SUPREME COURT OF QUEENSLAND

CITATION:	*Meredith v Gough & Ors* [2004] QCA 143
PARTIES:	**SCOTT ANDREW MEREDITH** (applicant/appellant) **v** **JASON GORDON GOUGH** (first respondent/first respondent) **ACTING MAGISTRATE ROGER STARK** (second respondent/second respondent) **DIRECTOR OF PUBLIC PROSECUTIONS (QUEENSLAND)** (third respondent/third respondent)
FILE NO/S:	Appeal No 11939 of 2003 SC No 9789 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	7 May 2004
DELIVERED AT:	Brisbane
HEARING DATE:	8 April 2004
JUDGES:	Davies and Williams JJA and Holmes J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – ADJOURNMENT, STAY OF PROCEEDINGS OR ORDER RESTRAINING PROCEEDINGS – STAY OF PROCEEDINGS – ABUSE OF PROCESS – IN GENERAL – where appellant charged with unlawful possession of cannabis sativa and trafficking – where perjured evidence was given by police officers at first committal hearing – where second committal hearing not concluded at time of hearing of appeal – where learned primary judge refused application for permanent stay of proceedings – whether permanent stay should be granted *Police Powers and Responsibilities Act* 2000 (Qld), s 77, s 78 *Bunning v Cross* (1978) 141 CLR 54, cited *Jago v District Court (NSW)* (1989) 168 CLR 23, cited

COUNSEL:	A Boe (sol) for the appellant W T McMillan (sol) for the first respondent M Bobic for the second respondent M O Plunkett for the third respondent
SOLICITORS:	Boe Lawyers for the appellant Carne Reidy Herd for the first respondent Crown Solicitor for the second and third respondents

[1] **DAVIES JA:** I agree with the reasons for judgment of Williams JA and with the order he proposes.

[2] **WILLIAMS JA:** Following what was referred to in argument as the "first committal" an indictment was presented to the Supreme Court alleging that on 27 August 2002 the appellant unlawfully had possession of the dangerous drug cannabis sativa, and the quantity of that drug exceeded 500 grams.

[3] Subsequently in about October 2003 what was referred to as the "second committal proceeding" commenced dealing with a charge of trafficking in a dangerous drug against the appellant. That proceeding has not yet concluded.

[4] On 30 October 2003 the appellant applied pursuant to s 592A(2)(a) of the Criminal Code (now s 590AA(2)(a)) seeking an order quashing the indictment or a "temporary stay of the whole of the proceedings". Then by originating application filed 31 October 2003 the appellant sought various orders with respect to the second committal proceeding; essentially he sought a declaration that the proceeding "constitutes an abuse of process" and a consequential order permanently restraining its further prosecution.

[5] Those applications came before Douglas J who, for reasons delivered on 5 December 2003, dismissed each application. From the order dismissing the application with respect to the second committal an appeal is brought to this court; there can at this stage be no appeal from the s 590AA(2)(a) application: s 590AA(4) of the Code.

[6] On 27 August 2002 police officers (Shore and King) stopped and searched a motor vehicle being driven by the appellant. In it they located some cannabis and other items referring to an address at 99 Levington Road. Later that day police officers (led by Detective Stagoll) searched a shed at 99 Levington Road and located further cannabis; Stagoll subsequently obtained a warrant pursuant to s 77 and s 78 of the *Police Powers and Responsibilities Act* 2000 on the basis that it was an "emergent search".

[7] It was on the evidence given by those police officers at the first committal hearing that the appellant was committed for trial on a charge of possessing cannabis and the indictment referred to above was subsequently presented.

[8] Thereafter the appellant was charged with trafficking in a dangerous drug and, as already noted, the committal proceeding relating thereto commenced in October 2003. It emerged from evidence given then that Shore and King had probably given false testimony at the first committal in relation to the circumstances in which they stopped the vehicle being driven by the appellant on 27 August 2002. When Shore

and King were called to evidence at the second committal each claimed privilege against self-incrimination and that claim was upheld by the magistrate. It also appeared from evidence given at the second committal that the basis upon which Stagoll had obtained the warrant with respect to the search of the shed on 27 August 2002 was probably also false. He also at the second committal claimed privilege against self-incrimination and his claim was also upheld.

[9] On the basis that perjured evidence was given at the first committal the appellant sought a permanent stay of the indictment. It was also alleged that critical evidence relied upon by the prosecution at the second committal is tainted by the earlier illegality and that therefore the second committal is an abuse of process. That was the basis of the application the subject of this appeal.

[10] In his reasons Douglas J noted that at the time the matter was before him investigations into the impugned police evidence were still being conducted by the Crime and Misconduct Commission and the Parliamentary Crime and Misconduct Committee. It was not seriously disputed by the respondents that the police officers in question had misled both the magistrate conducting the first committal and the magistrate issuing the warrant with respect to the shed at 99 Levington Road.

[11] However, the Director of Public Prosecutions proposes to proceed with the trafficking charge against the appellant by relying on witnesses other than those whose evidence has been tainted by the misconduct referred to. It appears that the prosecution could possibly lead evidence as to telephone intercepts involving the appellant (directly or indirectly), financial analysis of the appellant's affairs, and of an incident in August 2000 involving the substantial supply of a drug. The prosecution may also seek to lead evidence of items found on 27 August 2002, but coming from police officers other than those whose evidence has been impugned. That evidence may also include evidence as to the finding of cannabis in the appellant's motor vehicle and in the shed.

[12] Douglas J observed, correctly, that the power to stay criminal proceedings is one to be used exceptionally, only where there has been a fundamental defect which goes to the root of the trial: *Jago v District Court (NSW)* (1989) 168 CLR 23. He then addressed the submission made on behalf of the appellant that the ability to challenge admissibility of evidence on the *Bunning v Cross* (1978) 141 CLR 54 principle could be severely compromised if the police officers in question maintained their claim to privilege. Douglas J expressed the view that a trial judge would be able to cope with the problems created by that circumstance "so as to permit a fair trial to take place". He noted that the Director of Public Prosecutions was alive to the issues and was not seeking to rely on the "'tainted' witnesses" at any trial. Ultimately he said:

> "The existence of the CMC inquiry and the inability to predict at this stage whether the officers who have claimed privilege will continue to do so indefinitely are also matters that discourage me from now quashing or staying either the indictment or the committal hearings. In other words I am not convinced that the proceedings will involve irremediable prejudice to the accused that interferes with the conduct of a fair trial. It is also important to keep in mind the legitimate public interest in the disposition of charges of serious offences and in the conviction of those guilty of crime."

[13] It is of critical importance to note that the second committal is not yet concluded. Mr Boe in arguing the case for the appellant submitted that there were indications that the prosecution was seeking to rely indirectly on the tainted evidence in order to establish a prima facie case. That may, or may not, be so. One does not know what the true position will be until the conclusion of the evidence. As I pointed out in the course of argument there are indications that the charge arose out of a significant illicit drug operation and it is always possible that someone would "roll over" and give evidence for the prosecution against the appellant.

[14] One does not know whether or not the magistrate conducting the second committal will find that there is a sufficient case on which to commit the appellant for trial on the trafficking charge. If the appellant was committed for trial then it would be for the trial judge, either on an application pursuant to s 590AA or at the trial, to rule on the admissibility of evidence. That judge would be in a position to reach a considered decision whether evidence should be included because it was tainted with illegality in the light of all the then available material. That judge would be in a position to evaluate the impact of the tainted evidence on the other evidence relied on by the prosecution, and could exercise the necessary discretions to exclude any of the evidence on a variety of bases.

[15] Neither Douglas J at first instance, nor this court, on the material available could make the necessary rulings in the interests of justice which include not only the appellant's interest in securing a fair trial, but the community's interest in seeing that criminal activity is appropriately prosecuted. It would be premature for a court at this stage to make any of the orders sought by the appellant. A court at this stage is not possessed of all relevant information enabling it to exercise the discretions involved appropriately.

[16] So holding does not in any way detract from the fact that the giving of perjured evidence is a serious offence which must be dealt with by the law. Ultimately the question will be whether there is sufficient evidence, properly admissible, which warrants putting the appellant on trial; that question can only be answered when all relevant evidence has been explored at committal proceedings.

[17] It follows that the decision appealed from was correct and the appeal should be dismissed.

[18] **HOLMES J:** I have read and agree with the reasons for judgment of Williams JA and with the order he proposes.