SUPREME COURT OF QUEENSLAND

CITATION:	*The Queen v Brown* [2013] QCA 337
PARTIES:	**THE QUEEN** (appellant) **v** **JARROD KEVIN ANTHONY BROWN** (respondent)
FILE NO/S:	Appeal No 10349 of 2013 SC No 10093 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	8 November 2013
DELIVERED AT:	Brisbane
HEARING DATE:	8 November 2013
JUDGES:	Margaret McMurdo P and Holmes and Muir JJA Judgment of the Court
ORDER:	**The appeal is allowed and the order of the primary judge of 31 October 2013 is set aside.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL - PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – ORDERS SET ASIDE OR VARIED – where the respondent was granted bail on his own undertaking on a charge of riot – – where the Director of Public Prosecutions filed an application in the Supreme Court for review of the magistrate's decision under s 19B of the *Bail Act* – where the primary judge raised concerns over remarks attributed to the Premier in media reports to the effect that the court should follow community wishes in deciding the matter – where the primary judge, in adjourning the matter, requested senior counsel for the appellant to ascertain whether the reports were substantively accurate; whether the Premier had withdrawn what was said in terms of the outcome of the case; and if he had not, whether the court ought to proceed to hear the matter – where on resumption of the hearing counsel for the appellant made no comment with respect to those enquiries but submitted that the comments were irrelevant and that his Honour should proceed to hear the application – where the primary judge found that there was a risk that members of the public would perceive a result in the Crown's favour as having been influenced by the Premier's statements, damaging the independence and the integrity of

the Court – where the primary judge concluded that, exercising the court's inherent jurisdiction, he should order a temporary stay – where the Crown appealed the stay – whether the Court's inherent power to stay proceedings extended to the circumstances – whether the premises on which the primary judge's determination was based, as to the risk of public perception and damage to the independence and integrity of the Court, were sound – whether the stay order should be set aside

Bail Act 1980 (Qld), s 16, s 19B
Constitution of Queensland 2001 (Qld), s 58, s 59, s 61, s 62
Drugs Misuse Regulation 1987 (Qld), Sch 4
Supreme Court of Queensland Act 1991 (Qld), s 11

Assistant Commissioner Condon v Pompano Pty Ltd (2013) 87 ALJR 458; [2013] HCA 7, cited
Attorney-General v British Broadcasting Corporation [1981] AC 303, cited
British American Tobacco Australia Services Ltd v Laurie (2011) 242 CLR 283; [2011] HCA 2, cited
Director of Public Prosecutions v Filippa [2005] 1 Qd R 587; [2004] QSC 470, cited
Jago v District Court (NSW) (1989) 168 CLR 23; [1989] HCA 46, cited
Keramianakis v Regional Publishers Pty Ltd (2009) 237 CLR 268; [2009] HCA 18, cited
Mansfield v Director of Public Prosecutions (WA) (2006) 226 CLR 486; [2006] HCA 38, cited
Moevao v Department of Labour [1980] 1 NZLR 464, cited
R v Brown [2013] QSC 299, related
Victoria v Australian Building Construction Employees' and Builders Labourers' Federation (1982) 152 CLR 25; [1982] HCA 31, cited

COUNSEL: W Sofronoff QC SG, with A Pomerenke and A Messina, for the appellant
J J Allen, with D Shepherd, for the respondent

SOLICITORS: Director of Public Prosecutions (Queensland) for the appellant
Legal Aid Queensland for the respondent

[1] **THE COURT:** The appellant, the State of Queensland, appeals against an order of a judge of the Trial Division of the Supreme Court made on 31 October 2013 staying an application pursuant to s 19B(2) of the *Bail Act* 1980 (Qld) for the review of the decision of a magistrate on 18 October 2013 to grant bail to the respondent. The grounds of appeal are as follows:

> "1. The primary judge erred in:
>
> (a) ordering that further proceedings in the application before the primary judge be stayed when there was

no legal or evidentiary justification for making such an order;

(b) taking into account a media report as to a statement made by the Premier, when that was irrelevant;

(c) taking into account the failure of the Appellant to accede to the primary judge's request that the Appellant adduce evidence as to the context and timing of the purported statement of the Premier, and as to whether the purported statement had been withdrawn, when such matters were irrelevant;

(d) concluding that a reasonable member of the public would perceive a result in favour of the Crown as having been influenced by the purported statement of the Premier;

(e) concluding that the appropriate remedial response to any such perception was to stay further proceedings in the application;

(f) failing to decide the Appellant's application for review as soon as was reasonably practicable in accordance with s l9B(9) of the *Bail Act* 1980 (Qld)."

Background

[2] On 18 October 2013, the respondent, Jarrod Brown, was granted bail on a charge of riot on 27 September 2013 at Broadbeach. He was already on bail for the alleged offences of possessing methylamphetamine in a quantity exceeding that specified in Sch 4 of the *Drugs Misuse Regulations* 1987 (Qld); possessing cannabis; possessing property suspected of having been used in connection with the commission of a drug offence; and unauthorised possession of ammunition (a 0.22 calibre bullet). It followed that under s 16(3) of the *Bail Act* the court was required to refuse bail unless he showed cause why his detention in custody was not justified. The magistrate at Holland Park had regard to the strength of the evidence and the fact that the respondent was likely to spend longer in pre-trial custody than any sentence imposed if he were convicted of riot. Her Honour determined it was appropriate to grant the respondent bail on his own undertaking with conditions that he report to police three days a week; that he have no contact with two named people; that he not take any unlawful or non-prescribed drugs; and that he provide a specimen of his blood or saliva for analysis upon request by a police officer who reasonably suspects on reasonable grounds that he has consumed or taken an unlawful or non-prescribed drug.

[3] On 24 October 2013, the Director of Public Prosecutions (DPP) filed an application in the Trial Division of this Court returnable on 30 October 2013 for review of the magistrate's decision under s 19B of the *Bail Act*. The application was to be heard by a single judge;[1] proceed by way of a hearing *de novo*;[2] and be decided by the reviewing court as soon as reasonably practicable.[3]

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1 *Bail Act* 1980 (Qld), s 19B(3)(b).

2 *Director of Public Prosecutions v Filippa* [2005] 1 Qd R 587 at [15]-[16] per Douglas J.

3 *Bail Act* 1980 (Qld), s 19B(9).

[4] At the hearing of the application, the learned primary judge drew attention to a report he had heard on the Australian Broadcasting Corporation (ABC) Radio at about breakfast time on 24 October 2013. So concerned was his Honour that he downloaded it. It was in these terms:[4]

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

[5] The judge had also downloaded a related report:[5]

> "**DPP to appeal against bail for alleged bikies**
> By Melinda Howells
>
> *Updated 2 hours 20 minutes ago*
>
> 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.
>
> New anti-bikie laws included a presumption against bail for gang members.
>
> Premier Campbell Newman says the courts should uphold community expectations.

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4 *R v Brown* [2013] QSC 299 at [3].
5 *R v Brown* [2013] QSC 299 at [4].

> '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.
>
> *First posted Wed 23 Oct 2013, 6:09pm AEDT.*"

[6] It was common ground that the reference in the first downloaded report to "a 25-year [old] alleged bikie member who appeared in the Holland [Park] Magistrates Court in Brisbane last week" was to the respondent.

[7] The primary judge told the parties he was troubled by these reports, particularly the remarks attributed to the Premier. His Honour identified his concern:[6]

> "I ask with some great seriousness, Mr Fuller, because it is essential in our system that justice be seen to be done. If I or any other judge were to hear this matter now, with those remarks on the record and not withdrawn and acknowledge, it would be very [difficult] for members of the public to avoid a conclusion – wrongly, no doubt – but [there] would be a great risk that they might draw a conclusion that the court was bending to the will of the government. Justice, in other words, would not be seen to be done."

[8] Counsel for the appellant responded that he could "make no remarks one way or the other with [respect] to comments made by the Premier".[7] He observed that the application was made by "the Director's office in good faith with respect to what it says was an error in the application of the applicable law by the Magistrate at the time".[8] He pointed out that the Director had statutory independence. The primary judge adjourned the matter to enable counsel for the appellant to ascertain whether the report which the primary judge read to counsel was substantially accurate, whether the Premier had withdrawn what was said in terms of the outcome of the matter before him and, if not, whether the court ought to proceed to hear the matter or stay it.

[9] When the hearing was resumed on 31 October 2013, after an exchange between the primary judge and counsel, his Honour ordered that the Crown in right of the State of Queensland be substituted for the DPP as applicant. Counsel for the appellant said that he made no comment with respect to the accuracy or otherwise of the report of the ABC program or as to whether the Premier had withdrawn what was said in terms of the outcome of the case. He submitted that whatever comments were made did not impact upon the proceeding and that the primary judge should proceed to deal with the application.

[10] Counsel for the respondent expressed doubt that the material before the court allowed "the conclusion to be drawn that the [Premier's] remarks were made in the specific context of [the present] case".[9] He submitted, however, that the primary judge was entitled to answers to the questions he had posed to counsel for the appellant and that the proceeding should be stayed until the questions were answered. He observed:[10]

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6 Record at 106.
7 Record at 106.
8 Record at 106.
9 Record at 117.
10 Record at 118.

> "The problem you have with any press report is you don't know which part of it you're reading and whether there is a context or whether it's part of the same interview."

The primary judge's findings

[11] After discussing issues including the separation of powers, judicial independence and the conventions in place to maintain a civil, functional relationship between the judiciary and parliament, the primary judge made these findings:

- by 23 October, the DPP had decided to make the subject application;
- on 23 October, 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;
- on 23 October, the Premier publicly stated:[11]

  > "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";

- any reasonable member of the community who became aware of the proceeding would conclude that the first mentioned statement referred to a number of decisions, including the decision the subject of the application before the primary judge;
- a reasonable member of the community would infer from the statements that the Premier wished the court to refuse to grant the respondent bail.

[12] Critically for present purposes, the primary judge found that there was:[12]

> "… 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."

On the basis of these findings, the primary judge concluded that a stay should be ordered. If the inferences were not properly drawn, his Honour said, he accepted the submission of counsel for the respondent that it was appropriate to stay the application until the Crown called the necessary evidence.

The parties' submissions

[13] The Solicitor-General, who appeared for the appellant with Mr Pomerenke of counsel, submitted that the inherent jurisdiction of the court to stay proceedings was not engaged merely because the court perceived a threat to its independence and that neither the doctrine of separation of powers nor the associated notion of judicial independence represented a principle which would enliven the court's inherent jurisdiction to stay proceedings. It followed, according to the argument, that the purported remarks of the Premier and the matters the primary judge's questions sought to elicit were irrelevant to any legal ground on which the court might stay proceedings. It was further submitted that, even if relevant, the primary judge's conclusions on the question of community perceptions were unjustified.

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11 *R v Brown* [2013] QSC 299 at [12].

12 *R v Brown* [2013] QSC 299 at [13].

[14] Counsel for the respondent, Mr Allen with Mr Shepherd, submitted that the ordering of the stay was within the Court's inherent power to "maintain its authority and to prevent its process being obstructed and abused". In that regard, reference was made to this passage from the decision of the High Court in *Assistant Commissioner Condon v Pompano Pty Ltd*: [13]

> "Independence and impartiality are defining characteristics of all of the courts of the Australian judicial system. They are notions that connote separation from the other branches of government, at least in the sense that the State courts must be and remain free from external influence. In particular, the courts cannot be required to act at the dictation of the Executive." (citations omitted)

[15] It was further submitted that it was open to the primary judge to find that the comments attributed to the Premier created a risk to the integrity of the court as:

- the statements were made with the authority of the Premier's office;
- the criticisms contained in them were "strident and forceful"; and
- there was a real risk that members of the public would perceive an outcome in the Crown's favour as having been influenced by them.

In those circumstances, the ordering of a temporary stay was a proper exercise of discretion. Alternatively, it was open to the primary judge to conclude that there was sufficient cause for concern to warrant a stay until "the relevant evidence was able to be obtained and examined".

Consideration

[16] The jurisdiction of the Supreme Court of Queensland, referred to in s 11(1) of the *Supreme Court of Queensland Act* 1991 (Qld) and s 58 of the *Constitution of Queensland* 2001 (Qld), incorporates the inherent jurisdiction of the Courts of Common Law and Chancery, including an inherent power necessary to effectively exercise the court's jurisdiction.[14] As Brennan J stated in *Whan v McConaghy*:[15]

> "The limits of the inherent jurisdiction are determined primarily by reference to the purposes served by its exercise, the chief among them being control of the court's procedure, suppression of abuses of its process, preventing attempts to thwart its process, and ensuring fairness in its proceedings."

[17] It is neither possible nor prudent to attempt exhaustively to list the powers exercisable by a superior court of record under its inherent jurisdiction.[16] It may be accepted, as the respondent submitted, that the inherent power of the Court to control its process and proceedings is extensive and is not confined to closed categories; it is: [17]

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13 (2013) 87 ALJR 458 at [125].

14 *Keramianakis v Regional Publishers Pty Ltd* (2009) 237 CLR 268 at [36]; *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 87 ALJR 458 at [39]-[40] per French CJ.

15 (1984) 153 CLR 631 at 642.

16 Mason K, "The Inherent Jurisdiction of the Court", *The Australian Law Journal*, Vol 57, August 1983 at 449.

17 *Jago v District Court (NSW)* (1989) 168 CLR 23 at 74 per Gaudron J, cited with approval in *Walton v Gardiner* (1993) 177 CLR 378 at 394.

> "exercisable if the administration of justice so demands, and not one the exercise of which depends on any nice distinction between notions of unfairness or injustice, on the one hand, and abuse of process, on the other hand."

In *Moevao v Department of Labour*,[18] Richardson J made remarks relevant in this regard, later quoted with approval by the High Court:[19]

> "the public interest in the due administration of justice necessarily extends to ensuring that the Court's processes are used fairly by State and citizen alike. And the due administration of justice is a continuous process, not confined to the determination of the particular case. It follows that in exercising its inherent jurisdiction the Court is protecting its ability to function as a Court of law in the future as in the case before it. This leads on to the second aspect of the public interest which is in the maintenance of public confidence in the administration of justice."

[18] The court's powers must, however, be exercised judicially and directed to the effective exercise of the court's jurisdiction in accordance with established legal principle.[20] The real issue in the present case is as to the soundness of the premises on which the primary judge's determination was based, namely that there was "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"[21] and that, in consequence, the "independence of the judicial arm [would be] damaged" thereby affecting "the institutional integrity of [the] Court".[22] For the reasons which follow, this Court does not accept these premises as correct.

[19] The members of the public to whom regard should be had for present purposes are persons who are reasonable and fair-minded and who are "neither complacent nor unduly sensitive or suspicious".[23] We will refer to such persons merely as "members of the public". Such persons would apprehend that Queensland judicial officers would dispose of their busy workloads in accordance with their oaths or affirmations of office: to do equal justice to all persons and discharge the duties and responsibilities of the office according to law to the best of their knowledge and ability without fear, favour or affection.[24]

[20] Gleeson CJ, in an address entitled "The Role of the Judge and Becoming a Judge" delivered at the National Judicial Orientation Programme on 16 August 1998, observed:[25]

> "The duty of a judge is to administer justice according to the law, without fear or favour, and without regard to the wishes or policy of

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18 [1980] 1 NZLR 464 at 481.

19 *Jago v District Court (NSW)* (1989) 168 CLR 23 at 29-30 per Mason CJ; *Walton v Gardiner* (1993) 177 CLR 378 at 394 per Mason CJ, Deane and Dawson JJ.

20 *Mansfield v Director of Public Prosecutions (WA)* (2006) 226 CLR 486 at [10] per Gleeson CJ, Gummow, Kirby, Hayne and Crennan JJ.

21 *R v Brown* [2013] QSC 299 at [13].

22 *R v Brown* [2013] QSC 299 at [13].

23 *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283 at 306 per French CJ referring to the reasons of Kirby J in *Johnson v Johnson* (2000) 201 CLR 488 at 508–509.

24 *Constitution of Queensland* 2001 (Qld), s 59(2), Sch 1.

25 Gleeson A M, "Performing the Role of Judge", *Judicial Officers' Bulletin*, Judicial Commission of New South Wales, Vol 10, No 8, September 1998 at 57.

> the executive government. Judges, of course, give effect to the will of parliament as expressed in legislation; but their duty is to behave impartially in conflicts between a citizen and the executive. There may, from time to time, be a big difference between the will of parliament as expressed in legislation and the policy of the executive government."

[21] It will be the case, from time to time, that a law that a judge is bound to apply will be unpopular. It may also be the case that a judge, being true to his or her oath or affirmation of office, will declare unconstitutional and invalid a law that has general community approval. As McHugh J observed in an address, "Tensions between the Executive and the Judiciary":[26]

> "… if the rule of law is to remain the basis of our democracy, the courts cannot be moved by the political consequences of their decisions. They must maintain an a-political stance. In contrast to the exercise of executive power, judges cannot base their decisions on, or be affected by, potential political implications and media pressures. The judges must base their decisions on the law."(citations omitted)

[22] Judges of the Supreme Court sit as independent arbiters in civil and criminal cases. The State is a necessary party to the latter and is frequently involved in the former. The Australian Supreme Courts developed a reputation for independence and impartiality prior to federation. That reputation has been maintained without interruption. Such criticisms as have been made, from time to time, concerning the discharge by the courts of their functions have overwhelmingly concerned delays in determining proceedings and sentences imposed for criminal offences. In this State, criticisms on the grounds of delay have become infrequent.

[23] The Attorney-General, a member of the executive government, if dissatisfied with rulings of law or sentences imposed, may exercise a right of appeal under s 669A of the *Criminal Code* (Qld). Such appeals are regularly instituted. Appeals from the District Court and the Trial Division of the Supreme Court lie to this Court. The Attorney-General's appeals succeed in some cases and fail in others. The State of Queensland and other manifestations of the Crown in right of the State of Queensland are also frequently litigators in civil matters in the Supreme Court. Despite the volume of litigation to which the Crown is a party, it is not suggested, except by those few who embrace far-fetched conspiracy theories, that the decision-making processes of the courts are in any way influenced by the wishes of the Attorney-General or the executive government.

[24] Judicial independence is not protected and fostered merely by practices and conventions. The security of tenure of Supreme Court judges is protected by statute. Judges may be removed from office before reaching the compulsory retirement age of 70 only by a formal act of the Governor in Council following a resolution of parliament on grounds of proved misbehaviour or incapacity.[27] Judges' salaries may not be decreased.[28] Judges are thus not in a position of being rewarded or punished by the executive government in respect of any determination that they may make.

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26 Address to the Australian Bar Association Conference, 10 July 2002.

27 *Constitution of Queensland* 2001 (Qld), s 61.

28 *Constitution of Queensland* 2001 (Qld), s 62.

[25] The substance of most, if not all, of the matters discussed above is known, or can be expected to be known, by members of the public. That being the case, it is improbable that members of the public would perceive the Supreme Court to have the institutional fragility implicit in the primary judge's findings or that judges of that Court would be pressured or influenced in their decision-making processes by statements of the nature of those under consideration.

[26] In support of his contention that a reasonable member of the public would give a judge more credit for independence and impartiality than the primary judge's finding implied, the Solicitor-General referred to *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation*,[29] in which Gibbs CJ referred with approval to the following observations of Lord Salmon in *Attorney-General v British Broadcasting Corporation*:[30]

> "I am and have always been satisfied that no judge would be influenced in his judgment by what may be said by the media. If he were, he would not be fit to be a judge."

[27] Gibbs CJ continued:[31]

> "It is the everyday task of a judge to put out of his mind evidence of the most prejudicial kind that he has heard and rejected as inadmissible. It is not uncommon for a judge to try a case which was the subject of emotional public discussion before the proceedings commenced. I find it quite impossible to believe that any judge of the Federal Court who may ultimately deal with the proceedings in that court will be influenced in his decision by anything he may have read or heard of the evidence given or statements made at the inquiry."

[28] Gibbs CJ had earlier said:[32]

> "In relation to the suggestion that the public proceedings of the Commission might subject the judges of the Federal Court to subconscious pressure, reference was made to *Bell v. Stewart*. The remark there made that an arbitration judge might be affected by public statements as to alleged notorious facts occurred in a dissenting judgment; the majority of the court took a different view, and said that it was 'ridiculous to suppose that the arbitration law was, or could, in the hands of the President' [of the Commonwealth Court of Conciliation and Arbitration], 'be, in any way obstructed or interfered with by the published words'. The view of the majority in that case is consistent with that taken in a number of other decisions." (citations omitted)

[29] In *The Business of Judging: Selected Essays and Speeches*, the late Lord Bingham, former Lord Chief Justice of England and Wales, wrote of "the presumption that

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29 (1982) 152 CLR 25 at 58.

30 [1981] AC 303 at 342–343.

31 *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25 at 58.

32 *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25 at 58.

a judge sitting alone will not be influenced in the decision he makes by comment in the press".[33] This and the sentiments expressed in the passages quoted above suggest that the primary judge took an unduly pessimistic approach to public perceptions of a judge's susceptibility to media or political influence.

[30] It is now appropriate to turn briefly to a consideration of the content of the downloaded ABC material.

[31] Counsel who appeared for the respondent at first instance had a valid point when he made the observation quoted in paragraph [10] above. It is plain that the ABC report deals with statements by the Premier, the Queensland Police Service (QPS) and the DPP. It is also plain that it is impossible to tell whether the comment attributed to the Premier in the first paragraph of the ABC report quoted in paragraph [4] above, was uttered at about the same time as the words attributed to the Premier in the last two sentences of the quotation. It is also reasonable to infer that the quotation does not purport to contain a complete record of what was said by the Premier on any particular occasion.

[32] The remarks attributed to the Premier were associated with the statements by the QPS and the DPP that they would be challenging court decisions. The necessary inference was that applications would be made to the Supreme Court in that regard. The program thus conveyed to listeners that emanations or representatives of the State were challenging decisions by means of the appropriate processes established by statute for that purpose.

[33] The words attributed to the Premier are implicitly critical of decisions made by magistrates who have granted bail to "alleged bikie members". The decisions of magistrates and judges are not exempt from criticism, even robust criticism. The most competent of judicial officers will err from time to time; that is why appeal processes exist. The Solicitor-General submitted that persistent statements criticising judicial decisions by a member of the executive or legislature could in no circumstances have any effect on the integrity of the court; rather, such statements could reflect only on the integrity of their maker. While we are confident that judges and magistrates would continue to make independent decisions in the face of sustained criticism, we are not so sanguine that consistent disparagement cannot have any tendency to weaken public confidence in the courts. Recognising such considerations, members of the executive and other members of Parliament generally, and observing a convention in that regard, exercise restraint in voicing such criticisms.

[34] In an article published in *The Australian Law Journal*, Gleeson CJ observed of public confidence in the judiciary, "Confidence is not maintained by stifling legitimate criticism of courts or of their decisions".[34] After discussing the nature and extent of criticisms of and complaints about judges, the Chief Justice said:[35]

> "Confidence in the judiciary does not require a belief that all judicial decisions are wise, or all judicial behaviour impeccable, any more

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33 Bingham T, *The Business of Judging: Selected Essays and Speeches*, Oxford University Press, London, 2000 at 61.

34 Gleeson A M, "Public Confidence in the Judiciary", *The Australian Law Journal*, Vol 76, September 2002 at 560.

35 Gleeson A M, "Public Confidence in the Judiciary", *The Australian Law Journal*, Vol 76, September 2002 at 561.

> than confidence in representative democracy requires a belief that all politicians are enlightened and concerned for the public welfare. What it requires, however, is a satisfaction that the justice system is based upon values of independence, impartiality, integrity, and professionalism, and that, within the limits of ordinary human frailty, the system pursues those values faithfully."

[35] These views, which we respectfully adopt, are inconsistent with the primary judge's approach which implicitly postulates a public perception of the Supreme Court as a fragile institution whose judges may be swayed by random utterances of a member of the executive. The reputation of an institution gained by the conduct of its officers over decades is most unlikely to be affected adversely by occasional criticisms.

[36] The two concluding sentences of the quotation from the ABC program express the wish that magistrates and judges in bail matters concerning "alleged bikie members" ascertain the wishes of the community and act in accordance with those wishes. That approach is incompatible with the duty of a judicial officer to apply the law as expressed in legislation irrespective of the wishes or policy of the executive or, for that matter, the popularity of the legislation involved. Unsurprisingly, nothing in the *Bail Act* requires or allows a judicial officer determining an application for bail to take into account "what the community wants". It is unproductive to subject the words of the passage quoted to further analysis.

[37] The application was made as a result of a decision by the DPP in the exercise of his statutory duties. There is no suggestion of bad faith on the part of the DPP in making or prosecuting the application. No abuse of process, bias, actual or apprehended, or contempt of court was alleged or found. Nor was it alleged or found that, if the application proceeded, the respondent would not obtain a fair hearing. In fact, it is apparent from the primary judge's reasons that, as one might expect, there was no possibility that his Honour or any other Supreme Court judge might be influenced by the content of the program. Assuming that the Premier's remarks were made as reported, they were not such as would lead a reasonable member of the Queensland public to think that any Queensland judicial officer would fail to be true to his or her oath or affirmation of office in consequence of them. For that reason the contention that it was appropriate to stay the proceeding until the appellant met the primary judge's demands in relation to the subject statements should be rejected.

Conclusion

[38] For the above reasons, the primary judge erred in ordering that the application be stayed and in failing to determine the application properly brought before him. The order must be set aside so that the appellant's application can be determined in the Trial Division according to law.

ORDER:

[39] The appeal is allowed and the order of the primary judge of 31 October 2013 is set aside.