SUPREME COURT OF QUEENSLAND

CITATION:	*R v Brown* [2013] QSC 299
PARTIES:	**R** (applicant) **v** **JARROD KEVIN ANTHONY BROWN** (respondent)
FILE NO:	BS 10093 of 2013
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	31 October 2013
DELIVERED AT:	Brisbane
HEARING DATE:	30 October 2013; 31 October 2013
JUDGE:	Fryberg J
ORDERS:	**Further proceedings in this application are stayed until further order.**
COUNSEL:	TA Fuller QC for the applicant PJ Callaghan SC for the respondent
SOLICITORS:	Director of Public Prosecutions (Qld) for the applicant The Aboriginal and Torres Strait Islander Legal Service (Qld) for the respondent

[1] **FRYBERG J:** On 18 October, less than a fortnight ago, the present respondent, Jarrod Kevin Anthony Brown, was granted bail in the Magistrates Court at Holland Park. Mr Brown was before the Court on one count of obstructing a police officer in the performance of his duties, two counts of possession of dangerous drugs (methylamphetamine and cannabis), one count of possessing scales reasonably suspected of having been used in connection with the commission of a drug offence and one count of possessing ammunition while not being the holder of an authority to do so.

[2] On 24 October the present application was filed in this Court on behalf of the Crown[1] for a review of that decision. The solicitor for the applicant was named as the Director of Public Prosecutions. The application was returnable on 30 October.

[3] Meanwhile, at about breakfast time on 24 October, the Australian Broadcasting Corporation's radio news service broadcast a report. I heard the report, albeit only once, and for reasons which will become apparent, it occasioned me some alarm, not least because I was the senior judge in applications for the following week. At about 9:30 am, after I arrived at work I downloaded the report from the ABC's website. The material downloaded accorded with my recollection of the broadcast. I set it out in full:

> "**Premier Campbell Newman says he is concerned by recent court decisions granting bail to alleged bikie members, despite new laws giving court officials the power to keep them locked up**.
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> Queensland police say they will be challenging two court decisions that have allowed alleged bikie gang members to walk free.
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> Lorne Campbell, 33, appeared in the Maroochydore Magistrates Court on Tuesday charged with breaching strict conditions relating to his place of address.
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> He had been on bail for extortion and firearm offences relating to a shotgun attack on a Sunshine Coast tattoo parlour in April.
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> Campbell appeared in court on Tuesday and police argued he was a member of the Rebels bikie gang to keep him in locked up.
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> But Magistrate Bernadette Callaghan was not satisfied that he was and granted Campbell bail.
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> The office of the Director of Public Prosecutions (DPP) says it will apply to the Supreme Court to review that decision.
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> The DPP says it will also appeal another relating to bail granted to a 25-year alleged bikie member who appeared in the Holland Magistrates Court in Brisbane last week.
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> Mr Newman says he wants the Queensland judiciary to start realising what the community wants and act accordingly.
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> 'To protect the community - that's all the Government is after [and] that is all the Queensland community is after,' he said.
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> *First posted 1 hour 43 minutes ago.*"

[4] At the same time I downloaded a related report:

> "**DPP to appeal against bail for alleged bikies**
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> By Melinda Howells
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> *Updated 2 hours 20 minutes ago*
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> The ABC has confirmed that Queensland police and the director of public prosecutions will seek a Supreme Court review of two decisions to release suspected bikies on bail.
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> New anti-bikie laws included a presumption against bail for gang members.

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[1] The application was originally brought in the name of the Director of Public Prosecutions, but that has since been corrected.

> Premier Campbell Newman says the courts should uphold community expectations.
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> 'What we now need to see is those involved in the court system, the insiders in the legal system, start to realise that that's what the community wants and they need to act accordingly to protect the community,' he said.
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> *First posted Wed 23 Oct 2013, 6:09pm AEDT*."

[5] The matter duly came on before me for hearing yesterday. At the outset I drew the parties' attention to the broadcast. I enquired of Mr Fuller QC, who appeared for the Crown, whether the reference to bail having been granted "to a 25 year alleged bikie member who appeared in the Holland Magistrates Court in Brisbane last week" was a reference to this case and was told that it was. I told the parties that I was troubled by the broadcast, particularly by the remarks made by the Premier. I requested Mr Fuller to ascertain whether the report was substantively accurate; whether the Premier had withdrawn what was said in terms of the outcome of this case; and whether if he had not, the Court ought to proceed to hear the matter. Mr Fuller observed that I had posed a number of significant issues and sought an adjournment until today. He said that he would ask the Court for more time if he needed. That adjournment was granted.

[6] This morning Mr Fuller informed the Court that the Crown would not be calling any evidence in relation to the first two issues, nor would it be making any submissions about them. He submitted that the report was ambiguous and that it would not be sound to conclude that the Premier was referring to Mr Brown's case simply on the basis of the report. He submitted that the Crown had brought the application properly, that it should be heard and that the Premier's comments could not have any impact on public perceptions of the case and posed no risk that an abuse of process could occur.

[7] For Mr Brown, Mr Callaghan SC submitted that the Court had an inherent power to stay the proceedings until any ambiguity in the evidence was resolved; that it lay within the power of the Crown to resolve any ambiguity; and that I should stay the proceedings until the Crown did so. He cautioned against inferring that the comments were made in a context referring to the present case.

[8] Much has been said in recent years about the doctrine of the separation of powers. In the context of the Westminster system of government in place in Australia and, of course, in Queensland, this refers principally to the separation of the judicial arm of government from the legislative and executive arms. The Supreme Court of Queensland is the linchpin of the judicial arm in this State. Its continuing existence is recognised in the Constitution of the Commonwealth and its independence and that of its judges are legally inviolable.

[9] It is inevitable in any system of government where power is divided among different institutions that grey areas will occur at the boundaries. In this State difficulties of that nature have historically been dealt with by each institution according respect to the others. The judiciary does not enquire into the internal workings of Parliament and evidence of what has happened in Parliament is generally inadmissible in court, regardless of its relevance. By the same token members of Parliament have exercised restraint in commenting about pending cases

in court. That convention of restraint is particularly applicable to Cabinet Ministers and above all the Premier and the Attorney-General.

[10] There are sound reasons for that convention. In our democracy, political power is notoriously the product of public perceptions. The power of a politician who is perceived to produce results which have popular appeal is thereby enhanced. Conventionally, however, our political leaders have refrained from attempting to project power into the decisions of the courts. Those decisions are made according to law. If they are to be influenced the proper way is by the passage of legislation, not by comments to the mass media. Such comments create the risk that public perceptions of the independence of the judiciary will be damaged.

[11] The Chief Justice of New South Wales recently explained the importance of that independence:

> "[I]ndependence is important so that the law is applied impartially to all and, equally importantly, so that the community will have confidence that the judiciary will apply the law fairly and impartially, and will hold other branches of government to account where necessary. In contemporary society, judicial independence from the Executive is particularly critical, because so many legal disputes pit citizens against the government; all criminal matters, environmental matters, challenges to administrative decision-making, and tax disputes, to name just a few.
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> … Being free from partiality or improper influence is of central importance, but the community must also be confident that the courts have the capacity to uphold their rights and interests if unlawfully infringed by the Executive, and that the other arms of government respect and are accountable to judicial decisions. If the community perceives the courts as impartial but largely powerless and able to be undermined by other branches of government, or if in fact the courts are weak, the important roles of an independent judiciary in upholding the rule of law is also compromised."[2]

[12] What then are the facts of the present case? I am satisfied that by 23 October the Director of Public Prosecutions had decided to make the present application and that he announced that decision publicly on that day. I am further satisfied that on the same day the Premier publicly stated:

- that he was concerned by recent court decisions granting bail to alleged bikie members, despite new laws giving court officials the power to keep them locked up.
- "What we now need to see is those involved in the court system, the insiders in the legal system, start to realise that that's what the community wants and they need to act accordingly to protect the community".

I am satisfied that any reasonable member of the community who became aware of the present application would conclude that the former statement referred to the decision of the subject of the present application for review (among others). In reaching this conclusion I take into account the fact that the Crown (which in this context is simply another name for the State of Queensland) has had ample time to

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[2] Hon T F Bathurst: "Separation of Powers: Reality or Desirable Fiction?", JCA Colloquium, Sydney 11 October 2013.

obtain evidence of the context and timing of the Premier's statements and has refused to do so.[3] Those matters are matters which are peculiarly within the knowledge of the executive government and one may comfortably infer that any evidence called in relation to them would not assist the Crown case. I am further satisfied that a reasonable member of the community would infer from the terms of the Premier's statements that he wished the courts to refuse to grant Mr Brown bail.

[13] How does that impact on the independence of this Court? I have not considered the merits of the application but it must be assumed at the very least that the application is reasonably arguable. A possible outcome must be the revocation of the grant of bail. Most lawyers would not doubt the integrity of such an outcome, but the general public is not comprised of lawyers. But most people know that in the absence of statutory authority, judges are not permitted to take community expectations into account in deciding cases. For a judge to do so would contravene his or her judicial oath. There is to my mind a very real risk that members of the public would perceive a result in favour of the Crown as having been influenced by the Premier's statements. Thereby the power of the executive arm of government would be enhanced and the independence of the judicial arm damaged. That damage would affect the institutional integrity of this Court.

[14] Does the risk of such damage warrant staying the application? The law requires the application to be decided as soon as is reasonably practicable.[4] A stay is a remedy of last resort. On the other hand, there is no question in the present case of a permanent stay; only one until further order. It is not difficult to imagine a number of circumstances which would lead to a stay being lifted while preserving the integrity of the Court. On balance I have come to the conclusion that the public interest is best served by ordering a stay until further order.

[15] I would add that even were I unable to draw all of the inferences of fact referred to above, I would accept Mr Callaghan's submission that a stay should be granted until the Crown chooses to call necessary evidence. I note however that these are not proceedings for contempt of court and it follows that the Premier’s subjective intention (or lack of it) in linking his statements to this case is irrelevant.

[16] Mr Fuller submitted that the respondent had made no application for a stay and by implication that the Court should not act of its own motion. Mr Callaghan submitted that the Court had inherent jurisdiction to make such an order. No authority was cited to me on the point. I take my cue from an extra-curial statement of McGarvie J in 1991:

> “The judiciary has the confidence and support of citizens because it is seen as the champion and protector of the rights the law gives them. In return the judiciary owes it to citizens not to become, through lack of application and self-organisation, a helpless giant,

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[3] I record my disappointment at the refusal of the Crown to call evidence or make submissions on the first two aspects of the matter. Lawyers are officers of the Court and owe it certain duties, and this is particularly true in the case of the Crown. It holds itself out as a model litigant. Its refusal to respond to the Court's request for assistance was most unfortunate, particularly in circumstances where instructions were being given by the independent Director of Public Prosecutions.

[4] *Bail Act1980*, s 19B(9).

> impotent to protect itself against assaults on its independence which reduce its capacity to protect the rights of citizens."[5]

[17] I order that further proceedings in this application be stayed until further order.

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5 Hon R E McGarvie: "The Foundations of Judicial Independence in a Modern Democracy", (1991) 1 *Journal of Judicial Administration* 3, p 4, cited Bathurst, *loc cit.*