# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v Harker* [2002] QSC 061 |
| PARTIES: | **THE QUEEN**<br>**v**<br>**DAVID JOHN HARKER** |
| FILE NO/S: | 92 of 2002 |
| DIVISION: | Trial Division |
| DELIVERED ON: | 20 March 2002 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 12 March 2002 |
| JUDGE: | Mackenzie J |
| ORDER: | **The application is refused** |
| CATCHWORDS: | CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – STAY OF PROCEEDINGS – ABUSE OF PROCESS – GENERALLY - Application to stay an *ex officio* indictment – where the Crown presented the indictment outside the time limit prescribed by s 590 *Criminal Code* – administrative malfunction - whether this was an abuse of process<br><br>*Criminal Code* s 561, s 590, s 590 (1), s 590 (3), s 590(4)<br><br>*Barton v The Queen* (1980) 147 CLR 75, approved<br>*Jago v District Court of New South Wales* (1989) 168 CLR 23, approved<br>*Moevao v Department of Labour* (1980) 1 NZLR 464, considered<br>*R v Cooney* (1987) 31 A Crim R 256, considered<br>*R v His Honour Judge Grant-Taylor and the Attorney General, ex parte Johnson* (1980) Qd R 38, considered<br>*Re Jenkin* (1994) 1 Qd R 266, considered<br>*Rona v District Court of South Australia* (1995) 77 A Crim R 16, considered<br>*Williams v Spautz* (1992) 174 CLR 518, approved |
| COUNSEL: | R East for the applicant<br>R Pointing for the Director of Public Prosecutions |
| SOLICITORS: | Legal Aid Queensland for applicant<br>Director of Public Prosecutions |

[1] **MACKENZIE J:** This is an application to stay an ex officio indictment 67/02 presented on 15 February 2002 on the ground that its presentation was an abuse of process.

[2] The indictment charges the applicant with carrying on business of trafficking in amphetamines between 1 March 2000 and 9 February 2001, unlawful possession of cannabis sativa, heroin and methylamphetamine on 14 July 2000 and unlawful possession of cannabis sativa on 8 February 2001. There is also in existence an indictment 92/02 containing counts of possession of cannabis sativa and methylamphetamine on 14 July 2000, in count one, and possession of heroin on 14 July 2000, in count two. Count three alleges a supply of amphetamine on the same day. Counts one and two of indictment 92/02 appear to replicate the substance of count 2 on indictment 67/02. There was a separate committal on 28 August 2001 of those charges and the charge of supplying dangerous drugs in indictment 92/02 (which presumably is an act done in the course of trafficking). The committal with respect to the charge of carrying on business in trafficking in drugs occurred on 2 August 2001.

[3] The indictment with respect to carrying on the business of trafficking should have been presented by 4 February 2002 to comply with the six month time limit prescribed in s 590 of the *Criminal Code* (since the six month period elapsed on a Saturday). The basis of the application that the presentation of the ex officio indictment was an abuse of process is that it was an attempt by the Crown to avoid the constraints in s 590.

[4] When the ex officio indictment was presented Mr East for the applicant conceded that he could not oppose its presentation (*R v His Honour Judge Grant-Taylor and the Attorney General, ex parte Johnson* (1980) QdR 38). Mr Pointing, who appeared at the presentation and on this application, said at the presentation that he had decided to present an ex officio indictment rather than attempt to establish good cause for an extension of time within which the indictment could be presented, as provided for in s 590(3). Argument before me was confined to whether, in the circumstances, presentation of the ex officio indictment was an abuse of process. What might constitute "good cause" was not argued.

[5] Certain facts are uncontroversial in the application:

1. That the presentation of the indictment with respect to carrying on the business of trafficking in drugs was outside the time prescribed in s 590;
2. That since the reason for failure to present the indictment within time was administrative malfunction or, as Counsel for the Director put it, incompetence within the Office of the Director of Public Prosecutions, the prosecution did not seek to rely on "good cause" within the meaning of s 590(3);
3. That no prejudice would be caused to the applicant merely by reason of lateness of presentation of the indictment;
4. That the applicant made admissions of carrying on a business of trafficking in drugs; and
5. That if the present application fails a nolle prosequi would be entered to indictment 92/02.

[6] Section 590 is expressly subject to s 561 which authorises presentation of ex officio indictments. Section 561 authorises such presentation whether the accused person has been committed for trial or not. The mere fact that in a case where committal proceedings were held and a committal occurred, the prosecution fails to present an indictment within the six month period (or any time extended under s 590(3)), is therefore not fatal to the later indictment. As s 590(4) says, a person is only entitled to be discharged from the consequences of the committal.

[7] Nevertheless, Australian superior courts have inherent jurisdiction to stay proceedings which are an abuse of process (*Barton v The Queen* (1980) 147 CLR 75; *Jago v District Court of New South Wales* (1989) 168 CLR 23; *Williams v Spautz* (1992) 174 CLR 518). Mr East for the applicant also relied on a passage in *Re Jenkin* (1994) 1 QdR 266, 283, in which the question was whether the predecessor of the current s 590 entitled an accused to discharge from further proceedings or from the consequences of the committal. After the conclusion was arrived at that it was the latter, it was observed that any remedy in respect of further proceedings following such discharge lay in the court's inherent jurisdiction to stay proceedings in the event of an abuse of process or oppression.

[8] In *Williams v Spautz*, Mason CJ, Dawson, Toohey and McHugh JJ explained the need to distinguish between cases where abuse of process was relied on and those where further prosecution would result in a trial which was unfair. Consideration of the present case falls into the first category. Speaking of that category, the judgment proceeds:

> "… it by no means follows that it is necessary, before granting a stay, for the court to satisfy itself in such a case that an unfair trial will ensue unless the prosecution is stopped. There are some policy considerations which support the view that the court should so satisfy

> itself. It is of fundamental importance that, unless the interests of justice demand it, courts should exercise, rather than refrain from exercising, their jurisdiction, especially their jurisdiction to try persons charged with criminal offences, and that persons charged with such offences should not obtain an immunity from prosecution."

[9] Later the Judges adopted the words of Richardson J in *Moevao v Department of Labour* (1980) 1 NZLR 464, 482 that the court grants a permanent stay:

> "… in order to prevent the criminal processes from being used for purposes alien to the administration of criminal justice under law. It may intervene in this way if it concludes … that the court processes are being employed for ulterior purposes or in such a way … as to cause improper vexation and oppression."

[10] In *R v Cooney* (1987) 31 ACrimR 256, where the facts were less meritworthy for the prosecution than in the present case, the Court of Criminal Appeal refused to stay a second indictment after a nolle prosequi had been entered on an identical indictment in circumstances which "frustrated the method of listing cases". Andrews CJ said the following (264):

> "There may be a rare case in which conduct by the prosecuting authority is so blatantly abusive as to call for a gesture on behalf of the court resulting in a stay, the better to ensure that there will be no repetition of such behaviour."

[11] While superior courts have the power to ensure that their process is not used as an instrument of oppression, it is not the proper approach to equate that power to one to punish the prosecuting authority for non-compliance with case management procedures (*Rona v District Court of South Australia* (1995) 77 ACrimR 16) or, in my opinion, a failure to indict within a prescribed time limit, if there is a clear explanation of the failure and such non-compliance or failure is not aggravated in some way by other factors. The kind of cases referred to in the passage quoted from *Cooney* should truly be rare. The present case is far removed from that kind of case.

[12] Mr East's argument in favour of a stay focussed on the proposition that the ex officio indictment had been presented for an improper purpose, to circumvent the failure to comply with s 590. Notwithstanding the opening words of s 590(1), presentation of an ex officio indictment should be characterised as a misuse of the power to present an ex officio indictment and an abuse of process. He submitted it was one of the rare cases where the prosecution's conduct was so blatant that a stay was justified to prevent the administration of justice being brought into disrepute and to prevent such misbehaviour in future.

[13] He submitted that the present s 590 was enacted so that a person committed for trial might have the proceedings commenced in, and therefore brought under the control of, a superior court within the statutory time limit, with the safeguard for the prosecution that an extension of time could be obtained if justified. Presentation of an ex officio indictment in this case, he submitted, circumvented s 590 and rendered the protection meaningless without any sanction on the prosecution. To the extent that it is implicit in those submissions that it is appropriate to impose a sanction upon the Director of Public Prosecutions for not complying with the time limit, it is important to remember that the reason why compliance with s 590 was not achieved was an administrative malfunction or incompetence on the part of someone in that office. That is far removed from a case where there has been a deliberate attempt to avoid prescribed procedures. Administrative incompetence on the part of a prosecuting authority is to be deplored, but it does not, without more, equate to an abuse of process, applying proper principles.

[14] In the circumstances the application is refused.