SUPREME COURT OF QUEENSLAND

CITATION:	*Higgins v Mr Comans, Acting Magistrate & DPP (Qld)* [2005] QCA 234
PARTIES:	**HIGGINS, Paul Anthony** (appellant) v **MR COMANS, ACTING MAGISTRATE** (first respondent) **DIRECTOR OF PUBLIC PROSECUTIONS (QUEENSLAND)** (second respondent)
FILE NO/S:	CA No 60 of 2005 SC No 10640 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Case Stated
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	28 June 2005
DELIVERED AT:	Brisbane
HEARING DATE:	17 June 2005
JUDGES:	McPherson and Keane JJA and White J Separate reasons for judgment of each member of the Court, each concurring as to the determination made
ORDER:	**Question submitted for determination "Does a Magistrates Court conducting an examination of witnesses pursuant to Part 5, Division 5 of the *Justices Act* 1886 (Qld) have power to stay such proceedings as an abuse of process?" is answered "No"**
CATCHWORDS:	CRIMINAL LAW - JURISDICTION, PRACTICE AND PROCEDURE - PROSECUTION - COMMITTAL FOR TRIAL BY JUSTICE OR CORONER - POWERS AND DUTIES OF MAGISTRATE OR CORONER - OTHER MATTERS - where appellant was charged with committing offences against the person of his former de facto partner - where charges were dismissed when committal proceedings could not proceed due to complainant's ill-health - where complainant subsequently died - where appellant was again charged with the same offences - where appellant sought to stay committal proceedings as abuse of process - where magistrate ruled he had no power to stay the committal - where appellant appealed to a single judge of the Supreme

Court who stated a case for the Court of Appeal - whether the Magistrates Court has the power to grant a stay of proceedings in relation to the examination of witnesses on a committal hearing

Criminal Code 1899 (Qld), s 592A
Justices Act 1886 (Qld), s 83A, s 104, s 108, s 146, s 222A

Ammann v Wegener (1972) 129 CLR 415, cited
Clough v Leahy (1904) 2 CLR 139, cited
Coco v Shaw [1994] 1 Qd R 469, cited
D'Orta-Ekenaike v Victoria Legal Aid [2005] HCA 12; (2005) 214 ALR 92, cited
Dietrich v The Queen (1992) 177 CLR 292, distinguished
Director of Public Prosecutions v Shirvanian & Anor (1998) 44 NSWLR 129, distinguished
Fuller v Field & South Australia (1994) 62 SASR 112, cited
Granowski v Shaw (1896) 7 QLJ 18, cited
Grassby v The Queen (1989) 168 CLR 1, followed
Kendall v United States (1838) 37 US (12 Pet) 524, cited
Jago v District Court (NSW) (1989) 168 CLR 23, considered
John Fairfax Publications Pty Ltd & Ors v Ryde Local Court & Ors [2005] NSWCA 101; CA 40894 of 2004, 11 April 2005, cited
Papzoglou v Republic of the Philippines (1997) 74 FCR 108, applied
Re Mercantile Bank, ex p Millidge (1893) 19 VLR 527, cited
Williamson v Trainor [1992] 2 Qd R 572, distinguished

COUNSEL: M C Chowdhury for the appellant
A B Fiddes (legal practitioner) for the first respondent
M R Byrne for the second respondent

SOLICITORS: Bell Miller for the appellant
C W Lohe, Crown Solicitor for the first respondent
Director of Public Prosecutions (Queensland) for the second respondent

[1] **McPHERSON JA:** The question is whether a magistrate has a general power to stay committal proceedings taking place before him. No express power is given by the legislation, so that the power to do so, if any, exists only if it can be discovered by implication in the statutory provisions authorising such proceedings. In *Grassby v The Queen* (1989) 168 CLR 1, the High Court of Australia held that no such power was capable of being implied. Mr Chowdhury submits that the New South Wales legislation in question in that case is distinguishable from that now in force in Queensland, and that we are therefore not bound and ought not to follow that decision. That, if I may respectfully say so, is a bold submission.

[2] Dawson J in *Grassby v The Queen* undertook a historical survey of the committal process in New South Wales as well as a comparison of it with that prevailing in England. What his Honour said there was agreed to by all the other members of the High Court on that occasion, with only some slight difference

emanating from Deane J that is not relevant here. The legislation governing the subject in Queensland was originally identical with that in New South Wales, which in fact formed part of the Queensland legal inheritance at the time of Separation in 1859. This can be seen from vol 1 of *Statutes in force in the Colony of Queensland*, edited by Ratcliffe Pring in 1862, who was then the colony's Attorney-General. Pring included in his official printed collection not only the *Justices of the Peace (Adopting) Act* 1850 (14 Vic No 43) referred to by Dawson J in *Grassby v The Queen* (1989) 168 CLR 1, at 12, but also the English statutes it introduced including 11 & 12 Vic c 42, which, taken together, are widely known as Sir John Jervis's Act. Sections 17 to 23 of that Act prescribed the procedure to be followed by justices of the peace in committal proceedings (Pring's *Statutes*, at 775-780).

[3] Until 1859, therefore, the statutory context in Queensland on this subject was identical with that in New South Wales. In 1886 the Queensland Parliament enacted the *Justices Act 1886*, a draft of which is generally understood to have been prepared by Sir James Cockle CJ and completed after his departure from the colony by Sir Samuel Griffith. It is the statute now in force in Queensland. Although it has undergone various amendments in the course of its 120 year reign, the Act continues, principally in ss 104 and 108, to prescribe the procedure in committal proceedings which does not differ materially from that considered by Dawson J in *Grassby*.

[4] In speaking of that procedure in *Re Mercantile Bank, ex p Millidge* (1893) 19 VLR 527, at 529, Hood J said:

> "The duty of a magistrate on hearing an information for an indictable offence is one which is exercised in favour of the defendants. It is an investigation on their behalf relating to the charge against them in order to satisfy a bench of magistrates that there is something for a higher court to decide. It is not any determination or decision on the case itself that the magistrates have to give, except, it may be, when they discharge the defendants on the ground that there is no case."

To say that the proceedings are purely for the benefit of the defendant would be to state the matter a little too highly. The prosecution, too, as was acknowledged by Mr Byrne for the Director on the hearing before us, has the benefit from the proceedings of finding out weaknesses in its own case, and so of avoiding being encumbered with trials that are bound to fail. Nevertheless, the function of the magistrate, as the justices now almost invariably are in Queensland, is essentially that of receiving evidence from the prosecution to justify a trial of the defendant for an indictable offence. Strictly speaking, anyone can lawfully take evidence if others are prepared to give it: see *Clough v Leahy* (1904) 2 CLR 139, 159-160. The only difference here is that witnesses in these proceedings are compellable, and the hearing may lead to a trial of the defendant.

[5] That is what makes the duty of the committing magistrate primarily if not exclusively ministerial rather than judicial in character, as has been recognised in the authorities: cf *Coco v Shaw* [1994] 1 Qd R 469, 483-4, 499-500. Sections 104 and 108 of the *Justices Act* are in this respect in mandatory terms. A magistrate who declines to perform the duty imposed by those sections is therefore susceptible to an order from this Court in the nature of a mandamus to compel him or her to hear, but not to determine: see *ex p Donald, Re McMurray* (1969) 89 WN Pt 1 (NSW) 462. In that regard, this Court has inherited all the supervisory powers over inferior courts

and tribunals of the court of King's Bench at Westminster: *Granowski v Shaw* (1896) 7 QLJ 18, 19. The jurisdiction was at one time invested in express terms by s 21 of the *Supreme Court Act 1867*. It is now conferred by force of s 58 of the *Constitution of Queensland 2001*, of which s 58(2)(a) continues to declare it to be "the supreme court of general jurisdiction in and for the State". The "high and transcendent" powers, as Blackstone called them (3 Bl Com 42), of King's Bench automatically attach to the highest court of general jurisdiction in the land: see *Kendall v United States* (1838) 37 US (12 Pet) 524, 627, and so confer on it the supervisory jurisdiction of that Court (*Kendall v United States*; *R v Magistrates of Sydney* [1824] NSWSC 20), or its modern statutory equivalents: *Judicial Review Act 1991*, s 41(2).

[6] The justification for this state of affairs lies in part in the constitution of a hierarchy of courts as part of our legal system, which is designed to ensure that the law is uniformly applied. It was obviously more needed in days when magistrates consisted of lay justices than it is now when they are for the most part composed of professionally trained persons. But it remains a function of the Supreme Court to see that the law is universally applied, the more so here where it may be doubtful whether an appeal lies from a decision of a magistrate acting in the role of committing justice to compel him to do his duty.

[7] In his reasons in this matter, Keane JA observes that it is erroneous to assert that there is more than one common law in Australia or that there is a common law unique to each individual state. The High Court of Australia is there to ensure uniformity in its application throughout the nation. Of course, possessing as they each do legislatures of their own, the States may act to introduce disconformity in the law from State to State. But I am satisfied that no such alteration in the law has been brought about by relevant legislation in Queensland as to render the reasoning and decision in *Grassby v The Queen* (1989) 168 CLR 1 inapplicable in this State to the process of examining persons charged with indictable offences. In particular and for the reasons given by Keane JA, I see in s 83A of the *Justices Act* no justification in Queensland for departing from that decision. The magistrate here may under the powers conferred by s 83A(5) give only such a direction as he is "entitled to make at law", which does not include making an order staying the proceedings before him in derogation of the functions imposed by the *Justices Act* of conducting an examination of witnesses in relation to the indictable offence now before him. *Grassby v The Queen* is authority for that proposition, and it binds this Court.

[8] I agree with the answer proposed by Keane JA to the question in the stated case.

[9] **KEANE JA:** The question for the determination of the Court is whether a Magistrates Court conducting an examination of witnesses pursuant to Part 5, Division 5 of the *Justices Act* 1886 (Qld) has power to stay such proceedings as an abuse of process. This question arises upon a case stated to this Court pursuant to r 483 of the *Uniform Civil Procedure Rules* 1999 (Qld).

[10] The appellant was charged on 15 February 2003 with offences against the person of his former de facto partner. These charges were dismissed on 18 November 2003 when a committal hearing in relation to the charges was unable to proceed because of the complainant's ill-health. The complainant subsequently died.

[11] On 1 May 2004 the appellant was again charged with the offences in respect of which he had been discharged in November 2003. On 3 September 2004, the charges were listed for committal hearing. At the hearing the appellant sought to have the committal hearing stayed as an abuse of process. The magistrate, who is the first respondent, ruled that he had no power to stay the hearing and refused the application.

The issue

[12] This Court is concerned solely with the issue of whether the Magistrates Court has the power to grant a stay of proceedings in relation to the examination of witnesses on a committal hearing. It is not concerned with whether, or in what circumstances, that power should be exercised in any particular case.

[13] The powers of a magistrate conducting an examination of witnesses are conferred by sections 104 to 111 of the *Justices Act*. Those provisions do not include an express power to stay the committal proceedings. The only express mention of a power to stay contained in the *Justices Act* is found in s 222A, which provides that:

> "(1) This section applies to the following -
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> (a) an order made under an Act for the payment of restitution or compensation that may be appealed against under section 222;
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> (b) the operation of the *Sale of Goods Act* 1896, section 26(1) in relation to a conviction that may be appealed against under section 222.
>
> (2) Unless otherwise expressly provided, the order or operation is stayed -
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> (a) until the end of 1 month after the making of the order or conviction; and
>
> (b) if an appeal against the order or conviction is started under section 222 - until the end of the appeal."

[14] It will readily be seen that s 222A operates only to stay certain orders that might be made by a magistrate, as opposed to proceedings that might take place before a magistrate and, moreover, that the stay of the orders mentioned in the section takes place automatically. Whether or not the orders are to be stayed is not a matter for a magistrate to determine in the exercise of his or her discretion.

[15] The Magistrates Court, as an inferior court, has only the powers, jurisdiction and functions conferred on it by its constituting statutes.[1] In the absence of any express power to stay committal proceedings, the issue becomes whether such powers should be taken to be conferred on the Magistrates Court as a matter of necessary implication. As Dawson J pointed out in *Grassby v The Queen*,[2] this is because:

> "… a magistrate's court is an inferior court with a limited jurisdiction which does not involve any general responsibility for the administration of justice beyond the confines of its constitution. It is unable to draw upon the well of undefined powers which is available to the Supreme Court. However, notwithstanding that its powers may be defined, every court undoubtedly possesses jurisdiction

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1 See *Justices Act* 1886 (Qld), s 22A; *Magistrates Act* 1991 (Qld), s 8; *Magistrates Courts Act* 1921 (Qld), s 4.

2 (1989) 168 CLR 1 at 16.

> arising by implication upon the principle that a grant of power carries with it everything necessary for its exercise …"

[16] Whether or not an inferior court possesses a particular implied power must be determined by reference to the particular function or jurisdiction which that court is authorized by statute to exercise. As Dawson J said in *Grassby*:[3]

> "It would be unprofitable to attempt to generalise in speaking of the powers which an inferior court must possess by way of necessary implication. Recognition of the existence of such powers will be called for whenever they are required for the effective exercise of a jurisdiction which is expressly conferred but will be confined to so much as can be 'derived by implication from statutory provisions conferring particular jurisdiction'. There is in my view no reason why, where appropriate, they may not extend to ordering a stay of proceedings: cf *R v Hush; Ex parte Devanny* (1932) 48 CLR 487 at 515."

[17] In *Grassby*, Dawson J rejected the contention that the powers of a magistrate conducting an examination of witnesses extended to ordering a stay of those proceedings.[4] The judgment of Dawson J in *Grassby* was agreed in by Mason CJ, Brennan and Toohey JJ while Deane J, the only other member of the Court in that case, said that:

> "Subject to one qualification, I am in general agreement with the judgment of Dawson J. The qualification relates not to a matter of general principle but to the effect of the statutory provisions directly involved in this case. My view on that narrow question of construction leads, however, to a different conclusion about the outcome of the appeal from that reached by Dawson J."[5]

[18] Despite this near unanimous affirmation of the view of Dawson J in *Grassby*, the appellant in this case submits that *Grassby* "does not state the law for Queensland, and in any event that the question considered by the Court in that case needs to be reconsidered".

[19] The suggestion that *Grassby* "does not state the law for Queensland" may be dealt with shortly. First, insofar as the appellant's submissions depend upon principles of the common law, it is erroneous to proceed on the footing that it is possible that there is a common law unique to each individual State.[6] Secondly, *Grassby* has previously been applied by this Court without any suggestion that the principles for which the decision is authority are not applicable in Queensland.[7]

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3 *Grassby v The Queen* (1989) 168 CLR 1 at 17.

4 *Grassby vThe Queen* (1989) 168 CLR 1 at 17 - 18.

5 *Grassby v The Queen* (1989) 168 CLR 1 at 5.

6 See, eg, *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 112; *Lipohar v The Queen* [1999] HCA 65 at [43] - [44]; (1999) 200 CLR 485 at 505; *John Pfeiffer Pty Ltd v Rogerson* [2000] HCA 36 at [2]; (2000) 203 CLR 503 at 514.

7 See, eg, *R v His Honour Judge Noud; ex parte MacNamara* [1991] 2 Qd R 86 at 93; *Crowe v Bennett; ex parte Crowe* [1993] 1 Qd R 57 at 60 - 61. The appellant cited comments made by Kniepp J in *R v Sloan* (1988) 32 A Crim R 366 as supporting the view that a Magistrates Court has the power to stay committal proceedings. This case was decided before *Grassby*, and Kneipp J qualified his comments by stating that "I have not investigated the power of a Magistrates' Court in this regard, … ": *R v Sloan* (1988) 32 A Crim R 366 at 369.

[20] The appellant sought to distinguish *Grassby* on the basis that s 83A of the *Justices Act* confers a power to order a stay of committal proceedings. In particular, the appellant relied upon s 83A(5), which introduces a number of specific kinds of direction which a magistrate may give in a proceeding for an offence, with the words:

> "At a direction hearing, a magistrate may give a direction he or she is entitled to make at law about any aspect of the conduct of the proceedings, including, for example, about any of the following … "

[21] The Explanatory Memorandum to the Bill providing for the insertion of s 83A stated that it was:

> "… to provide a magistrate with a similar power to that given to the District and Supreme Courts in s 592A (Pre-trial directions and rulings) of the *Criminal Code*. Under this new provision the magistrate may give binding directions to a party to the proceedings about any aspect of the conduct of the proceeding."[8]

Reference to s 592A of the *Criminal Code*, as it was at the time of the introduction of s 83A of the *Justices Act* in 2002, shows that s 592A(2)(a) expressly referred to a direction "in relation to the … staying of the indictment". This particular power was withheld and, so it may be inferred, deliberately withheld from the powers conferred by s 83A(5) of the *Justices Act*. Further, the appellant's reliance on the general terms of s 83A(5) to bring a permanent stay of committal proceedings within the category of directions which the magistrate is "entitled to make at law about any aspect of the conduct of the proceeding" is essentially circular. The submission begs the question of what directions the magistrate is entitled to give at law in relation to committal proceedings. Reference to s 108 of the *Justices Act* effectively circumscribes the magistrate's function "at law" in this regard as I will explain below.

[22] The appellant's submission that *Grassby* should be reconsidered is based in part on the comment by Bollen J in *Fuller v Field & South Australia*[9] that "I would not be surprised to find that the High Court one day reconsiders *Grassby* (supra) in the light of *Dietrich v The Queen* (1992) 177 CLR 292". The decision in *Dietrich* established that a court has jurisdiction to adjourn or permanently stay criminal proceedings to allow an indigent person charged with a serious offence to obtain legal representation so that the person may have a fair trial.[10] The appellant's submission ignores the occasions since *Grassby* was decided on which the High Court has reiterated that powers will be regarded as impliedly conferred on a court of defined jurisdiction only where such powers can be seen to be reasonably necessary for the exercise of that jurisdiction,[11] that subsequent High Court authority has made it clear that the *Dietrich* principle does not apply to committals[12] and, finally and decisively, that it is only the High Court that may depart from its previous decisions.

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8 Explanatory Memorandum to the Criminal Law Amendment Bill 2002 (Qld) at 15.

9 (1994) 62 SASR 112 at 113.

10 See *Dietrich v The Queen* (1992) 177 CLR 292 at 297 - 298, 330 - 331, 356 - 357 and 364 - 365.

11 *Pelechowski v The Registrar, Court of Appeal (NSW)* [1999] HCA 19 at [50] - [51]; (1999) 198 CLR 435 at 451 - 452; *Byrnes v The Queen* [1999] HCA 38 at [32]; (1999) 199 CLR 1 at 19 - 21; *TKWJ v The Queen* [2002] HCA 46 at [44]; (2002) 212 CLR 124 at 138.

12 *New South Wales v Canellis* (1994) 181 CLR 309 at 328.

[23] The appellant also cited cases on this point from England and Wales. It is true that the prevailing trend of authority on this issue has taken a different path in that jurisdiction.[13] Earlier in his reasons in *Grassby*, Dawson J explained the statutory basis for the divergent paths taken by the law in this regard in England and Wales on the one hand and Australia on the other.[14] This divergence makes it difficult to accord any weight to those English authorities that stand for an approach different to that espoused by the High Court.

[24] It is sufficient at this point to say that, in my opinion, it is the test enunciated by Dawson J in *Grassby* that must be applied by this Court to determine the question posed by the case stated.

[25] In accordance with that test, the starting point is to identify the precise ambit of the jurisdiction conferred on the Magistrates Court in relation to the examination of witnesses. As the Full Court of the Federal Court said in *Papzoglou v Republic of the Philippines*,[15] "as [*Grassby*] makes clear, the question whether the magistrate has an implied power to stay or otherwise terminate the proceedings as an abuse of process must depend on the construction of the legislation". The jurisdiction conferred on a Magistrates Court for this purpose is relevantly conferred by s 108(1) of the *Justices Act* which provides that:

> "(1) If upon a consideration of all the evidence adduced upon an examination of witnesses in relation to an indictable offence (including any answer made by the defendant to the words addressed to the defendant pursuant to section 104(2)) the justices are of the opinion that the evidence is not sufficient to put the defendant upon the defendant's trial for any indictable offence, the justices shall order the defendant, if the defendant is in custody, to be discharged as to the charge the subject of the examination but if the justices are of the opinion that the evidence is sufficient to put the defendant upon trial for an indictable offence they shall, subject to section 113, order the defendant to be committed to be tried for the offence before a court of competent jurisdiction, and in the meantime shall by their warrant commit the defendant to prison, to be there safely kept until the defendant is delivered by due course of law or granted bail."

[26] It is apparent that the statute confers on the Magistrates Court jurisdiction to undertake an examination of all the evidence able to be put forward on behalf the prosecution so that it can be determined whether this evidence is sufficient to put the accused on trial. If there is sufficient evidence then the accused **must** be committed for trial, while if there is not sufficient evidence then the accused **must** be discharged. As with the legislation that the High Court was considering in *Grassby*:

> "… the scheme of that section, far from requiring the implication of a general power to stay proceedings, is such as to impose an obligation upon the magistrate to dispose of the information which brings the defendant before him by discharging the defendant as to it or by committing him for trial."[16]

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13 See, eg, *R v Horseferry Road Magistrates Court; ex parte Bennett* [1994] 1 AC 42.

14 *Grassby v The Queen* (1989) 168 CLR 1 at 12 - 15.

15 (1997) 74 FCR 108 at 129.

16 *Grassby v The Queen* (1989) 168 CLR 1 at 17 - 18.

[27] It is difficult to see how a power to stay proceedings can be said to be necessary to a magistrate in carrying out his or her statutory function of determining whether or not there is sufficient evidence for a person to stand trial. Rather, in my opinion, the existence of such a power is impliedly precluded by a statutory scheme which requires that a magistrate reach one of only two end points - commitment of the accused for trial or discharge of the accused on the grounds of insufficient evidence. Assuming for the moment that the power to stay could be implied, the power to stay would only need to be exercised when there was sufficient evidence to commit a person for trial, because otherwise the person would have to be discharged in any event. Where there is sufficient evidence to put the accused on trial, a stay could only be granted in contravention of the express words of the statute, which require that, in those circumstances, a person be committed for trial.

[28] It is not enough to justify the implication urged by the appellant that, perhaps as a matter of economy in the administration of criminal justice, it would be useful if a prosecution, that would probably be stayed at trial, could be halted at the committal stage. In this regard, I would respectfully agree with the observation of Spigelman CJ in *John Fairfax Publications Pty Ltd & Ors v Ryde Local Court & Ors*,[17] in a judgment with which Mason P and Beazley JA agreed, that "what is 'reasonably necessary' cannot be stretched to encompass what is merely desirable or useful." Whatever the merits that might attach to a power to stay committal proceedings, it cannot be said that such a power is reasonably necessary for those proceedings to be carried out. The result is that it is impossible to imply a power of the type contended for by the appellant. This was precisely the consideration that led Dawson J to conclude in *Grassby* that:

> "There is no room in the face of these statutory obligations, couched as they are in mandatory terms, for the implication of a discretionary power to terminate the proceedings in a manner other than that provided. Nor is this surprising. True it is that a person committed for trial is exposed to trial in a way in which he would otherwise not be, but the ultimate determination whether he does in fact stand trial does not rest with the magistrate. The power to order a stay where there is an abuse of the process of the trial court is not to be found in the committing magistrate and the considerations which would guide the exercise of that power have little relevance to the function which the magistrate is required to perform."[18]

[29] These observations are equally applicable to the examination that a magistrate is required to undertake pursuant to sections 104 to 111 of the *Justices Act*.

[30] Further, if committal proceedings were stayed as a result of an exercise of the power for which the appellant contends, there would be nothing to prevent the Crown from simply presenting an *ex officio* indictment in the higher court. In Queensland, a Crown Law Officer or a Crown prosecutor can authorize the presentation of such an indictment regardless of whether a person has been committed for trial.[19] It has

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17 [2005] NSWCA 101; CA 40894 of 2004, 11 April 2005 at [45].

18 *Grassby v The Queen* (1989) 168 CLR 1 at 18.

19 *Criminal Code* 1899 (Qld), s 561. It has been suggested that the terms of the equivalent provision in Western Australia, which are similar to those in the Queensland *Criminal Code*, would ensure that an indictment presented after a committal would remain valid even if the committal itself was quashed by a writ of certiorari: *Michael v Musk & Anor* [2004] WASCA 203 at [65]; (2004) 148 A Crim R 140 at 152 - 153.

been recognised that such a decision is usually not subject to judicial review.[20] That an exercise of the implied power for which the appellant contends could be trumped by a decision of the executive tends to confirm that the power of a magistrate conducting an examination of witnesses is not judicial in nature, and that this power does not extend to the making of an effective order for a stay.

[31] The appellant also submits that there is authority in this Court, such as the judgment of Ambrose J, with whom Derrington J agreed, in *Williamson v Trainor*[21] for the proposition that a Magistrates Court does possess the implied power to stay proceedings for the hearing and determination of summary offences and that it would be incongruous if that power did not also exist in relation to committal proceedings. The appellant asks rhetorically how such a power can be seen to be implied in s 146 of the *Justices Act* and not in s 108 of the *Justices Act*.

[32] As the appellant concedes in his written submissions, the approach of Ambrose J in *Williamson* depends upon statements of principle drawn from the decision of the High Court in *Jago v District Court (NSW)*.[22] In that case, Mason CJ explained the rationale which underpins the power of a court to stay criminal proceedings as an abuse of process in the following terms:

> "The question is not whether the prosecution should have been brought, but whether the court, whose function is to dispense justice with impartiality and fairness both to the parties and the community which it serves, should permit its processes to be employed in a manner which gives rise to unfairness."[23]

[33] This explanation reflects the general approach that an abuse of process arises when "the processes and procedures of the court, which exist to administer justice with fairness and impartiality, may be converted into instruments of injustice or unfairness".[24] The relevant concern is whether judicial power to make a final determination of guilt or innocence at a trial is being abused so as itself to create an injustice.

[34] The powers exercised by a Magistrates Court in conducting an examination of witnesses are distinctly not judicial. In *Ammann v Wegener*[25] Gibbs J, in a judgment with which Walsh and Stephen JJ agreed, reviewed the authorities on this issue and said:

> "In *Cox v Coleridge* ((1822) 1 B & C 37 [107 ER 15]), it was held that a preliminary inquiry before a magistrate as to whether there was sufficient ground to commit a prisoner for trial was not a judicial inquiry. Holroyd J went further; he said ((1822) 1 B & C, at pp 51-52 [107 ER, at p 20]): 'A magistrate, in cases like the present, does not act as a Court of Justice; he is only an officer deputed by the law to enter into a preliminary enquiry . . .' Notwithstanding the reforms made since the time of that decision by *Sir John Jervis' Act* ((1848) 11 & 12 Vict, c 42) and by the Colonial and State statutes that

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20 *Barton v The Queen* (1980) 147 CLR 75 at 102 - 103, 107 and 109; *R v Dexter* [2002] QCA 540 at [68]; (2002) 136 A Crim R 276 at 293.

21 [1992] 2 Qd R 572.

22 (1989) 168 CLR 23.

23 *Jago v District Court (NSW)* (1989) 168 CLR 23 at 28.

24 *Walton v Gardiner* (1993) 177 CLR 378 at 393.

25 (1972) 129 CLR 415 at 435 - 436 (citations in original).

> followed its provisions, it has been held that the nature of the inquiry has not been altered and that a magistrate in conducting such an inquiry is exercising an executive or ministerial and not a judicial function: *Reg v Nicholl* ((1862) 1 QSCR 42); *In re Mercantile Bank; Ex parte Millidge* ((1893) 19 VLR 527, at p 539); *Huddart, Parker & Co Pty Ltd v Moorehead* ((1908) 8 CLR 330, at p 357); *Ex parte Cousens; Re Blacket* ((1946) 47 SR (NSW) 145); *Ex parte Coffey; Re Evans* ((1971) 1 NSWLR 434). A different view was suggested in *Reg v Schwarten; Ex parte Wildschut* ((1965) Qd R 276), but in that case the actual decision was that prohibition lay to a magistrate conducting preliminary proceedings whether or not he was performing a ministerial function - a question which does not here concern us. It may therefore be accepted that a preliminary inquiry with a view to deciding whether an accused person should be committed for trial is not a judicial proceeding."

[35] More recently, in *D'Orta-Ekenaike v Victoria Legal Aid*,[26] Gleeson CJ, Gummow, Hayne and Heydon JJ reaffirmed that "[a] committal proceeding is an administrative function conducted by a judicial officer".

[36] The appellant's submissions seem to suggest that there is some conflict between the decisions in *Grassby* and *Jago*. That view is, in my respectful opinion, misconceived. Regardless of whether committal proceedings are characterized for present purposes as judicial or administrative, there cannot, as the passage from the reasons of Dawson J in *Grassby* extracted above at [26] explains, be said to be any unfairness to an accused arising out of an examination to determine whether there is a prima facie case on which the accused may be tried. Real unfairness may arise in the pursuit of a conviction at a trial on the basis of such evidence but there is no such unfairness in determining the antecedent question of whether that evidence is sufficient to sustain the charges. The principles enunciated in *Grassby* and *Jago* are clearly consistent with each other. That is hardly surprising; and not least because both these decisions were delivered by the High Court on the same day.

[37] It was with these considerations in mind that, in *Director of Public Prosecutions v Shirvanian & Anor*,[27] the New South Wales Court of Appeal held, by majority, that a magistrate of the Local Court of New South Wales did have the power to permanently stay criminal proceedings that were being tried summarily. Mason P, with whom Beazley JA agreed, analysed the judgments in both *Grassby* and *Jago* and, while accepting the authority of *Grassby* in relation to committal proceedings, concluded that a power permanently to stay a trial for summary offences could be "implied from the very nature of the exercise of jurisdiction **as a court of trial**" and that "[v]ery clear language would be required to deprive the Local Court, alone of all courts in New South Wales, of this tool designed to achieve the fundamental objectives of the abuse of process doctrine."[28] Those considerations are simply not applicable to the examination that is conducted in a Magistrates Court pursuant to sections 104 to 111 of the *Justices Act*. In such a proceeding, the magistrate is not functioning as "a court of trial". The function which a magistrate performs under

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26 [2005] HCA 12 at [88]; (2005) 214 ALR 92 at 112.

27 (1998) 44 NSWLR 129.

28 *Director of Public Prosecutions v Shirvanian & Anor* (1998) 44 NSWLR 129 at 136 - 137 (emphasis added).

s 146 of the *Justices Act* as a court of trial is radically different. It is in this difference that the answer to the appellant's rhetorical question lies.

Conclusion and Orders

[38] In my respectful opinion, an examining magistrate has no power permanently to stay the proceeding. Whether or not proceedings on indictment should be stayed as an abuse of process is a decision for the court which tries the matters charged on indictment.

[39] I would answer the question posed by the case stated: No.

[40] **WHITE J:** There is nothing that I can usefully add to the reasons for judgment given by McPherson and Keane JJA. I agree with their Honours that the answer to the question posed by the case stated should be "No".