SUPREME COURT OF QUEENSLAND

CITATION:	*R v W; ex parte A-G (Qld)* [2002] QCA 329
PARTIES:	**R** **V** **W** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 84 of 2002 DC No 62 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Appeal under s 669A(1A) Criminal Code
ORIGINATING COURT:	District Court at Rockhampton
DELIVERED ON:	30 August 2002
DELIVERED AT:	Brisbane
HEARING DATE:	15 August 2002
JUDGES:	Williams JA, Mackenzie and Holmes JJ Separate reasons for judgment of each member of the court, each concurring as to the orders made
ORDERS:	**1. Allow the Attorney-General's appeal.** **2. Set aside the order of the District Court at Rockhampton permanently staying the proceedings upon the indictment and discharging the accused.** **3. Order that the trial be adjourned to a date to be fixed, to be determined according to law.**
CATCHWORDS:	APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – STAY OF PROCEEDINGS – WHEN GRANTED - where respondent charged with indecent treatment of a child under 12 and under care – where it was ordered that the proceedings on the indictment be permanently stayed – where Attorney-General appeals the order to stay - whether the learned trial judge erred in the

exercise of his discretion to stay the indictment

Jago v District Court (New South Wales) (1989) 168 CLR 23, considered
Longman v The Queen (1989) 168 CLR 79, considered
R v S [2000] 1 Qd R 445, considered
Walton v Gardiner (1993) 177 CLR 378, considered

COUNSEL: P F Rutledge for the appellant
B G Devereux for the respondent

SOLICITORS: The Director of Public Prosecutions (Queensland) for the appellant
Legal Aid Queensland for the respondent

[1] **WILLIAMS JA:** The reasons for judgment of Mackenzie J clearly demonstrate that the learned District Court judge erred in ordering that proceedings on the indictment in question be permanently stayed. The appeal by the Attorney-General should be allowed and orders made as proposed by Mackenzie J.

[2] **MACKENZIE J:** The respondent was arraigned and pleaded not guilty to an indictment charging him that on a date unknown between 1 May 2000 and 21 September 2000 he wilfully and unlawfully exposed a girl under the age of 12 years in his care to an indecent act. In a letter dated 31 May 2001 it was stated:

> "The particulars relied upon by the crown are that on an occasion between the 1st May 2000 and the 20th September 2000 at [the respondent's residence] in the accused bedroom whilst the complainant was in the room the accused injected his penis with a syringe and played with his penis. The complainant was called into the accused room from the lounge room when she was watching the secret world of Alex Mac on Television.
>
> Please note that the particulars supplied are not those of the trial prosecutor and may be subject to change when the matter is listed for trial." [*sic*]

[3] After hearing lengthy submissions the learned District Court judge ordered that the proceedings on the indictment be permanently stayed. The following passage summarises the reasons why the order was made.

> "While I acknowledge that the authorities show that it is only in exceptional circumstances that a stay should be granted I am of the opinion that the defence has satisfied the onus of showing that such exceptional circumstances exist in the matter and that a stay should be granted. In this regard I rely principally, but not only, on the lack of sufficient particularity and, indeed, the lack of any evidence by the complainant especially in her section 93A statement about any specific act referring as she appeared to do in that statement to a number of identical acts over a period of approximately four months.

> I refer also to the apparent changes in the complainant's version as evidenced by her two supplementary statements as well as the likely prejudice to the accused which may arise due to the evidence concerning drug use and the other identified inherent weaknesses in the Crown case.
>
> I am of the opinion that to allow the prosecution to proceed in this matter would be unfair to the accused and that the interests of justice would not be served."

[4] The application before the learned trial judge rolled up a number of matters which, it was submitted, justified granting a stay, including those specifically mentioned in the passage above from the learned trial judge's reasons. These will be analysed in more detail later. The application was made in circumstances where, on the day of the trial, the prosecution had not yet supplied the defence with two supplementary statements from the complainant. It was alleged that there were inconsistencies between their contents and the evidence that the defendant had come to meet. In certain details, but not necessarily in others which are more critical to the decision, there seemed to be variations, or at least less certainty.

[5] It should be observed that it is very unsatisfactory for the prosecution not to have its case fully prepared in advance of the date set for trial. Sometimes, issues need clarification in minor respects or arise unexpectedly during the trial and need to be met by further evidence. Leaving those aside, the defence is entitled to know in advance of the evidence to be called by the prosecution. However, late provision of additional significant evidence or a late perception on the part of the prosecution of a need to supplement its case in important respects will generally be more relevant to whether an application for an adjournment should be granted to either party than to an application for a stay.

[6] The alleged offence came to the attention of the police on the evening of 20 September 2000. So far as it appears from the record, the background to the matter was that the respondent and the child's mother had been living together for some time. They were both drug users and, according to the respondent, she had departed from their residence in mid-May 2000 leaving her children with him. She returned only intermittently. On 20 September 2000 there was an argument as a result of which the respondent was taken by another man for a drive to quieten him down. According to the girl's mother the following then occurred:

> "About 10 minutes after they had left my daughter came out into the living room and she said '[the accused's] been injecting himself in his dick and pulling himself in front of me.'
>
> I said: 'Why haven't you told me this before.' or words to that effect.
>
> She said: 'I have.'
>
> I said: 'You've never told me something like this before. You've told he injected himself in front of you before but never there.'

She said: 'I thought you knew what I was talking about.'

I also asked her how many times [the accused] had done this in front of her and she said: 'Five or six times' I also [*sic*] [her] if he had touched her and she that he had not touched her.'

A short time later [the accused and his friend] came back to the house and I confronted [him] about what [she] had said. [He] told me that had [*sic*] had injected himself in front of [her] and he had asked her to leave the room but she didn't so he just kept going. I can't remember the exact words that he used.

I then abused him about this and he threw me out of the house and that's when I rang the police."

[7] On 21 September 2000 an electronically recorded statement was taken from the complainant by a police officer in the presence of an officer of the Department of Family Services. The girl confirmed that there had been an argument in which the respondent had accused her mother of being the cause of his drug problem. She said that she responded that it was because of him that her mother was like she was. Her statement continues as follows:

"… what did you say to mum?-- I said that um, '[the accused's] been having speed and syringes in front of me. He has it two to three times a day and he has it in his penis too'.

In his penis?-- And he makes me sit in the room and watch him.

So you've seen him use a syringe in his penis? And he's - he's injected something into his penis, has he? Okay. What - when did this happen, sweetheart?-- Um, well, mum went away for a little while about two weeks ago and he stopped when mum came back. He used to have it two to three times a day and he showed me where he got it from, too.

Okay. Um, did he do - did he do this just once or more than once?-- Every time he [indistinct] every day.

Did he inject himself anywhere else do you know?-- Um, in his arm.

Arm?-- And his penis and that's all. And he wouldn't let me sleep out or anything because he was scared I was gonna tell someone.

Okay. So you - you saw him inject himself into his penis; how many times did you see that?-- Um, he did that about oh, seven times, and all the rest he did it in his arm.

Okay?-- And that was every day.

So, did you see him all those times - every time?-- He made me watch him.

Did he? Where did he do this?-- Um, most of the time, he sat out in the lounge room and did it after the boys went to sleep.

Yeah?-- Or he would go in the room when the boys were awake and then we'd go in there.

Which room was this, love?-- His room.

…

Okay. How do you know he injects himself in his penis?-- He made me watch.

Were you very close to him?-- Yes. He was sitting on the chair and I had to sit on the bed.

…

Did he take the pants off or anything?-- Yep.

What about underwear or anything like that - jocks?-- He took his pants off to do it.

All right. Okay. Did you have your clothes on?-- Yes. I said, 'I shouldn't be in here, it's not a good idea', and he just said, 'Don't worry about it, stay in here'.

Okay, did he do anything else then?-- He sat there and played with himself.

Did he? Was this every time or just once?-- Every time.

Every time he injected himself? Okay. Then what happened then?-- And then he'd go all funny and spew up and go all angry.

And he's spew up, what, vomit? Did he?-- Yep.

Every time?-- Yep."

[8] The respondent was then interviewed by the same police officer on 22 September 2000. The account he gave was to the effect that there was only one occasion when the complainant had been present in the bedroom when he had injected himself in the penis with amphetamine. He had been sitting on a chair facing a duchess when he injected himself. At the time the complainant was lying on the bed. He said that the girl was in the room because she was scared of the dark.

[9] He conceded that the girl may have seen him preparing the syringe, but denied that she could have seen him actually injecting himself because he was facing away from her. On two occasions the police officer asked him questions based on the sequence of events being that the respondent had injected himself, then played with his penis, which the respondent denied emphatically. The following questions and answers then appear in the record of interview:

> "So you're denying those allegations, okay. Right, how many times did you inject yourself in - in - in your genitals?-- The once. And that's the only time you ever - that - that I ever done it.
>
> Right?-- You know, and that's the only time that [the girl] was in - ever, ever in the room.
>
> Right. [The girl] was saying it happened more than once?-- Oh, I've never showed [her] any more than once. It's something you don't show a kid. The only reason that she wouldn't go outside that night is because she was scared.
>
> Sorry, happened at - at night. What time of the night was it?-- Yeah, that - that would have been probably - oh, 8 o'clock, half past 7.
>
> And she was in your bed?-- Yes, she was. She was laying on the bed. Yes, [indistinct]."

[10] Later he was asked the following:

> "CONST HUNTER: Do you think its reasonable though if you're going to partake in that behaviour that you do it elsewhere when, um, there's - there's ----- ?-- Well -----
>
> ----- no kids there?-- I couldn't though. Because she wouldn't go out of the room. She [indistinct] wouldn't go [indistinct] that night because of - because of her being too scared and that if I went to the lounge room, well she'd be there. Straight away."

[11] The last two passages quoted may be open to the inference that the respondent was unwilling that the complainant remain in the room but proceeded nevertheless to inject himself. On the other hand, to the extent that the girl describes a particular incident, she says that she went into the room when he was already there and was told to remain despite her reluctance.

[12] The respondent said that after injecting himself he had left the bedroom and gone into the lounge room to watch television. He also denied that the girl may have been able to see his reflection in the mirror of the duchess.

[13] On 27 February 2002, the day of the trial, two supplementary statements were given by the girl. The first statement is to the effect that when she was conferring with the Crown Prosecutor on an earlier date, she remembered that before she went into the bedroom she was watching television. She said the following:

> "I remember that before I went into the bedroom with the accused I was watching television and there was a show on about a witch which I think was called Alex Mac. I am not 100% sure but I do remember the show was about a witch.

> I cannot remember whether [he] called me into the bedroom or whether I just walked in there for some other reason and I remember that I was sitting on the floor or the bed. I don't remember which.
>
> At the time this had happened I was by myself with [him] and my two younger brothers were with my mother and not in the house at all."

[14] In the second, she said that when she walked into the bedroom the respondent was already in the room, sitting on a chair. She sat on the bed or the floor. At that time he was wearing all of his clothes. She saw him mixing speed. The statement then continues:

> "I then got up and started to leave the room but [the accused] said words to the effect that he wanted me to stay in the room. I then saw him unzipped [*sic*] his pants and pulled his pants down towards his knees. I could clearly see his penis.
>
> I then saw [him] start to play with his penis for about 1 or 2 minutes and I saw him get a stiffy. I remember that I asked him what he was doing and he said: 'It makes it easier to find a vein.' Or words to that effect.
>
> [He] then injected himself in the penis using the syringe and then he just sat there staring into mid air for a couple of minutes and then I saw him run into the bathroom and I heard sounds of vomiting."

[15] The Attorney-General appeals on the grounds that the learned trial judge erred in the exercise of his discretion to stay the indictment because:

> (a) there was no fundamental defect which prevented the accused from receiving a fair trial according to law; and
> (b) it was wrong to rule that individually or collectively there was any reason to justify the grant of a stay.

[16] The power to grant a permanent stay is to be used only in the most exceptional circumstances. The case must be an extreme one to warrant a stay. There is a strong public interest in the prosecution of serious offences and the conviction of offenders, subject to the public interest in ensuring that judicial proceedings are not abused, that accused persons' trials are fair to them, that innocent persons are not convicted, and public confidence in the administration of justice is maintained. (*Jago v District Court (New South Wales)* (1989) 168 CLR 23; *Walton v Gardiner* (1993) 177 CLR 378, 395-6.)

[17] The learned trial judge's careful reasons advert to the relevant authorities and analyse in detail the factors upon which he based his conclusions. A decision to stay proceedings is a discretionary judgment and as such should not be set aside in the absence of demonstrated error of fact or law.

[18] The principal focus of the respondent's resistance to the appeal was that the offence had been insufficiently particularised by reference to date or an objectively

verifiable event. The learned trial judge had observed that the Crown Prosecutor had argued that the admission in the record of interview that the respondent had injected himself in the penis on one occasion when the complainant was in the bedroom showed that he knew that a particular act was the subject of the complaint; however, the respondent had not identified that occasion by reference to date or in any other way; therefore it was possible that he was not describing the same occasion as she was.

[19] The point is made in *R v S* [2000] 1 Qd R 445, 455 that it is questionable whether it is possible or helpful to lay down absolute rules regarding the sufficiency of particulars. Once the sufficiency of particulars falls to be decided in the context of the particular circumstances of an individual case, each case must be decided on its merits. It may be a matter of judgment and impression whether the case falls on one side of the line or the other, given the wide variety of circumstances which may exist. The present case has a feature that is often absent from cases of this kind, where denials that anything untoward had happened are common. The unusual feature is that the respondent has admitted an act with some resemblance to that described by the complainant occurring in the same room as that nominated by the complainant. His description has differences from the complainant's but the mere existence of differences in detail would not necessarily lead to the conclusion that the complainant and the respondent were describing different occasions. In the end it would be a matter for the jury to decide that question.

[20] There is a range of possible reasons why the account elicited from the complainant is not as comprehensive as might be desired. Whatever the reason, it is not clear, and seems never to have been clarified, whether she alleges that there was only one occasion when the respondent injected himself in the way described by her in the bedroom, or whether some or all of the other like incidents referred to by her also occurred there. She told her mother that he had done a similar act on five or six occasions. In her recorded statement to the police she said it occurred about seven times. The passage in her interview which relates most clearly to the issue, although possibly ambiguous because of the reference to injections in the arm as well, appears in the seventh to twelfth questions and answers in the passage in paragraph [7].

[21] In the fifth last question and answer of the same quotation there is reference to the respondent playing with himself. Whether it is correct to interpret that answer as indicating that it occurred after the injection or whether the complainant is merely saying that it happened as well, without implying that it was sequential upon the injection, has a bearing on whether there is a variance with what the complainant says about the sequence in the second supplementary statement (quoted in para [14]) or with the terms of her complaint to her mother (quoted in para [6]). It has already been noted that the police officer, in questioning the respondent, put to him that the sequence was injection followed by the other act.

[22] By the time the application for stay came to be decided, it was necessary to have regard to the facts as they then stood rather than focus unduly on the original particulars. The Crown could particularise that the complainant was describing an act that occurred at about a time of day when a particular television show or, at least, one involving a witch was being broadcast. The incident she was describing happened within a period of no more than four months before the date of the complaint. It occurred on an occasion when her mother and brothers were absent

from the house and she and the respondent were the only people in the house. Given the infrequency of the mother's contact this is not without significance, since the brothers generally lived at the respondent's home throughout the mother's absence. It directs the respondent's attention to a limited number of occasions over a relatively short period when the offence might have occurred.

[23] In my view, an offence identified to that extent in the context of the particular facts of the case provides sufficient particularity to allow the respondent to know the case that he must meet and to defend himself. The fact that he has described a particular act which may or may not be the same act as that described by the girl is not critical to the issue of sufficiency of identification of a particular incident. Whether the two descriptions relate to the same occasion is only an evidentiary issue. Sufficiency of particularisation does not depend on the existence of close correspondence of competing accounts of the same occasion. Nor does the absence of any competing version of the same occasion from an accused or the description of a different occasion by him affect the issue.

[24] While the issue is not critical to the sufficiency of particularisation, it may have evidentiary implications. One irreconcilable difference between the respondent and the complainant is that he says that there was only one occasion when he injected drugs into his penis in the girl's presence. She says there were multiple occasions. That would be a matter for the jury to consider. With regard to the occasion described by her, the possibilities are that the complainant and the respondent are speaking of the same occasion but give different accounts of it, or that the occasion the complainant is describing is not the same as that described by him. If the jury concludes that the first is the case, it would have to resolve the conflicting descriptions of what occurred. If it could not exclude the possibility that the respondent tried to hide from her what he was doing, but despite that, she observed what she said she saw, the outcome may possibly be different from what it would be if they rejected his version. If it concludes that the second is the case, the jury's approach to credibility, which would include consideration of the evidence concerning the number of occasions he injected himself in the girl's presence and that on a different occasion he injected himself but it was not intended that the girl observe what he was doing, would be important. In both instances, consideration of other alleged inconsistencies would also be important.

[25] The additional matters relied on in support of a stay are summarised in the learned trial judge's reasons in the following passage:

> "In support of his application for a stay Mr Clark [*sic*] has argued also that the inconsistencies in the evidence proposed to be led from the complainant are such that it is obvious that the complainant has changed her instructions to the Crown. He argues further that there is no evidence of fresh complaint, that there is no corroboration and that a 'Longman direction' would inevitably need to be given to the jury and that in all the circumstances it would be unfair and unjust for the Crown to proceed with the prosecution.
>
> He argues also that because the allegation involving the use by the accused of an illicit drug there would already be a risk of significant prejudice to the accused. Mr Clarke submits that even if some of these matters taken in isolation would not result in the accused not

> being able to have a fair trial when all of these matters are considered together it would be unjust to allow the prosecution to proceed."

[26] The learned trial judge referred to the issue of inconsistency in the complainant's versions in his reasons and characterised them in the passage quoted in para [3] as "apparent changes" in the complainant's version. With the benefit of analysing the evidence under less pressure of time than the learned trial judge it is, in my view, not clear that there is a critical variance and that whether there is or not is essentially a question for determination by a jury.

[27] With regard to potential prejudice due to evidence of drug use, that allegation is an integral and inseparable part of the prosecution case. For that reason it causes no unwarranted prejudice to the respondent. It could not play any significant part in the decision whether a basis for a stay had been made out.

[28] With regard to fresh complaint, the period alleged in the indictment as that within which the offence occurred is a period of slightly over four and a half months, ending on a date following the making of the complaint. On the evidence, the period would have been a little shorter, since, depending on the view taken by the jury, the complainant's mother left the residence on the 17 or 18 May, according to the respondent, or in early June, according to the complainant's mother. She returned intermittently throughout the period, staying only for short periods.

[29] The learned trial judge was correct to observe that the admissibility as a fresh complaint of the complaint to the complainant's mother by her could have been a matter for argument. It is probable that the complaint was not made until some time after the offences were alleged to have occurred, but there were plainly aspects of the evidence which were relevant to the issue of whether there was reasonable opportunity to complain before that. Whether the evidence should be admitted would be the first step in the inquiry. If it was admitted, it would then be a question for the jury whether it regarded the evidence as supportive of the credibility of the complainant as a witness.

[30] In my judgment it could not be said confidently at the stage when the application was made that the evidence was inadmissible in the absence of further inquiry. Nor could it be confidently predicted that if admitted it was highly likely that it would be given little weight by the jury.

[31] It was common ground that a direction in accordance with *Longman v The Queen* (1989) 168 CLR 79 should be given. It is appreciated that the argument addressed to the learned trial judge and repeated before us was that it was an accumulation of the matters referred to rather than any particular one standing alone which added weight to the primary ground for the application. For the reasons given in my view such weight is very slight at best.

[32] It follows, in my view, that the learned trial judge erred in exercising his discretion in favour of a stay. It was not open to conclude in the circumstances of the case that, as the case stood at the time the decision was made, grounds for a stay had been established. I would allow the Attorney-General's appeal, set aside the order of the District Court at Rockhampton permanently staying the proceedings upon the indictment and discharging the accused, and order that the trial be adjourned to a date to be fixed, to be determined according to law.

[33] **HOLMES J:** I agree with the reasons for judgment of Mackenzie J and with the orders he proposes.