SUPREME COURT OF QUEENSLAND

CITATION:	*ABC v Director of Public Prosecutions (Queensland) & Anor* [2007] QSC 134
PARTIES:	**ABC** Applicant v **Director of Public Prosecutions (Queensland)** First Respondent and **Jason Gough** Second Respondent
FILE NO/S:	BS10395/06
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	7 June 2007
DELIVERED AT:	Brisbane
HEARING DATE:	Written submissions
JUDGE:	White J
ORDER:	**There be no order as to costs**
CATCHWORDS:	PROCEDURE - COSTS - NO JURISDICTION AS TO SUBJECT MATTER - where the originating application (civil) sought a stay of criminal proceedings - where the stay was refused - where the Director of Public Prosecutions sought costs from the applicant - whether an application for a stay of criminal proceedings is a civil proceeding or a criminal proceeding - whether costs can be awarded for or against the Crown in criminal proceedings - whether the Supreme Court of Queensland has jurisdiction to award costs in criminal proceedings PROCEDURE - COSTS - NO JURISDICTION AS TO SUBJECT MATTER - where the originating application (civil0 sought a stay of criminal proceedings - where the stay was refused - where the second respondent to the application for a stay was the arresting officer - where the arresting officer sought costs from the applicant - whether an arresting officer (police officer) is sufficiently identifiable with the Crown - whether a police officer is entitled to costs in a

situation where there is no statutory right to costs

Affleck v The King [1906] 3 CLR 608, cited
Clifford v O'Sullivan [1921] 2 AC 570, considered
Commissioner of the Public Service v Hall [2005] QSC 388, cited
R v Gioa (1988) 19 FCR 212, followed
R v His Honour Judge Kimmins, Ex parte Attorney-General [1980] Qd R 524, cited
Re Powell (1894) 6 QLJ 36, considered
R v Scott (1993) 116 ALR 703, considered
Ex parte Woodhall (1888) 20 QBD 832, considered
Watson v Attorney-General for New South Wales (1987) 8 NSWLR 685, questioned

Director of Public Prosecutions Act 1984 (Qld), s 10
Justices Act 1886 (Qld), s 157, s 158
Police Service Administration Act 1990 (Qld), s 2.5A, s 3.2(1); s 3.3(3); s 3.3(4)
Police Service Administration Regulation 1990 (Qld), s 2.1; s 2.2
Supreme Court Act 1995 (Qld), s 221
Supreme Court Act 1967 (Qld), s 58
Supreme Court Act 1933 (ACT), s 33

COUNSEL: C Jennings for the applicant
PJ Davis SC for the first respondent
Queensland Police Service Solicitor for the second respondent

SOLICITORS: Nyst Lawyers for the applicant
Office of the Director of Public Prosecutions for the first respondent
CJ Strofield, Queensland Police Service solicitor for the second respondent

[1] By originating application, the applicant sought an order permanently staying the prosecution of certain criminal charges including for trafficking in the dangerous drug methylamphetamine. That application was determined by me adversely to the applicant.

[2] The respondents, by written submissions, seek their costs on the basis that since the application was civil in form and unsuccessful, the usual rule that costs should follow the event should prevail.

[3] The applicant contends that the proceedings are criminal and in that circumstance the rule that orders are made neither against nor in favour of the Crown should prevail.

[4] The applicant proceeded on the hearing of the originating application on the basis that this court had jurisdiction to determine the issue of the stay, notwithstanding that an indictment had not been presented relating to the most recent charge in this court and that committal proceedings had not commenced in the Magistrates Court at Southport. An appeal has been filed against my decision dismissing the application and it may be that the issue of jurisdiction becomes an aspect of that appeal. I do note that Cooper J in *R v Scott* (1993) 116 ALR 703, a decision of the Federal Court (Miles, Hill and Cooper JJ) a case to which reference was not made on the originating application observed at 725 that the jurisdiction of a superior court supervising criminal prosecutions to ensure there is no injustice exists at all stages of the criminal process after the bringing of charges.

[5] The first and critical question is whether the court in hearing and determining the originating application was exercising criminal or civil jurisdiction. The respondents contend that because the means by which the Supreme Court came to hear the matter was by the filing of an originating application in the appropriate form – clearly a civil process – then, in the absence of any extant criminal proceedings, the proceedings were civil. That cannot be determinative of the question. An application for bail, for example, is brought by originating application and, as the analysis of both Hill J and Cooper J demonstrate in *Scott*, bail applications are to be characterised as criminal.

[6] As Hill J noted in *Scott*, Viscount Cave formulated two conditions for determining whether there was a criminal matter in the context in that case of whether there was

a right to appeal. In *Clifford v O'Sullivan* [1921] 2 AC 570, the right was dependent upon whether there had been a judgment "in any criminal cause or matter". In considering the word "criminal" his Lordship said at 580

> "It must involve the consideration of some charge of crime, that is to say, of an offence against the public law (*Imperial Dictionary*, tit. "Crime" and "Criminal"); and that charge must have been preferred or be about to be preferred before some Court or judicial tribunal having or claiming jurisdiction to impose punishment for the offence or alleged offence. If these conditions are fulfilled, the matter may be criminal, even though it is held that no crime has been committed, or that the tribunal has no jurisdiction to deal with it …, but there must be at least a charge of crime (in the wide sense of the word) and a claim to criminal jurisdiction."

[7] Justice Hill considered a number of other decisions including *Ex parte Woodhall* (1888) 20 QBD 832 where Bowen LJ said at 838-9

> "How can the matter be other than criminal from first to last? It is a matter to be dealt with from first to last by persons conversant with criminal law, and competent to decide what is sufficient evidence to justify a committal. The questions upon which the application for a writ of habeas corpus depend, are whether or not there was evidence before the magistrate of a crime, which would be a crime according to English law, having been committed in a foreign country, and whether or not that evidence was sufficient to justify him in committing the accused for trial if the crime had been committed in England. These must be questions arising in a criminal matter, and it follows that the judgment given upon the application for a writ of habeas corpus is a judgment in a criminal matter."

[8] His Honour concluded at 710-11

> "From these cases it seems to me that the following principles should be extracted. First, at the core of a criminal matter or cause lies the question whether there is involved a breach of public law for which punishment may be imposed. There could be no doubt in the present case that had the indictment been presented the proceedings thus commenced would have been criminal and not civil. Secondly, the words "criminal cause or matter" are not to be construed narrowly. Thirdly, it will not be necessary that a charge has been laid against an accused person or that an indictment has been filed before the proceedings can be said to be criminal. It will be sufficient if there are proceedings about to be commenced, provided those proceedings themselves otherwise qualify as criminal proceedings. This, in my

> mind, is the true meaning of the two-fold test of Viscount Cave in *Clifford and* [sic] *O'Sullivan*."

[9] I am of the opinion that notwithstanding the manner in which the applicant commenced these proceedings the subject matter of the application is such that the application qualifies as a criminal proceeding.

[10] The second critical question is whether the court has jurisdiction to make an order for costs in a criminal cause or matter. The starting point for this court's jurisdiction to award costs is s 221 of the *Supreme Court Act* 1995 which provides

> "The Supreme Court shall have power to award costs in all cases brought before it and not provided for otherwise than by this section."

[11] This provision is the exact successor to s 58 of the *Supreme Court Act* of 1867 and, as is well understood, there must be a statutory basis for the court's power to make a costs order. As a matter of construction s 221 seems wide enough to encompass an order for costs in criminal proceedings. However Griffith CJ in *Re: Powell* (1894) 6 QLJ 36 said at 38

> "There is no doubt that it is at common law a prerogative right of the Crown not to pay costs in any judicial proceeding, and that this prerogative of the Crown will not be held to be taken away by statute except by express words or necessary implication.
>
> It is not, however, necessary that the Crown should be expressly named in the statute if it appears clearly that the law was intended to apply to cases to which the Crown is ordinarily a party."

Re: Powell was not a criminal proceeding but one under *The Crown Lands Act* of 1884 but the principle is of general application, see *R v His Honour Judge Kimmins Ex parte: Attorney-General* [1980] Qd R 524 at 526 per Douglas J with whom WB Campbell and Andrews JJ agreed. Griffith CJ spoke to similar effect in *Affleck v The King* (1906) 3 CLR 608 giving the judgment of the court on costs

against the Crown in a proceeding under the *Crown Remedies and Liability Act* of 1890 (Vict).

[12] The provisions about costs in the *Criminal Code* are reserved for quite particular circumstances, not here relevant.

[13] The parties have referred to two decisions, *Watson v Attorney-General for New South Wales* (1987) 8 NSWLR 685 and *R v Goia* (1988) 19 FCR 212, an appeal from an order in the Supreme Court of the ACT. In the former case, costs were awarded in favour of a successful applicant for a permanent stay of criminal proceedings in the New South Wales District Court without elaboration. In the latter case, costs were refused on the basis of the general rule that in criminal proceedings brought by the Crown, costs would not be awarded in favour of or against the Crown. Forster and Pincus JJ in *Goia* doubted that *Watson* could be distinguished on the basis that it related to an interlocutory application.

[14] In *Scott*, the legislation under consideration was s 23 of the *Supreme Court Act* 1933 (ACT) which expressly retains any "practice which would otherwise be followed in any criminal cause or matter or in proceedings on the Crown side of the Court". This seems to do no more than express what is understood to be the position in Queensland as exemplified in *Re: Powell* and *R v His Honour Judge Kimmins*. I am persuaded that the approach in *Goia* is one I should follow here.

[15] There is one final issue to resolve. Ought the respondents be characterised as "the Crown" for the purpose of the application of the rule? I have no hesitation in doing so for the first respondent, the Director of Public Prosecutions. By s 10 of the *Director of Public Prosecutions Act* 1984 the functions of the Director are to

> "(1)(a) … prepare, institute and conduct on behalf of and in the name of Her Majesty –
>
> (i) criminal proceedings;
> (ii) proceedings in the Court of Appeal;
> (iii) proceedings in the High Court of Australia that arise out of criminal proceedings;
>
> …"

[16] The position of the second respondent, the charging detective, is less straight forward and no submissions were directed to this issue. The applicant was notified through his solicitors that the Director had taken over the prosecution of the charges by letter dated 26 March 2007. The applicant did not seek to discontinue proceedings against the second respondent and in accordance with directions he filed material and was represented by counsel briefed by the solicitor for the Queensland Police Service on the hearing.

[17] The position of a police officer is *sui generis*, *Police Service Administration Act* 1990, s 2.5A. He is employed under that Act and not, for example, the *Public Service Act* 1996. A police officer is subject to the directions and orders of the Commissioner and to the orders of any superior officer, s 3.2(1). Such an officer is entitled to exercise the powers of a constable at common law or under any other Act or law. And except as specifically identified, the Act does not derogate from any powers, obligations and liabilities of a constable at common law or under any other Act or law, s 3.3(3) and (4). It may be noted that T. A. Critchley, the author of *A History of Police in England and Wales* (1967) observed at 5 that by end of the thirteenth century the constable had acquired two distinct characteristics: as the elected representative of the parish and as an officer recognised by the Crown as having a particular responsibility for keeping "the King's peace" and "the use of the designation 'constable' gave his authority a royal flavour …". When Sir Robert Peel's reforms took effect in 1829 the continuity with the constables was

maintained, see for Australia, Mark Finnane *Police and Government: Histories of Policing in Australia* (1994).

[18] The oath or affirmation taken by a police officer requires that he "well and truly serve our Sovereign Lady Queen Elizabeth the Second and Her Heirs and Successors according to law in the office of constable or in such other capacity … [and] … cause Her Majesty's peace to be kept and preserved … " *Police Service Administration Regulation* 1990 ss 2.1, 2.2.

[19] This tends to suggest that in the context of this matter concerning criminal proceedings that the second respondent is sufficiently identified with the Crown. Where a police officer is a complainant in the Magistrates Court, costs may be awarded because they are expressly provided for in the *Justices Act* 1886 in ss 157 and 158 and it has been held that there is no power to award costs after a magistrate finds that a defendant has no case to answer at a committal hearing - *Commissioner of the Police Service v Hall* [2005] QSC 388. But these matters do not inform the question here. I conclude that there is no basis for an award of costs in favour of the second respondent.

[20] The order is that there be no order as to costs.