91] In dismissing the Crown's appeal Sulan J followed the decision of the New South Wales Court of Criminal Appeal in *R v Seebag*.[92] There Smart J said:

> "[26] When an application for an adjournment is made by the Crown and opposed by the accused and one of the grounds is the expense which will be suffered by the accused, the judge has to take into account the whole of the circumstances and determine overall what is the correct result. It is often not possible to divorce consideration of the question of adjournment and the question of costs and expenses incurred by an accused.
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> The circumstances which may arise are legion and it would be unwise to attempt to lay down a comprehensive and detailed set of principles designed to cover all cases. The overriding principle is that the judge should do what is just in the whole of the circumstances." (emphasis added)

[81] There are statements in other cases to the effect that the making of Mosely orders will be a rare event.[93] As I have said, these statements reflect nothing more than that circumstances justifying a Mosely order will not often arise.

[82] The starting points are two in number. First, there is no statutory power to order the Crown to pay the costs of an accused who has been charged on indictment. Second, it is not for the Court to determine whether an indictment will be presented, who is to be charged and who is not to be charged or, generally, how an indictment will be prosecuted by the Crown.[94] For such reasons, decisions about prosecutorial matters are generally not subject to judicial review.

[83] However, the Court is concerned with prosecution decisions at least in so far as they may affect the fairness of the trial of the charges in the indictment. That is a concern that does not just involve the conduct of the trial proper. It may involve interlocutory steps, such as disclosure. It may also involve the manner in which the whole prosecution is being conducted. In such cases, and apart from the familiar kinds of orders made to ensure the fair execution of interlocutory steps, the Court holds an ultimate power to stay a prosecution to ensure fairness as between prosecution and defence.

[84] A prosecution on indictment imposes a burden upon an accused. The process is emotionally fraught, long and, for those who have to pay their own legal expenses, expensive. The process can involve unforeseen events that add to delays and

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90 At [49].

91 At [47] and [74]; but Sulan J would have allowed the accused's appeal from the refusal of the permanent stay.

92 Unreported, Hunt CJ at CL, Smart and James JJ 16 February 1993 followed in *R v Bucksath* (2000) 114 A Crim R 1 at [25].

93 *Zonneveld v The Queen (No 2)* [2018] ACTCA 31, at [25], *R v Bui* (2011) 5 ACTLR 230 at [74], [96] and *R v Fisher* (2003) 56 NSWLR 625 analysed previously.

94 *Sankey v Whitlam*, *Barton*.

expense. Many occasions will arise when either party will cause expense to the other party that might have been avoided. However, few such instances would justify a Mosely order. This is because such an order constitutes an interference with the right of the Crown to prosecute its indictment. An order cannot be justified merely because, in the civil jurisdiction, costs, or even indemnity costs, would have been ordered against the Crown in similar circumstances. The only justification can be that, in the absence of a stay, the continuation of the prosecution would be unfair to the accused to a degree that justifies stopping the prosecution until the party that has caused it has alleviated the unfairness. Whether or not the asserted unfairness reaches that level is the judgment that lies at the heart of the exercise of the discretion.

[85] As I have said above, the authorities do not support the imposition, as a precondition to the exercise of the discretion to grant a stay, that the circumstances be rare or exceptional. The test is one of unfairness in all the circumstances. However, the cases in which a stay will be ordered will be rare simply because it can be confidently expected that Australian prosecution authorities will continue to exercise their powers properly and so as not to cause unfairness to the accused – as they have done in the past. However, even when such powers have been exercised in good faith, occasions can arise in which the circumstances demonstrate that the further prosecution of an indictment will cause such unfairness to an accused that the proceeding should be stayed. Indeed, the Crown may be unaware of the accused's personal circumstances that, when disclosed after a decision has been taken, demonstrate unfairness.

[86] The unfairness may mean that the prosecution must be stayed permanently or it may mean that the prosecution must be stayed until the circumstances giving rise to unfairness have been eliminated. In cases in which a Mosely order is sought, the unfairness is one that can be alleviated by the payment of money.

Determination

[87] As previously observed the appellant contends that Shanahan DCJ made three errors.

The judge did not consider whether the case was "exceptional"

[88] His Honour did not have to do so.

[89] His Honour appreciated that he was making an order which was an exception to the rule that costs orders are not made on proceedings on indictment. His Honour said that Mosely orders are "different from the court making an order that the Crown pay costs, which is precluded by the *Criminal Code*"[95] and then went on to consider the circumstances said to justify such an order.[96]

[90] His Honour was not obliged to consider "exceptionality" in a vacuum. He had to consider the particular features which were said to justify departure from the general rule that costs are not ordered.

[91] The first complaint is not made out.

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95 ARB 74.
96 ARB 74.

The judge found fault but didn't consider the relevance of the nature of the fault found

[92] The Crown submitted that the only fault which could be attributed to the prosecution was in taking a step (conferring with the child) later than that step should have been taken. The Crown submitted that was not the type of error which could give rise to the exercise of the discretion to make a Mosely order.

[93] I reject that submission. The discretion is a broad one based on fairness. It can arise in a myriad of circumstances and there is no justification for limiting the cases in which it can arise.

[94] His Honour found specifically that the child should have been the subject of a conference earlier and if that had occurred an adjournment of the pre-recording of her evidence and the trial would not have been necessary.

[95] Whether the conduct here by the Crown did justify the making of a Mosely order cannot be considered in isolation from other considerations such as the effect of the conduct on the respondent.

His Honour erred in finding that the Crown's conduct "impacted" upon the ability of the respondent to properly fund the trial and caused fundamental unfairness in the trial proceeding

[96] His Honour found that the relevant loss was the costs thrown away by the adjournment of the pre-recorded evidence of the child and the trial in the sum of $2,400.

[97] The respondent, in his affidavit swore that he had spent $6,600 on legal fees and the final estimate of fees for the entire proceeding was up to $30,000. However, his affidavit shows that he does not have the means to raise such a sum. The $6,600 was incurred in bringing the application before his Honour which, in the main, failed.

[98] There is no basis upon which his Honour could have found that the loss of $2,400 in the context of the present litigation led to any significant effect upon the respondent's ability to fund his trial or to any unfairness in the prosecution continuing.

[99] His Honour's error is one of law and therefore the appeal ought to be allowed and the order set aside.