SUPREME COURT OF QUEENSLAND

CITATION:	*Owen v Edwards* [2006] QCA 526
PARTIES:	**OWEN, Ronald** (applicant/appellant) **v** **EDWARDS, Darren Andrew** (respondent)
FILE NO/S:	CA No 106 of 2006 DC No 17 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Application for leave s 118 DCA (Criminal)
ORIGINATING COURT:	District Court at Maroochydore
DELIVERED ON:	8 December 2006
DELIVERED AT:	Brisbane
HEARING DATE:	22 September 2006
JUDGES:	Keane JA, Jones and Douglas JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Application for leave to appeal allowed** **2. Appeal dismissed**
CATCHWORDS:	CRIMINAL LAW - JURISDICTION, PRACTICE AND PROCEDURE - ADJOURNMENT, STAY OF PROCEEDINGS OR ORDER RESTRAINING PROCEEDINGS - STAY OF PROCEEDINGS - ABUSE OF PROCESS – appeal from decision of District Court which overturned Magistrate's decision to permanently stay summary proceedings against the applicant – lengthy delay in having matters heard – delays caused by inefficiency rather than malice by police prosecutions – no loss of evidence causing prejudice – whether delay constitutes an abuse of process – whether proceedings should be permanently stayed CRIMINAL LAW - APPEAL AND NEW INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - INTERFERENCE WITH DISCRETION OR FINDING OF JUDGE - PARTICULAR MATTERS - CONTROL OF PROCEEDINGS – respondent failed to comply with various procedural requirements in lodging appeal including one day late lodgment of appeal and non-compliance with practice

directions – applicant not disadvantaged by non-compliance – whether procedural irregularities and non-compliance invalidate the appeal

PROCEDURE – INFERIOR COURTS – QUEENSLAND – MAGISTRATES COURTS – APPEAL AND NEW TRIAL – respondent appealed from decision of Magistrate to permanently stay summary proceedings against the applicant – respondent a Detective Sergeant of Police – whether respondent is an aggrieved person within the meaning of the *Justices Act 1886* (Qld) and has standing to lodge the appeal

Justices Act 1886 (Qld), s 222, s 222(1), s 224(1)

Brown v Owen [2005] QDC 040; DC No 10 of 2004, 4 March 2005, considered
Day v Hunter [1964] VR 845, followed
Double Time Pty Ltd v Ryan [2001] QCA 57; [2002] 1 Qd R 371, followed
Jago v District Court (NSW) (1989) 168 CLR 23, followed
R v Tait [1998] QCA 304; [1999] 2 Qd R 667, considered
Walton v Gardener (1993) 177 CLR 378, followed

COUNSEL: The applicant appeared on his own behalf
P J Davis SC, with M J A Dight, for the respondent

SOLICITORS: The applicant appeared on his own behalf
Queensland Police Service Solicitors Office for the respondent

[1] **KEANE JA:** I agree with the reasons of Jones J and with the orders proposed by his Honour.

[2] **JONES J:** The applicant seeks leave to appeal against the decision of the District Court pronounced on 4 April 2006 revising a decision of the Gympie Magistrates Court by which summary trial proceedings were permanently stayed. The appeal to the District Court was instituted pursuant to s 222 of *Justices Act 1886* (Qld) and was filed one day late. An extension of time was sought and granted. In the same proceedings the applicant here made an application to strike out that appeal. The learned primary judge did not formally pronounce upon this application but its dismissal would have been an inevitable consequence of his allowing the original appeal. Since this point is taken in the present grounds of appeal the fate of that application can be resolved here.

[3] The applicant appears as an unrepresented litigant. The grounds of appeal, identified alphabetically from A to K, do not follow the usual form, and are grouped somewhat erratically. They often descend into argument and sometimes into evidence. The applicant canvasses some of the grounds quite extensively in his Outline of Argument and again in his Submission in Response to the Respondent's outline. The grounds of appeal raise many issues, some of which can be dealt with in short terms. But the principal issue is whether the inordinate delay in bringing to trial the summary charges which were commenced against the applicant in year 2000, constitutes an abuse of the court's process.

Background facts

[4] The applicant is a firearms dealer and the holder of an armourer's licence. In year 2000 he was charged with a number of indictable offences and at the same time a number of summary offences with which these proceedings are concerned. Each of the summary charges relate to alleged breaches of the *Weapons Act 1990* (Qld) ("the Act"). There are 161 charges of failing to enter transactions involving a weapon in a register as required by s 71(2) of the Act, and 163 charges relating to the modification of a firearm in breach of s 62 of the Act.

[5] The delay in bringing the applicant to trial on the summary charges has arisen because of a number of factors. Firstly the charges on indictment were pursued in advance of the summary complaints. This is normal practice and the applicant took no objection to that course being followed. It did, however, result in the summary complaints being mentioned from time to time in the Magistrates Court. Secondly, in respect of the indictable charges there were a number of interlocutory manoeuvrings before the trial took place which caused delay. The responsibility for much of this would seem to rest with the Office of the Director of Public Prosecutions. As well, because the trial was to be held in Gympie, there were fewer sittings at which the matters of this length could be listed. In the upshot, the trial for the indictable charges lasting over three weeks concluded only on 28 October 2003 with the result that the appellant was acquitted on all counts.

[6] Attention to the summary charges was then renewed when these matters were first mentioned after the trial on 7 November 2003. On 19 December 2003 the Magistrate ordered that the prosecution provide particulars of the charges as well as a brief of evidence. By 5 March 2004 – a hearing mention date – the order had not been complied with and the prosecution argued that the brief made available for the District Court proceedings was sufficient for the purposes of the summary hearing. The defendant's solicitors objected to this and requested that all charges be dismissed. The hearing Magistrate thereupon dismissed the charges but his decision was overturned on appeal to the District Court on 4 March 2005. See *Brown v Owen* [2005] QDC 040.

[7] The summary charges were again listed in the Magistrates Court on 15 June 2005. By this time, the complainant Mark Brown had retired from the Queensland Police Service. The carriage of the complaints had been taken over by the present respondent, Darren Andrew Edwards, a police officer who took over the official responsibilities of the former complainant. On this occasion the applicant applied to have the complaints permanently stayed on the grounds that "delay in the conduct of the prosecution" constituted an abuse of process. The Magistrates Court ruled in the applicant's favour on 14 July 2005 and this set in train the appellant's proceedings which now come before this Court.

Appeal to the District Court

[8] There were three proceedings before the learned District Court Judge, namely:-

(a) Application by the present respondent to extend time within which to appeal;
(b) The applicant's application to strike out the appeal;
(c) The appeal itself against the Magistrate's order for a permanent stay.

In relation to the first, the learned primary judge did extend the time within which the respondent could appeal, allowed the appeal and set aside the order permanently staying the summary charges. As mentioned above he did not expressly dispose of the application to strike out the appeal though in the light of the orders made the only consequence is that he would have dismissed it.

[9] The learned primary judge identified two errors in the Magistrate's reasons for granting the stay. Firstly, in finding that the delay extended back to 2000 and attributing the cause of the delay to the prosecution. Secondly in finding prejudice to the applicant when there was no evidence of any actual prejudice as opposed to the general effect of lapse of time. The learned primary judge found at para [18]:-

> "It is clear from the learned Magistrate's reasons that her decision to stay was based upon the delay from 2000 when the complaints were made, until 15 March 2004 when her predecessor dismissed the charges. It is clear that the principal reason for her decision was her conclusion that unfairness to Mr Owen had been occasioned by the delay in prosecuting the indictable offences the blame for which she attributed to the Director of Public Prosecutions Office. Mr Davis makes the point that the indictable offences were dealt with by the District Court which had power to regulate the conduct of those proceedings. I agree with him that it is difficult to see how the Magistrate could regard the time taken to prosecute the District Court proceedings as relevant delay, except in the sense that this then delayed the disposition of the summary matters. I infer that Mr Owen consented to the various adjournments of the complaints pending the finalisation of the indictable matters. If he had attempted to bring those matters on I am sure I would have been told."[1]

[10] The learned primary judge referred to the well settled principles referred to in *Jago v District Court (NSW)*[2] and to other authorities *R v Clarkson*[3]*; Walton v Gardiner*[4]*; Johannson & Chambers v R*[5]. He considered that the (applicant) "must point to actual prejudice which cannot be adequately addressed".[6] He found:-

> "[22] Mr Owen has not attempted to demonstrate any actual prejudice, for example to point to any important witnesses or evidence favourable to him lost or unavailable due to the delay. Mr. Davis says that the case is essentially based on documents prepared in relation to each weapon. I have no doubt that the now almost 6 year course of criminal litigation undertaken by prosecuting authorities has subjected Mr Owen to physical and emotion strain and that it has been very expensive to defend, but absent any additional factors none of that can enliven the discretion to stay what are serious charges. As the learned Magistrate noted in her reasons, the prosecutor below submitted that the weapons the subject of the charge were made available to Mr Owen so that his experts could examine them and there is no suggestion that this expert evidence is

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1 Record at pp 146-7
2 (1989) 168 CLR 23
3 [1987] VR 962 at 873
4 (1993) 177 CLR 379
5 (1996) 87 A Crim R 126
6 Reasons [20]

> no longer available because of the delay. The prosecutor also referred to the public interest in insuring that the weapons the subject of the charges were appropriately dismantled and deactivated so that the risk of unlawful weapons being available generally in the community was reduced. There was no demur from Mr Owen's solicitor to these propositions, nor is it suggested on appeal that they were wrong. The public interest in having the criminal law upheld is often mentioned as one of the factors to be balanced by a court when it is being asked to exercise the discretion to permanently halt a prosecution: *R v Barton* (1980) 147 CLR 75 at 102 and 106."

Appeal to the Court of Appeal

[11] The first ground of appeal (Ground A) relates to this failure expressly to disclose the strike out application. The application was based upon –

(a) The out of time lodgement of the appeal;
(b) The respondent's failure to file an outline of argument within 28 days; and
(c) The respondent's failure to file the outline of argument in the time ordered by the Court.

[12] To appeal within time the present respondent ought to have filed and served his Notice within one calendar month of the Magistrate's decision i.e. on or before 15 August 2005.[7] The legal officer representing the respondent having been advised by the registry staff that it was permissible to do so, sent his Notice of Appeal by facsimile to the Court on 15 August 2005 and sent the original Notice of Appeal by post, such that it arrived for filing on 16 August 2005. In fact the advice was wrong and the original was required to be filed on the 15 August 2005. The respondent acknowledged this meant that the appeal was one day out of time. An application for an extension of time was made and considered by the learned primary judge. He allowed the extension of time noting that the Registrar agreed to allow filing by a means not permitted by law; there was no prejudice to Mr Owen; the length of the delay; and the desirability that the appeal be dealt with on its merits.

[13] Section 224(1) of the *Justices Act* relevantly provides that a District Court Judge may, on application of a party or the judge's own initiative – extend the time for filing a Notice of Appeal.

[14] The thrust of Mr Owen's challenge is that the extension of time must be granted before there can be a valid Notice of Appeal. He contends that it is not possible to grant leave to extend retrospectively.

[15] That submission is quite inconsistent with the clear words of the section. By its terms the section envisages that proceedings have already commenced, otherwise there would be no party and the judge would have no framework within which to act on his or her own initiative. Moreover, in *Double Time Pty Ltd v Ryan*[8] the Court of Appeal considered the Court's jurisdiction to make such an order. The Court said (at para [13]):-

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7 See s 222(2) of the *Justices Act*
8 [2002] 1 Qd R 371

> "It would seem odd that where procedural steps have not properly been carried through, the question of whether the Court has jurisdiction may be left to be determined by one of the parties, albeit that that party might take an otherwise completely unreasonable attitude. The better view is that the Court in such cases retains its jurisdiction, with the issue whether and how the proceedings are to be progressed depending on the exercise of judicial discretion."

[16] Thus the only consideration then is whether the discretion conferred by that section was properly exercised. The principal relevant considerations were identified in *R v Tait*[9]. These have been referred to in the submissions of each of the parties and they do not need to be set out here. The applicant seeks to compare the approach taken in *Tait* to suggest that leave should have been granted here. What was different in *Tait* was the feature that there was no explanation for the delay and the delay exceeded four months. It is clear there is no basis for interfering with the learned primary judge's exercise of his discretion here.

[17] The respondent's non-compliance with the two procedural directions was not referred to by the learned primary judge. The applicant contends that His Honour's failure to do so constitutes an error. In his Outline of Argument and again in his Submission in Response, the applicant seeks to elevate this non-compliance by the respondent to conduct which would disqualify the appeal to the District Court.

[18] The actual application for an extension of time was made some six months after the appeal was lodged presumably only after the respondent became aware of the one day's delay in the institution of the appeal. This fact does not invalidate the appeal.

[19] The respondent's first non-compliance was with Practice Direction No. 5 of 2001. That non-compliance was the subject of an order made by the District Court which the respondent again failed to comply with in time but the delay was only a matter of one working week. Non-compliance of such an order in a criminal case by the Office of the Director of Public Prosecutions is a matter that warrants criticism but it does not invalidate the appeal.

[20] In the circumstances of this case the applicant has not shown himself to be disadvantaged by the non-compliance. He was legally represented on the appeal to the District Court and the appeal was fully argued. It is clear enough that procedural irregularities and procedural non-compliance without more do not invalidate an appeal. The remarks from *Double Time Pty Ltd v Ryan* referred to above apposite on this point but I would add also the paragraph which followed which states:-

> "(14) The trend of modern authority would be to regard this applicant's late compliance with s 222(2)(a)(ii) as an irregularity enlivening such a discretion in the court whether or not to proceed, and not such as to deny the court jurisdiction. In the present circumstances where the delay, albeit substantial, occasioned no whit of prejudice to any other party, the appeal should plainly have proceeded. Entering into the recognisance was not determinative of the court's jurisdiction, in the sense that delay in doing so could not be excused, or the question whether the appeal was well founded left

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9 [1999] 2 Qd R 667

> to be determined by the attitude of one or other of the respondents to the non-compliance."

[21] Similarly here, notwithstanding the fact that the learned primary judge did not mention this non-compliance, this would not have constituted a basis for denying the respondent the right to be heard on his appeal, the delay being minor and there being no prejudice to the applicant.

[22] That being so, there is no merit in Ground A of the appeal nor in Grounds C and F which also relate to this particular issue.

Respondent's standing to appeal

[23] It is convenient to deal with the issue of the respondent's standing which is the topic raised in Ground G in these terms:-

> "Justice Robertson has erred in law in his opinion that Mr Edwards has standing under s 222(1) of the *Justices Act 1886*."

The applicant contends that this error is sufficient to invalidate the appeal. He argues that the present respondent was neither a complainant nor a defendant and he had no personal involvement such as to be a person aggrieved by the decision of the Magistrates Court.

[24] Section 222(1) provides:-

> "If a person feels aggrieved as complainant, defendant or otherwise by an order made by justices or a justice in a summary way on a complaint for an offence or breach of duty, the person may appeal within 1 month after the date of the order to a District Court judge."

[25] The learned primary judge referred to this provision and noted that the respondent is a Detective Sergeant of Police, the case officer for the prosecution and in fact responsible for progressing the prosecution. His Honour found at para [17], that the respondent fell within the embrace of the section permitting an appeal by a person who "feels aggrieved as a complainant, defendant or otherwise".

[26] The applicant draws attention to His Honour's mistaken reference to s 221(1) which is simply a typographical error. He then asserts that the interpretation of the section adopted by His Honour would result in any person in the world having standing to lodge an appeal.

[27] That is clearly not the case. The limitation in the ambit of persons who can claim to be "aggrieved" has been the subject of judicial consideration. Only the parties can properly be referred to as either complainant or defendant.[10] Consequently, the reference to "a person who feels aggrieved…otherwise" is clearly a reference to someone who is not a party to the original proceedings. In *Day v Hunter*[11] the court held that:-

> "…it will not be established merely by the applicant swearing that he 'feels aggrieved', for if that were the case a stranger to the proceedings, with no real or direct interest therein, could bring himself within the words by so swearing. These words were clearly intended to exclude from the operation of the section the common

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10 See s 42 of the *Justices Act*

11 [1964] VR 845

> informer and other busybodies, who have no real or direct interest in the proceedings in which the decision sought to be reviewed was given, and to prevent them from intermeddling officiously therein. That this is the proper construction of the words in question here finds support, we think, in the speech of Lord Herschell LC in *Powell v Birmingham Vinegar Brewery Co* [1894] AC 8 at p 10, where the question he had to consider was whether the respondents were 'persons aggrieved' within the meaning of s 90 of the *Trademarks Act 1883*.
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> …
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> Whether he can bring himself within these words depends on the facts of the case, and whether he is able to show that he is really and directly interested in the proceedings." [12]

[28] That test has, for example, been applied to allow appeals to be brought by an objector in a licensing matter by a police officer in connection with domestic violence cases.[13] The application of that test to the person who currently stands in the shoes of the complainant for the purpose of pursuing the prosecution is clearly a person who is in a position to 'feel aggrieved' such as to allow the institution of an appeal under this legislation. For this reason Ground G fails.

[29] Of the remaining grounds of appeal, Ground B relates to a mis-statement about the nature and number of charges. This is a factual error which has no consequential impact on the issues litigated in the District Court or before the Court of Appeal. The applicant's Outline includes references to an erroneous attribution of the circumstances to the firearms buy-back scheme of the Commonwealth Government. This error likewise does not touch the essential issue of the appeal.

[30] The other grounds, in various ways, raise the factors of delay and the alleged abuses of process which contributed to delay in the criminal proceedings which ended in October 2003 with the applicant's acquittal.

[31] In his extensive Outline, the applicant has in paragraph 1 particularised each of his attendances at court and the circumstances in which adjournments were granted on various occasions. It is unnecessary to canvass this detail other than to observe that it is the universal practice that where a person is charged with indictable offences and summary offences that the indictable offences will be disposed of first, particularly if there is a likelihood that the person charged will give evidence on the trial. Throughout the period whilst awaiting the trial the plaintiff was represented by legal practitioners. If there were good reasons for the usual practice not to be followed, then I expect the applicant would have been so advised. There is no reference to any such point having been raised in the decision of the learned Magistrate nor in the appeal to the District Court. The applicant now challenges the assertion that he acquiesced in the delay of the summary hearings (Outline para [5](k)) but this is clearly a situation from which the learned primary judge was entitled to infer that these were consent adjournments.[14]

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12 Ibid at pp 847-848

13 See *Edwards v Raabe* (2000) 117 A Crim R 191

14 Reasons for Judgment para [3] at Record p 144

[32] Much is made also of the conduct of the officers of the Director of Public Prosecutions which was duly considered by the learned primary judge and described by him as "bumbling". It is undoubtedly the case that this conduct added to the general delay and to the sense of grievance which the applicant continues to express. Whilst court appearances no doubt occasioned expense and inconvenience for the applicant, his claim that the purpose was "to financially ruin" him and "to prevent the proceedings of other complainants in the Supreme Court"[15] is entirely without evidentiary foundation. The fact that such assertions were made by the applicant's legal representatives an argument in the Magistrates Court quite properly did not enter into the learned primary judge's consideration as a basis for holding there was an abuse of process. In similar vein in the Outline of Argument, the applicant asserted that there was some bias on the part of the learned primary judge.[16] That allegation too is entirely without foundation and irrelevant to the consideration of this appeal.

[33] The consideration of the length of delay has to be looked at in the context of the two perspectives from which it arises. Some delay was inevitable whilst the criminal trial was disposed of. It should not perhaps have taken three years for this to have occurred but delays of two years or more for a trial which is to occupy three weeks in a regional centre would not be unusual. From the time when the summary proceedings could have been progressed there was little delay before the applicant commenced his initiatives to have the proceedings respectively struck out and then permanently stayed.

[34] The learned primary judge summed up the consequences of the history of delay in the following terms:-

> "[21] In this case there is no doubt that the prosecution has acted irresponsibly and at times unprofessionally. The history of the matter strongly smacks of gross inefficiency, rather than malice. Despite the criticisms of the Director of Public Prosecutions Office in my earlier judgment, the appellant here did not comply with the practice direction and I agree with Mr Martin that it was only the strong words and the directions made by Judge Griffin in November that spurred the appellant into action. None of the incompetence demonstrated since the appeal was filed is however relevant to the issue before me."

[35] The principles upon which a permanent stay will be granted are well settled. In *Jago v District Court (NSW)*[17] Mason CJ said (at p 33):-

> "The test of fairness which must be applied involves a balancing process, for the interests of the accused cannot be considered in isolation without regard to the community's right to expect that persons charged with criminal offences are brought to trial. At the same time it should not be overlooked that the community expects trials to be fair and to take place within a reasonable time after a person has been charged. The factors which need to be taken into account in deciding whether a permanent stay is needed in order to vindicate the accused's right to be protected against unfairness in the course of a criminal proceedings cannot be precisely defined in a way which will cover every case. But they will generally include

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15 Outline of Argument para [1](a)

16 Outline of Argument para [5](n)

17 (1989) 168 CLR 23

> such matters as the length of the delay, the reasons for the delay, the accused's responsibility for asserting his rights and, of course, the prejudice suffered by the accused…In any event, a permanent stay should be ordered only in an extreme case and the making of such an order on the basis of delay alone will accordingly be very rare."

[36] There has been some delay since that acquittal but it is not of the duration nor as a result of anyone's fault such as would ordinarily result in a permanent stay of the proceedings. It is evident from his reasons that the learned primary judge properly directed himself as to the applicable principles as indeed did the learned Magistrate.[18] The difference between them is that the Magistrate attributed the delay as being "solely due to the prosecution"[19]. That conclusion does not accord with the evidence.

[37] The learned Magistrate dealt with the issue of prejudice by noting that the case "concerns a technical argument concerning the completion of registers and the modification of weapons. There has been prepared expert reports for this Court and the defendant's own experts have had access to the weapons, hence no loss of evidence. One would have thought that loss of memory concerning completion of certain requirements would be in issue here and this must cause some prejudice to the accused in my opinion"[20]. Her concern was for some undefined loss of memory of some witnesses.

[38] The learned primary judge weighed this aspect against the general public interest to conclude that the prosecution should not be stayed. See the quotation in para [34] above. He then found as follows:-

> "[23] This is not a case which is exceptional in my opinion, and to exercise the discretion for the primary purpose of punishing a bumbling prosecution was wrong in all the circumstances of the case."[21]

[39] Again, the difference between the views of the learned Magistrate and the learned primary Judge reflects a different qualitative approach to the evidence. This process of assessment was referred to in *Walton v Gardener*[22] where the High Court was considering the role of a superior court in controlling the abuse of proceedings of a disciplinary tribunal. From the joint judgment of Mason CJ, Deane and Dawson JJ the following appears (at p 39):-

> "As was pointed out in *Jago*, the question whether criminal proceedings should be permanently stayed on abuse of process grounds falls to be determined by a weighing process involving a subjective balancing of a variety of factors and considerations. Among those factors and considerations are the requirements of fairness to the accused, the legitimate public interest in the disposition of charges of serious offences and in the conviction of those guilty of crime, and the need to maintain public confidence in the administration of justice."

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18 See Appeal record pp 29-31
19 Ibid at p 32/40
20 Record p 33/38
21 Record at pp 147/148
22 (1993) 177 CLR 378

[40] One significant factor here was whether the evidence was of such a nature that the delay in its presentation would give rise to prejudice. The evidence in relation to the first type of complaint, the respondent submits, involves mainly the matching of documentary evidence. The evidence in relation to the second type of complaint involves the receipt of the evidence of experts whose reports have been made available to the applicant.[23] Before the Magistrate the prosecutor said:-

> "Now, dealing with the issues my friend has raised, there is no loss of evidence in respect to this particular case. Essentially, your Honour, this case deals with scientific evidence. The weapons have come into police possession; they have performed scientific analysis by appropriately qualified persons and appropriately qualified civilians; those tests are documented; photographed, and appropriately recorded in a report at the time. So, being scientifically based, there is no risk of loss of evidence. And further, at the time, my friend's legal team performed an examination of the weapons as well."[24]

The applicant's legal representatives accepted this statement to have been correct up to the time of the application for the stay.[25]

[41] The learned Magistrate, despite having referred to that submission about evidence, nonetheless said –

> "One would have thought that the loss of memory concerning completion of certain requirements would be in issue here, and this must cause some prejudice to the accused in my opinion."[26]

[42] The learned primary judge found, correctly in my view, that the Magistrate had failed to have due regard to the fact that the evidence to be presented was of such a nature as not to give rise to actual prejudice. He noted, in para [22] of the Reasons that the applicant's solicitor did not contend differently. The applicant asserts that this finding was "bizarre and incoherent"[27] contending that his legal representatives have for five years been challenging the evidence which the prosecution intended to rely upon.

[43] This comment in the Outline of Argument misses the point of whether the delay in the presentation of evidence of this kind is prejudicial. The applicant before this Court made reference to "fading memory" but as the applicant has not pointed to any specific prejudice caused by delay it was necessary for the learned primary judge to make the assessment of whether prejudice of a general kind was likely to flow having regard to the nature of the evidence. He did this and in so doing identified the error in the assessment made by the learned Magistrate. The factors referred to in *Jago,* which needed to be taken into account, were properly considered by the learned primary judge. The test of fairness, balancing the community's interest on the one hand and the accused's interest on the other was properly undertaken. The impact on the accused, physically, emotionally and financially has been fully ventilated in the proceedings in the courts below and again before us in the extensive Outline of Argument and Submissions in Response. The community interest in having criminal charges properly dealt with has been commented upon in each of the cases referred to us. The result is,

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23 Record at p 17
24 Record at p 17
25 Record at p 21
26 Record at p 33
27 See Outline of Argument p 16

in the words of Mason CJ, that "a permanent stay should be ordered only in an extreme case and the making of such an order on the basis of delay only will accordingly be very rare"[28].

[44] In my view the learned primary judge correctly identified the errors which apparently influenced the decision of the learned Magistrate. He was correct in his assessment that the order granting the permanent stay was erroneous and should properly be set aside. I would therefore hold that this ground of appeal has not been made out.

[45] The applicant both in his Outline and in his Submission in Response makes substantial reference to principles relating to double jeopardy. This point was not particularly included in the grounds of appeal except tangentially in ground E by quoting from the Reasons of the learned Magistrate that – "the multiple prosecutions arising out of one set of events…is such that any trial held now would be an abuse of process and unfair".[29]

[46] That comment does not suggest that there was any consideration made below of whether the prosecution in these charges of statutory offences gives rise to double jeopardy, on their face they would appear not to. Relevantly to this appeal, double jeopardy was not a matter that attracted the attention of the learned primary judge. The fact that the applicant has been acquitted of other criminal charges is relevant as background to general considerations of delay, prejudice and unfairness but the focus on this appeal must be on the summary charges and whether they can now be fairly brought to trial. If, indeed the principle of double jeopardy is likely to be offended, then that is a matter for argument at trial. It does not properly arise in the context of this appeal and therefore requires no further consideration.

Conclusion

[47] For these reasons, I would allow the application for leave to appeal but on consideration of the issues dismiss the appeal. There should be no order for costs.

[48] **DOUGLAS J**: I also agree with the reasons of Jones J and with the orders proposed by his Honour.

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28 *Jago* (supra)

29 Record at p 152