SUPREME COURT OF QUEENSLAND

CITATION:	*Doonan v McKay* [2002] QCA 514
PARTIES:	**BERNARD GEORGE DOONAN** (appellant/applicant) **v** **JAMES ASHLEY MCKAY** (respondent)
FILE NO/S:	CA No 228 of 2002 DC No 642 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Application for leave s 118 DCA (Criminal)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	29 November 2002
DELIVERED AT:	Brisbane
HEARING DATE:	14 November 2002
JUDGES:	de Jersey CJ, Williams JA and Mullins J Separate reasons for judgment of each member of the court, each concurring as to the orders made
ORDERS:	**1. Grant leave to appeal;** **2. Allow the appeal and set aside the order granting a permanent stay of the prosecution;** **3. Remit the matter to the Magistrates Court at Charleville with a direction to enter up all necessary adjournments and proceed according to law;** **4. The respondent pay the appellant's costs of and incidental to the appeal to the District Court and of and incidental to the application and appeal in this Court to be assessed.**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – ADJOURNMENT, STAY OF PROCEEDINGS OR ORDER RESTRAINING PROCEEDINGS – STAY OF PROCEEDINGS – GENERALLY – where respondent was allegedly in breach of tree clearing permit restrictions in contravention of s 53(1)(b) of the *Forestry Act* 1959 (Qld) – whether learned Magistrate and District Court judge erred in granting a permanent stay of the proceedings to prosecute for either improper purpose, internal oppression or objective injustice – considerations relevant to grant of stay discussed

Forestry Act 1959 (Qld), s 53(1)(b)

R v Smith [1995] 1 VR 10, followed
Walton v Gardiner (1993) 177 CLR 378, considered
Williams v Spautz (1992) 174 CLR 509, considered

COUNSEL: R A Mulholland QC, with A J Macsporran, for the appellant/applicant
M J Byrne QC, with G R Allan, for the respondent

SOLICITORS: C W Lohe, Crown Solicitor for the appellant/applicant
Anderssen & Company for the respondent

[1] **de JERSEY CJ**: I have had the advantage of reading the reasons for judgment of Williams JA. I agree with the orders proposed by His Honour, and with his reasons.

[2] **WILLIAMS JA**: The applicant, Bernard George Doonan, proceeded in the Magistrates Court at Charleville by way of complaint against the respondent, James Ashley McKay, charging two offences against s 53(1)(b) of the *Forestry Act* 1959. That section makes it an offence to destroy a tree on a Crown holding otherwise than in accordance with a permit duly granted. With respect to count 1 the following were the relevant particulars:

> Between 30 April and 20 November 1989 at Torres Park the respondent destroyed a quantity of cypress pine trees with a girth of more than 19 cm diameter over bark located on Grazing Homestead Perpetual Lease 10/3159 Lot 5/CHS 12 Parish of Chesterton.

The particulars with respect to count 2 were identical save that the relevant Grazing Homestead Perpetual Lease was 10/2757 Lot 1/NV 67 and Lot 3/NV 67 Parish of Westerton. Further particulars were supplied identifying 149 trees as the trees allegedly destroyed for the purposes of both counts.

[3] Counsel for the respondent intimated, after pleas of not guilty were entered, that he wished to apply for a permanent stay of the proceedings pursuant to the complaint. Each side called some evidence before the Court heard argument on that application. The submission in support of the application referred to three grounds: improper purpose, internal oppression and objective injustice. In his reasons for granting a permanent stay the Magistrate relevantly said:

> "As to <u>improper purpose</u>: to my mind this is the least persuasive … submission. Nevertheless, the prosecution of these two charges is adversely tainted by an unusual confluence of events in mid-November 1999 … At about this time … there was also some communication about it being intended to push matters before court to get maximum exposure. There may be nothing sinister about such a purpose given there is a legitimate need to protect certain vegetation and publicly prosecute those who break the law, but in the light of the events just mentioned a question mark does hang over that communication.
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> …

> Then internal oppression: in my opinion there is acceptable evidence of what I might describe as internal conflict leading to an oppressive prosecution. … To be sure, the permits are the important documents, but the internal conflict I point to, does result in a prosecution which for all intents and purposes should not have been brought and which is therefore oppressive and unfair.
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> Then to objective injustice, which I think is the strongest issue on which I base my decision. This … is largely based on Coleman's evidence and the TCPs produced both for Torres Park and for the nearby Pampling and Adermann leases.
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> … With all the foregoing in mind, I am satisfied that the prosecution of these proceedings is oppressive and unjust and I permanently stay the prosecution of the charges …"

[4] From that decision the applicant appealed to the District Court. It was there held that the Magistrate erred in concluding that there was some "improper purpose" associated with the prosecution of the complaint. It was also found that there was no basis for the Magistrate's finding that the prosecution was oppressive or unfair under the heading of "internal oppression". But after making a comparison between the terms of the permit granted to the respondent and that granted to his neighbours Pampling and Adermann the District Court judge concluded that to enforce the conditions of the respondent's permit constituted a "discriminatory approach"; he went on:

> "To continue to investigate with a view to prosecuting when the permits are so discriminatory points immediately to an injustice which may allow the Court to exercise its power and grant a stay. The fact that the prosecution may at the end of the day establish a breach of the permit is not, at this point, determinative of the issue."

In consequence he concluded that the Magistrate was justified in "granting a stay of execution" and the appeal to the District Court was dismissed with costs.

[5] From that decision the applicant seeks leave to appeal to this Court. At the outset the parties were asked to address on the merits and the Court indicated that a grant of leave would be made if there was substance in the contentions of the applicant.

[6] I will deal first with the argument directed to what was termed "objective injustice".

[7] On the interpretation contended for by the applicant the Tree Clearing Permit issued to the respondent precluded the respondent from clearing cypress pine trees with a girth of more than 19 cm diameter over bark.

[8] Before the Magistrate counsel for the respondent elicited in cross-examination of witnesses for the complainant that Tree Clearing Permits granted to Pampling and Adermann, neighbours of the respondent, about 18 months after the permit granted to the applicant contained a condition along the following lines:

> "No areas of merchantable cypress pine are to be cleared, that is, any patches of cypress pine covering an area of about two hectares or more, or an area containing 100 trees or more of a diameter at breast

> height of 19 cm or greater, whichever is the lesser area, not to be cleared".

[9] The permits granted to Pampling and Adermann were not in evidence, and there was no further evidence enabling a finding to be made as to whether or not there was any specific justification for the difference in terms of the permits. The witnesses for the complainant did not volunteer any explanation for the differences based on, for example, physical difference in the land.

[10] It was essentially because the permits to Pampling and Adermann were prima facie more favourable (they permitted more clearing) than that given to the respondent that the Magistrate and the District Court judge concluded that there was a "discretionary" element to the prosecution which constituted such "objective injustice" as to warrant the granting of a permanent stay.

[11] No cases were cited by the Magistrate in support of his conclusion, but the learned District Court judge referred to *Williams v Spautz* (1992) 174 CLR 509 at 522 and *Walton v Gardiner* (1993) 177 CLR 378 at 394.

[12] *Williams v Spautz* (at 518) confirms that Australian superior courts have inherent jurisdiction to stay proceeding which are an abuse of process. Nothing was said in argument in this case as to the jurisdiction of a Magistrates Court (or District Court) to stay proceedings in such circumstances and it may be assumed for present purposes that the jurisdiction is the same in all courts associated with this case. The critical principle established by *Williams v Spautz* (at 522) is that proceedings may be stayed where they have been instituted for an improper purpose even where there were reasonable grounds for commencing the proceedings, and even where the moving party had established a prima facie case. The type of improper purpose discussed in that case was using the proceedings as a means of extorting a pecuniary benefit from the defendant, or obtaining some other collateral benefit, rather than prosecuting the proceedings to a conclusion.

[13] Nothing of that kind was suggested in this case under the heading "objective injustice" in the reasons of the Magistrate or the District Court judge. Section 53 of the *Forestry Act* made it an offence to destroy trees otherwise than in accordance with a permit. The prosecution prima facie established that the respondent destroyed trees otherwise than in accordance with the permit issued to him. The fact that a permit granted to the owner of nearby land permitted that person to do lawfully what, pursuant to the respondent's permit, was unlawful does not mean that the prosecution of the respondent was for an improper purpose. No other specific improper purpose was contended for by counsel for the respondent. It is not part of the court's function to determine whether it is appropriate to prosecute in a particular case (see *R v Smith* [1995] 1 VR 10 especially at 25).

[14] Further, it would be necessary here to find as a fact that the impugned conduct of the respondent would have been lawful under the other permit before there was any possible basis for concluding the differences in the permits constituted discrimination and made the prosecution of the respondent improper. That would require the Court in this case to have regard to the totality of the respondent's conduct, that is allegedly destroying in all between 34,000 and 43,000 trees and not just the 149 trees particularised in the complaint. No consideration was made by the Magistrate of such issues in this case.

[15] The court in *Walton v Gardiner*, following and applying *Jago v District Court (NSW)* (1989) 168 CLR 23, considered when criminal proceedings should be permanently stayed on the ground of abuse of process and indicated that the answer was to be reached "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". (396)

[16] That reasoning, to my mind, does not support the conclusion that it is enough to support the grant of a stay that a permit has been granted to others on more favourable terms than the permit granted to the respondent. If the respondent considered that he had been unfairly treated in that the terms of his permit were more onerous than that granted to his neighbours then there was provision under the legislation for him to apply for a variation or a fresh permit. It may even have been possible for the respondent to have the decision with respect to the granting of his permit reviewed or reconsidered.

[17] There is nothing in any of the material to suggest that objectively there was any unfairness about the trial of the respondent. There was no suggestion of any procedural irregularity.

[18] In the circumstances the ground of "objective injustice" is not made out. It thus becomes necessary to consider the other two grounds on which the Magistrate based his decision; the respondent submits that the District Court judge erred in his conclusion on those two issues.

[19] In order to evaluate the reasoning of the Magistrate and the District Court judge on the issue of "improper purpose" it is necessary to record some additional facts.

[20] Both the Department of Primary Industries – Forestry and the Department of Natural Resources have a role to play with respect to the implementation of the policy of the legislation dealing with tree clearing on Crown land. In 1995 the respondent made an application for a tree clearing permit and an officer of the DPI Forestry carried out an inspection of the relevant areas and made a recommendation. That report included a recommendation that some clumps of commercial cypress pine could be cleared. But the permit granted to the respondent in November 1996 prohibited the clearing of any commercial cypress pine; clearly in issuing the permit the recommendation of the reporting officer was not implemented. The respondent sought an amendment to the initial permit and an amended permit was issued in June 1998. Again that contained the standard condition prohibiting the clearing of any commercial cypress pine. The respondent made no further application to have the permit amended, nor did he at any time specifically request that the permit issued to him contain a provision in accordance with the recommendation contained in the original report.

[21] The evidence suggested that the relevant Departments first became aware of a possible breach by the respondent in September 1999. Thereafter there was some exchange of memoranda between various officers of the Departments involved but no decision to prosecute was then reached. No attempt was then made to gather evidence for possible use in legal proceedings. The respondent was described as a

high profile member of the local community who had been chairman of a committee to develop State land clearing policy.

[22] A "60 Minutes" film crew interviewed Departmental officers in early November 1999 and shot film on or about 2 November 1999 of apparent tree clearing on Torres Park. The interest of a TV current affairs program on the issue of tree clearing, including such activity on Torres Park, prompted a flurry of Departmental activity. Senior officers of the Departments in Brisbane were made aware of relevant issues. The TV program went to air on 21 November 1999.

[23] It would appear that as a result of senior Departmental officers being made aware of the issue an inspection of Torres Park was carried out on 19 November 1999. That resulted in further inspections, and the taking of photographs for possible use in future proceedings. From the Departmental point of view, further inspections in February and May 2000 resulted in the necessary evidence being obtained. It was then on 16 May 2000 that the complaint in question was taken out.

[24] The reference by the Magistrate to "an unusual confluence of events in mid-November 1999" is a reference to the publicity given to the issue by the TV program and the heightened interest thereafter by Departmental officers in obtaining evidence of a possible breach by the respondent. The Magistrate apparently considered that a desire to get "maximum exposure" of a prosecution constituted an "improper purpose" justifying staying the prosecution. But he also recognised that there is a legitimate reason in prosecuting persons who break the law where there is a public interest issue involved.

[25] I agree with the District Court judge when he said: "Although the publicity attendant upon the "60 Minutes" program may have provided the catalyst for the prosecution, it cannot be said that an abuse of process has occurred. … A prosecution of this nature may be a vehicle for bringing to the notice of the public of Queensland the need to comply with the tree clearing permits".

[26] Having regard to the authorities, and in particular *Williams v Spautz*, I cannot see that the material here establishes some "improper purpose" behind the prosecution. If there was evidence to support the allegations in the complaint, and it was conceded by both the Magistrate and the District Court judge that there was a prima facie case, the fact that the prosecution was prompted by media publicity and in consequence the hearing would receive greater publicity than it otherwise might does not mean that the prosecution was motivated by an "improper purpose".

[27] It is not entirely clear what the Magistrate concluded amounted to "internal oppression" on the facts here. Essentially his finding appears to have been based on the differences between the recommendations in the initial report and the terms of the permit. The Magistrate also appears to have relied on the fact that though, on the prosecution evidence, between 34,000 and 43,000 trees had been destroyed, only 149 were identified by way of particulars.

[28] So far as the latter point is concerned it appears that the prosecution considered it necessary to describe with great particularity the location of each tree said to have been illegally destroyed. To do that with respect to some thousands of trees would have involved great cost and could well have been regarded as unnecessary expenditure. In consequence a decision was made to prosecute only with respect to

the 149 trees particularised. But that did not mean that evidence of the context in which the complaint was made was irrelevant or inadmissible.

[29] Having regard to the whole of the material I am not satisfied that there was any basis for concluding that there was such "internal oppression" as would provide a basis for granting a stay of the prosecution.

[30] It follows that in all the circumstances the Magistrate erred in law in granting a permanent stay and also that the District Court judge on appeal erred in upholding the stay on a limited ground. In each case there were serious errors of law which justify this Court interfering, and ordering that the trial proceed. The respondent's material indicates some possible defences to the charges but such issues must first be raised at trial.

[31] It would appear that the parties are in agreement that any future hearing should be before a different Magistrate. This Court should remit the matter to the Charleville Court and any procedural views should be dealt with there.

[32] It follows that the orders of this Court should be:

(i) Grant leave to appeal;
(ii) Allow the appeal and set aside the order granting a permanent stay of the prosecution;
(iii) Remit the matter to the Magistrates Court at Charleville with a direction to enter up all necessary adjournments and proceed according to law;
(iv) Order that the respondent pay the appellant's costs of and incidental to the appeal to the District Court and of and incidental to the application and appeal in this Court to be assessed.

[33] **MULLINS J**: I agree with the reasons of Williams JA and the orders proposed by His Honour.