# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v Foley* [2002] QCA 522 |
| PARTIES: | **R**<br>v<br>**FOLEY, Clayte Terrance**<br>(applicant) |
| FILE NO/S: | Appeal No 4007 of 2002 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Removal or Remission |
| ORIGINATING COURT: | District Court at Brisbane |
| DELIVERED ON: | 29 November 2002 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 23 September 2002 |
| JUDGES: | de Jersey CJ, Davies JA and Jones J<br>Judgment of the Court |
| ORDER: | **Declare:**<br>**1. that the indictment signed by the Director of Public Prosecutions on 5 February 2002 has not been presented;**<br>**2. that no ex officio indictment may be presented charging the applicant with the offence the subject of the indictment referred to in 1.** |
| CATCHWORDS: | CRIMINAL LAW - JURISDICTION, PRACTICE AND PROCEDURE - PROSECUTION - FILING OF INFORMATION, PRESENTMENT OR INDICTMENT - QUEENSLAND - where a clerk in the Office of the Director of Public Prosecutions purported to present an indictment - whether the indictment was presented by a person who was authorized to do so<br><br>CRIMINAL LAW - JURISDICTION, PRACTICE AND PROCEDURE - PROSECUTION - FILING OF INFORMATION, PRESENTMENT OR INDICTMENT - QUEENSLAND - where the applicant was committed for trial and the Crown did not present an indictment within six months - where an application for an extension of time within which to present an indictment was refused - whether the Crown could now present an ex officio indictment charging the applicant with the offence for which he was committed |

CRIMINAL LAW - JURISDICTION, PRACTICE AND PROCEDURE - INFORMATION, INDICTMENT OR PRESENTMENT - OTHER MATTERS - where a clerk in the Office of the Director of Public Prosecutions purported to present an indictment - whether the indictment was presented by a person who was authorized to do so - whether the Crown having been refused an extension of time within which to present an indictment could now present an ex officio indictment in exactly the same terms

*Judiciary Act* 1903 (Cth), s 69(1)
*Criminal Code* (Qld), s 560(2), s 561, s 590, s 591
*Director of Public Prosecutions Act* 1984 (Qld), s 10(3), s 24(2)

*Barton v R* (1980) 147 CLR 75, considered
*Ex parte Johnson and Edwards* (1979) 2 A Crim R 414, considered
*Jane Denton's* Case (1823) 1 LEWIN 53; 168 ER 956, considered
*R v Baxter* (1904) 5 SR(NSW) 134, considered
*R v Bright* [1980] QdR 490, considered
*R v Durnin* [1945] QWN 35, considered
*R v Harker* [2002] QSC 61; SC No 92 of 2002, 20 March 2002, not followed
*R v McInnes, Erskine and Calwell* [1940] VLR 416, considered
*R v Parker* [1977] VR 22, distinguished
*R v Sylvander* [1999] QDC 184; DC No 3731 of 1998, 23 February 1999, considered
*R v Webb* [1960] QdR 443, considered

COUNSEL: A W Moynihan for applicant
D Meredith for respondent

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

[1] **THE COURT:** On 23 April 2002 the applicant filed an application in the District Court seeking an order that an indictment presented against him on 12 February 2002 alleging that he had assaulted Bradley John Harding and thereby did him bodily harm, be permanently stayed on the grounds that:

1. the indictment was presented by a person not authorized to do so by s 10(3) of the *Director of Public Prosecutions Act* 1984 (Qld);
2. the Crown having been refused an extension of time within which to present an indictment (pursuant to s 590 of the *Criminal Code* (Qld)) could not rely on s 561 of the *Criminal Code* to authorize a presentation of an indictment in exactly the same terms; and
3. further proceedings on the indictment would constitute an abuse of process.

Then by application filed in this Court on 3 May 2002 the applicant sought to remove that application into this Court.

[2] The respondent did not oppose the application for removal and on the commencement of the hearing of this appeal this Court removed the application into this Court. The question before this Court is whether, on any of the bases contended for by the applicant, an order should be made that the indictment against him should be permanently stayed or some other order should be made.

[3] The question arose in the following way. On 13 July 2001 the applicant was committed for trial on the offence that on 15 November 2000 at Brisbane in the State of Queensland he unlawfully assaulted Bradley John Harding and did him bodily harm. On 5 February 2002 an officer of the Director of Public Prosecutions applied to the District Court, apparently pursuant to s 590 of the *Criminal Code*, for an extension of time within which to present an indictment charging the applicant with that offence. Section 590, which we shall set out fully below, provides that when a person charged with an indictable offence has been committed for trial and it is intended to put the person upon his trial for the offence the Director of Public Prosecutions or a Crown Prosecutor must present the indictment no later than six months after the date on which the person was committed for trial; and if that is not done he or she may apply to the Court for an extension of time within which to present that indictment. The Court may grant such extension as it considers just if satisfied that good cause is shown and no miscarriage of justice is likely to result.

[4] In this case, it seems, the reason for the failure to present the indictment not later than six months after the committal was inefficiency in the management of the Director's Office. In those circumstances the Chief Judge of the District Court refused to extend time within which to present the indictment. On 12 February 2002 Ms S Phillips, a clerk in the Office of the Director of Public Prosecutions, who is neither a barrister nor a solicitor, appeared with leave in the District Court and there purported to present an indictment, signed by the Director of Public Prosecutions Leanne Joy Clare on 5 February 2002, charging the applicant with the offence.[1] It was on the following day that the applicant sought the stay now sought.

[5] The first of the above grounds assumes that an indictment must be presented by a person, qualified to do so, handing that indictment to the Court; and that Ms Phillips was not a person so qualified. This ground depends on the meaning of s 560 of the *Criminal Code* which is in the following terms:

> "(1) When a person charged with an indictable offence has been committed for trial and it is intended to put the person on trial for the offence, the charge is to be reduced to writing in a document which is called an indictment.
>
> (2) The indictment is to be signed and presented to the court by a Crown Law Officer or some other person appointed in that behalf by the Governor-in-Council.
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> (3) If a person has been committed for trial for an indictable offence that may be tried in the District Court, the Director of Public Prosecutions or a Crown Prosecutor may present the indictment to either the Supreme Court or District Court.

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[1] By that we mean that she handed the indictment to the court saying: "Your Honour, I present an indictment in respect of the accused Foley, charging him with one count of assault occasioning bodily harm".

> (4) In deciding the court to which the indictment is to be presented, the Director of Public Prosecutions or Crown Prosecutor must have regard to-
> (a) the complexity of the case; and
> (b) the seriousness of the alleged offence; and
> (c) any particular importance attaching to the case; and
> (d) any other relevant consideration."

[6] There is no doubt that, if subsection (2) of that section requires the written document called an indictment to be handed to the court by a Crown Law officer or some other person appointed in that behalf by the Governor-in-Council, Ms Phillips was not such a person and her purported presentation of that document was not a presentation of an indictment within the meaning of that section. "Crown Law Officer" is defined in s 1 of the *Criminal Code* to mean the Attorney-General or the Director of Public Prosecutions. The meaning of the phrase "person appointed in that behalf by the Governor-in-Council" in subsection (2) is expanded in s 24 of the *Director of Public Prosecutions Act* to include a person appointed to the office of Director, Deputy Director or Crown Prosecutor. But it is plain that Ms Phillips was none of these. Therefore, it was said by Mr Moynihan on behalf of the applicant, the indictment was purportedly presented by a person not authorized to do so and the presentment was therefore of no effect.

[7] To that Mr Meredith for the respondent made two responses. First he submitted that "presented to the court" in s 560(2) does not mean personally handing the indictment to the court, but causing it to be filed in or handed to the court, and consequently the person who hands that indictment to the court need not be a Crown Law officer or some person appointed in that behalf by the Governor-in-Council. In that submission he sought to draw an analogy between s 560(2) and the legislation considered by the Full Court of Victoria in *R v Parker*.[2] It was sufficient, he submitted, that a person of the kind described in s 560(2) sign the indictment and cause it to be filed in or handed to the court by a clerk. Secondly, he submitted, it followed from this that what took place on 12 February 2002 was not a proceeding with which the Director was concerned within the meaning of s 10(3) of the *Director of Public Prosecutions Act* and consequently one in which she was required to be represented by counsel or solicitor.

[8] The critical question on this first ground is the meaning of s 560(2) and, in particular, whether that subsection envisages that a person described therein would both sign and personally hand to the court the indictment described in subsection (1). It was conceded by the respondent that it requires that the indictment be personally signed by such a person.

[9] The ordinary literal meaning of the phrase "presented to the court", in the context of s 560(2), is that it also requires a person of the kind described to present that document personally to the court. The Oxford English Dictionary meaning of the transitive verb "present" is "to make present to, bring in to the presence of", and in law, "to bring or lay before a court". And the linking of that phrase with "signed" means that if, as the respondent conceded, "signed" means personally signed, the phrase also means personally presented. So it follows that, on its ordinary literal

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2 [1977] VR 22.

meaning, the subsection requires such a person personally to lay the document before the court.

[10] There is also support for this construction of the subsection in its historical context. The subsection is unchanged from that appearing in Sir Samuel Griffith's Draft Code.[3] The section in the Draft Code had, as its source, s 523 of Sir Samuel's Digest[4] which provided:

> "Indictable offences are to be prosecuted by information in the name of the Attorney-General or Solicitor-General, or of such other person as the Governor-in-Council [Governor] may appoint, who are respectively to perform the duties of a grand jury until other provision is made by law in that behalf."[5]

[11] It may be noted that, unlike s 523 and it sources, s 560 expressly required the document, now called an indictment, to be both signed and presented by one or other of the named persons not merely "presented by information in the name of" some such person. However s 523 and its sources said expressly that one or other of the named persons was to perform the duties of a grand jury. Those duties were first, to consider the bills which were preferred, in private to hear the evidence-in-chief led in support of them and, when 12 of their number were satisfied that at least a prima facie case was made out, to endorse the bill "true bill"; and secondly to themselves deliver those bills into court.[6]

[12] Consequently, although it is not entirely clear, it may well be that s 523 and each of its source provisions required not only that the information be in the name of one or other of the named persons but also that one or other of those persons:

(a) satisfy himself that a prima facie case had been made out; and
(b) himself deliver the indictment into court.

Whether or not that is clearly so, it seems to us that Sir Samuel, being aware of the functions of the grand jury, by the words which he chose envisaged that s 560 would impose both of these requirements on one or other of the persons named in that section.

[13] *R v Parker*, which Mr Meredith relied on, is, in our opinion, of no assistance on this question because the legislation considered in that case was materially different from s 560(2). The relevant provision there required that a Prosecutor "make presentment" at the court; and the construction of that phrase was confused

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3 See the second paragraph of s 586 of Sir Samuel Griffith's Draft Code.

4 Sir Samuel Griffith, *A Digest of the Statutory Criminal Law in Force in Queensland on the First day of January 1896*, Government Printer, Brisbane 1896. This was a restatement of the existing statute law, the *Supreme Court Act* 1867, s 27 and *The District Court Act* 1891, s 53, in consolidated form and simple phraseology.

5 This section is referred to in the margin of the Griffith Draft Code opposite s 586 as either a source or an analogous provision: see p xiv.

6 *Jane Denton's* Case (1823) 1 LEWIN 53; 168 ER 956. See also Stephen, *A History of the Criminal Law of England*, Macmillan and Co, London, 1883, Vol 1 at 274; Stephen and Stephen, *A Digest of the Law of Criminal Procedure in Indictable Offences*, Macmillan and Co, London, 1883, Article 190; Chitty, *A Practical Treatise on the Criminal Law*, 2nd ed, Samuel Brooke, London, 1826, Vol 1 at 324 - 325; Holdsworth, *A History of English Law*, 6th ed, Little, Brown and Company, Boston, 1938, Vol 1 at 321 - 323; *R v McInnes, Erskine and Calwell* [1940] VLR 416 at 427 - 428.

somewhat by the fact that "presentment" was both a verb and a noun, being also the document which we describe as an indictment. The question in that case was whether a presentment was made by a person who was a Prosecutor when he signed it but had ceased to be one when it was filed. The Full Court of Victoria held, by a majority, that it was not, because the presentment was not made before it was filed.[7] The Chief Justice then went on to say, obiter,[8] and Murphy J agreed,[9] that a Prosecutor might make the presentment by, having signed it, causing someone else to file it. But it by no means follows from this that where, as in this case, legislation requires a specified person to both sign and present an indictment, it is not necessary for that person personally to present it.

[14] Mr Meredith also relied, in support of his submission, upon a decision of the Full Court of Queensland in *R v Bright & Ors*.[10] That case involved the construction of s 69(1) of the *Judiciary Act* 1903 (Cth) which provided:

> "Indictable offences against the laws of the Commonwealth shall be prosecuted by indictment in the name of the Attorney-General of the Commonwealth or of such other person as the Governor-General appoints in that behalf."

An indictment charging the respondents with indictable offences against the laws of the Commonwealth was in the name of a person appointed pursuant to s 69(1). However it was presented by counsel who was not a person so appointed. The questions were whether that offended s 69 or, if s 560 was also relevant to the prosecution of such an offence, that section. The Court rejected an argument that s 69 must be read with s 560 of the *Criminal Code* in respect of the prosecution of indictable offences.

[15] D M Campbell J, with whom Andrews J agreed, said that s 69(1) did not refer to the presentation of indictments but to the prosecution of indictable offences. It therefore stated no requirements for a person who presents the indictment. And his Honour appeared to accept the argument for the Commonwealth that s 69 covered the field in this respect and that s 560 was not picked up by the *Judiciary Act*. However his Honour also referred to "the practice in Queensland for the Prosecutor to present an indictment in court".[11]

[16] Connolly J, on the assumption that s 560 was picked up by the Commonwealth legislation, appears to have been prepared to conclude that it was not necessary for a Crown Prosecutor to be personally present in court to present the indictment.[12] However his Honour concluded that s 69 was an exhaustive statement by the Parliament of the Commonwealth of the means by which its indictments were to be authenticated. His Honour therefore held that s 69 but not s 560 of the *Criminal*

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7 At 25 - 26, 39 - 40; just as an offer is not made before it is communicated.

8 At 29.

9 At 42.

10 [1980] QdR 490.

11 At 495.

12 At 498.

*Code* was applicable in respect of Commonwealth offences.[13] Consequently he agreed in the result reached by the other judges.

[17] The only assistance which Mr Meredith can gain from this case is the statement by Connolly J made on a hypothetical basis which his Honour ultimately did not accept. In doing so, his Honour referred to different legislation in New South Wales under which it had been held[14] that the Attorney-General or person who stood in his place fulfilled the function of the grand jury of finding a true bill by signing the information. It did not matter that thereafter someone other than the Crown Prosecutor (the person standing in the Attorney-General's place) prosecuted the offence. However the New South Wales legislation was in materially different terms from those under consideration here and the question - whether someone else may thereafter ***prosecute*** the offence - was also materially different. And his Honour did not appear to advert either to the precise terms of s 560(2) or its historical context.

[18] It would be curious if, given its plain wording and its historical context, s 560(2) were to be construed in a way which required the signing by a person described therein to be personal but the presentation by that person not to be so. In our opinion it requires both the signing and presentation to the court to be by a person described in s 560(2) as expanded by s 24 of the *Director of Public Prosecutions Act*. It follows from this that what occurred in the District Court on 12 February 2002 was not the presentation of an indictment; it could not have been because Ms Phillips was not such a person.

[19] It may no doubt be argued that, having so decided, it is not necessary to consider the second and third grounds relied on by the applicant. However, as it seems to be the intention of the Director of Public Prosecutions to present an ex officio indictment charging the applicant with this offence, we think it right that this Court should express an opinion on the second of those grounds. To do so it is necessary to construe s 561 and s 590. Accordingly we set out those sections together with s 591 which bears on that construction.

> "**561** (1) A Crown Law Officer may present an indictment in any court of criminal jurisdiction against any person for any indictable offence, whether the accused person has been committed for trial or not.
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> (2) An officer appointed by the Governor-in-Council to present indictments in any court of criminal jurisdiction may present an indictment in that court against any person for any indictable offence within the jurisdiction of the court, whether the accused person has been committed for trial or not and against any person for an indictable offence who with the person's prior consent has been committed for trial or for sentence for an offence before that court."
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> "**590** (1) Subject to section 561, when a person charged with an indictable offence has been committed for trial and it is intended to put the person upon his or her trial for the offence, the Director of Public Prosecutions or a Crown Prosecutor must present the

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13 At 500 - 501.

14 *R v Walton* (1851) 1 Legge 706.

indictment no later than 6 months after the date on which the person was committed for trial.

(2) If-

(a) an indictment is not so presented; or

(b) it becomes apparent that evidence necessary to establish the offence is not going to be available; or

(c) the accused has absconded and is not likely to be found before the expiry of the period; or

(d) for any other reason it is impracticable to present the indictment;

the Director of Public Prosecutions or a Crown Prosecutor may apply to the Court at any time before or after the expiry of the period for an extension of time within which to present an indictment.

(3) The court hearing the application may, if satisfied that good cause is shown and no miscarriage of justice is likely to result, grant the extension of time the court considers just.

(4) If an indictment is not presented before the expiry of the period or any extension of the period, the person is entitled to be discharged from the consequences of his or her committal."

"**591** When an indictment is presented in any court against any person who has not been committed for trial or held to bail upon the charge set forth in the indictment, and the accused person is not brought to trial within a year after the indictment is presented, the court may, upon the application of the accused person or any of the accused persons, if more than 1, authorise the accused person to bring on the trial, and the accused person may bring on the trial accordingly, unless in the meantime the court is informed that the Crown will not further proceed upon the indictment."[15]

[20] Section 590 in its present form came into force by the amending Act of 1997. Prior to the commencement of that Act it was in the following terms:

"(1) A person committed for trial before any Court for an indictable offence may, orally or in writing at any time during any Sittings of the Court held after the person's committal, make application to the Court to be brought to trial.

(1A) An application pursuant to this section shall be dealt with in open court and where the application is in writing may be dealt with in the absence of the applicant.

(2) If an indictment is not presented against the person committed for trial at some time during the first sittings of the court held after the person's committal, the court shall, upon the motion made on the person's behalf on the last day of those sittings, grant the person bail unless it appears from evidence upon oath that some material evidence for the Crown could not be produced at those sittings.

(3) Where a person committed for trial who has made application pursuant to subsection (1) is not brought to trial by the last day of the sittings of the court next following the sittings during which the application was made, the person is entitled to be discharged."

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15 See Draft Code s 618.

[21] That section was in much the same terms since the commencement of the *Criminal Code*[16] and indeed was in much the same terms as a provision in Sir Samuel Griffith's Draft Code.[17] Both in its original and its substituted form, the section can be seen to be aimed at ensuring that, where a person has been committed for trial, he is indicted within a reasonable time thereafter. Section 591 performs a similar function where there has been no committal or the person is not held to bail on the charge and an ex officio indictment is presented.

[22] Two significant changes were brought about by this substituted s 590. The first was that, instead of, as it formerly did, permitting a person who had been committed for trial to apply to be brought to trial with an entitlement to discharge if that was not done within a specified time, the substituted provision provided that entitlement to discharge would follow automatically unless an indictment were presented within a specified time. And secondly, and more importantly for present purposes, s 590 was made subject to s 561.

[23] Before the amendment, s 590 and s 591 appeared together to require the prompt prosecution by indictment of all indictable offences whether following a committal or not. However Mr Meredith submitted that the addition of the words "Subject to section 561" at the commencement of s 590 permitted an ex officio indictment for an offence to be presented pursuant to s 561 at any time notwithstanding a failure to comply with s 590(1) and a refusal of an application for an extension of time under s 590(2) and (3) in respect of that offence.

[24] Mr Moynihan for the applicant submitted that such a construction would deprive s 590 of its apparent purpose to which we have referred. It would, to say the least, be odd if the valuable safeguard provided to a defendant by s 590 could be circumvented in every case by the presentation of an ex officio indictment by a person nominated in s 561[18] without the benefit of the safeguard provided by s 591.

[25] The purpose of s 561 appears to have been to permit the presentation of an indictment for an indictable offence against a person notwithstanding that that person has not been committed for trial on that offence.[19] We would construe the phrase "whether the accused person has been committed for trial or not" in s 561(1) to mean whether or not that person has been committed for trial on some other offence;[20] to rebut an argument that, once a person has been committed for trial for

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16 The section had been amended to this form in 1975; *Criminal Code and Justices Act Amendment Act* 1975 (Qld), s 21. However, in material respects, the section was not changed by that amendment.

17 Section 617.

18 There is no hint either in the Explanatory Notes or in the Second Reading Speech as to the purpose of the addition of the phrase "Subject to section 561". Nor does it appear at which stage in the drafting process it was added. The Explanatory Notes state that the 1997 amendments "represent the outcome of an extensive consultation strategy commencing with Cabinet's establishment of the Advisory Working Group in April 1996". However the report of the Advisory Working Group did not propose any amendment to s 590.

19 See *R v Webb* [1960] QdR 443 at 447; *Ex parte Johnson and Edwards* (1979) 2 A Crim R 414 at 415 - 416. A common example is where a magistrate has refused to commit the defendant for trial: *R v Baxter* (1904) 5 SR(NSW) 134; *Barton v R* (1980) 147 CLR 75 at 99, 105.

20 *R v Durnin* [1945] QWN 35; *Barton v R* at 113(f).

an offence, he may be indicted only for that offence. There is no reason to think that its purpose was altered by the amendment of s 590. So construed, it does not permit the presentation of an ex officio indictment for an offence in respect of which a defendant has been committed for trial. To construe it so as to permit that result would be to permit circumvention of a safeguard which the legislature provided to a defendant to ensure a prompt prosecution or discharge.

[26] Once that is accepted, the phrase "Subject to section 561" in s 590 may be given a sensible meaning. It was intended to make it clear that that section does not prevent the presentation, pursuant to s 561, of an ex officio indictment against a person for an offence other than that on which he has been committed for trial, as s 561 envisages.

[27] Consequently we do not think that s 561, on its proper construction, would permit the presentation of an ex officio indictment where, as in this case, the only purpose thereof would be to charge a person with an indictable offence for which he had been committed for trial and on which it was intended to put him on trial, but in respect of which an application under s 590(2) had failed.[21]

[28] As no indictment has been presented it does not seem appropriate to order a stay of the indictment signed by the Director on 5 February. We would, however, grant the following declarations.

**Orders**

Declare:

1. that the indictment signed by the Director of Public Prosecutions on 5 February 2002 has not been presented;
2. that no ex officio indictment may be presented charging the applicant with the offence the subject of the indictment referred to in 1.

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[21] We would not follow *R v Harker* [2002] QSC 61; SC No 92 of 2002, 20 March 2002 in which a Supreme Court Judge refused to stay an ex officio indictment presented in circumstances similar to those in the present case. See to the opposite effect *R v Sylvander* [1999] QDC 184; DC No 3731 of 1998, 23 February 1999.