# SUPREME COURT OF QUEENSLAND

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| CITATION: | *DPP v Cicolini & Anor* [2007] QCA 336 |
| PARTIES: | **DIRECTOR OF PUBLIC PROSECUTIONS**<br>(applicant/respondent)<br>**v**<br>**CLIFFORD ROGER CICOLINI**<br>(first respondent/applicant)<br>**SHARYN LOUISE CICOLINI**<br>(second respondent/applicant) |
| FILE NO/S: | CA No 116 of 2007<br>CA No 117 of 2007<br>DC No 194 of 2007 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Application for Leave s 118 DCA (Criminal) |
| ORIGINATING COURT: | District Court at Cairns |
| DELIVERED ON: | 12 October 2007 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 21 September 2007 |
| JUDGES: | Muir JA, Cullinane and Lyons JJ<br>Separate reasons for judgment of each member of the Court, each concurring as to the orders made |
| ORDER: | **1. Leave to appeal granted**<br>**2. Appeal dismissed** |
| CATCHWORDS: | CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – PROSECUTION – FILING OF INFORMATION, PRESENTMENT OR INDICTMENT – QUEENSLAND – where the applicants were 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 granted by primary judge – whether discretion of primary judge to grant extension miscarried – whether respondent had shown 'good cause' for the delay – meaning of 'good cause' – construction of s 590<br><br>*Criminal Code 1899* (Qld), s 590<br>*District Court Act 1967* (Qld), s 118<br>*Justices Act 1886* (Qld), s 126 |

*CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, applied
*Cooper v Hopgood & Ganim* [1999] 2 Qd R 113, cited
*DPP v Cicolini & Anor* [2007] QDC 214, DC No 194 of 2007, 20 April 2007, affirmed
*Jago v District Court (NSW)* (1989) 168 CLR 23, cited
*Kleinwort Benson Ltd v Barbrak* [1987] 1 AC 597, applied
*R v Central Criminal Court, Ex parte Abu-Wardeh* [1997] 1 All ER 159, applied
*R v Crown Court at Manchester, ex Parte McDonald* [1999] 1 All ER 805, applied
*R v Foley* [2003] 2 Qd R 88; [2002] QCA 522, applied
*Stollznow v Calvert* [1980] 2 NSWLR 749, cited
*Witten v Lombard Australia Ltd* (1968) 88 WN (Pt 1) NSW 405, applied

COUNSEL: P Callaghan SC for the respondents/applicants
M Byrne appeared for the applicant/respondent

SOLICITORS: Ryan and Bosscher Lawyers for the respondents/applicants
Director of Public Prosecutions (Queensland) appeared for the applicant/respondent

[1] **MUIR JA**: The applicants seek leave to appeal under s 118 of the *District Court of Queensland Act* 1967 from the decision of a judge of the District Court in Cairns on 20 April 2007 ordering that the time for presentation of an indictment in respect of the offences upon which the applicants were committed for trial on 10 April 2006 in the Magistrates Court at Cairns be extended to Friday 4 May 2007.

[2] The application to the learned primary judge was made under s 590 of the *Criminal Code*. It provides:[1]

> (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 indictment no later than 6 months after the date on which the person was committed for trial.
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> (2) If, -
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> (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;
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> the director of public prosecutions or a Crown prosecutor may apply to the court at any time before or after the expiry

[1] *DPP v Cicolini & Anor* [2007] QDC 214, DC No 194 of 2007, 20 April 2007.

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."

[3] The applicants were separately committed on 10 April 2006 to the District Court at Cairns for trial in respect of the offences set out below:

The first respondent –

a. Fraud where property is valued at $5,000 or greater 13/3/2002 at Atherton
b. Attempt to dishonestly obtain a property at Atherton on 9/2/2002
c. Perjury at Cairns on 20/5/2002
d. Perjury at Cairns on 20/5/2002
e. Perjury at Cairns on 29/5/2002
f. Perjury/contradictory statements at Cairns between 19/5/2002 and 8/8/2002
g. Use of fabricated evidence at Cairns on 29/5/2002

The second respondent –

a. Fraud – where property is valued at $5,000 or greater at Rockhampton on 23/7/2002
b. Having in possession an animal with defaced brand 12/3/2002 – 20/7/2002
c. Stealing stock at Laura 12/3/2002 – 20/7/2003
d. Stealing stock at Laura 12/3/2002 – 20/7/2003
e. Stealing stock at Laura between 12/3/2002 and 20/7/2003
f. Stealing stock at Laura 12/3/2002 – 20/7/2003
g. Fraud – property valued at $5,000 or greater at Atherton on 13/3/2002
h. Attempt to dishonestly obtain property at Atherton 9/2/2002
i. Perjury at Cairns 20/5/2002
j. Perjury at Cairns 20/5/2002
k. Perjury at Cairns 29/5/2002
l. Fabricating evidence 12/3/2002 – 30/5/2002 at Cairns
m. Use of fabricated evidence Cairns on 29/5/2002
n. False declaration at Ipswich on 27/5/2002

**The history of the matter prior to application to a District Court**

[4] The following summary of the nature of the charges and of the committal proceedings given by counsel for the applicants was not disputed.

- "[the applicants] [asserted ownership of] 2,600 head of cattle, 2,400 of which were used as mortgage security over a loan

which was advanced by [the] bank for the purchase of a cattle station.

- The applicants had admitted that these cattle did not exist.
- When the bank became aware of the fraud, and appointed receivers, Sharyn Cicolini commenced civil proceedings to prevent this from happening.
- In the course of these proceedings, perjury was committed and evidence fabricated.
- Another series of charges alleged dishonest conduct in the course of dealing with cattle.
- Committal proceedings on all charges took place in the Magistrates Court at Cairns, commencing in June 2005. The proceedings were disjointed, prolonged and involved a co-accused by the name of Barbara Maxwell. The applicants were committed for trial on 10 April 2006."

[5] Ms Maxwell was not committed until 27 September 2006. Seemingly, as a result of the continuation of her committal proceeding, the relevant documents (which included transmission sheets, depositions and exhibits) were not forwarded by the Magistrates Court to the office of the Director of Public Prosecutions ("DPP") until after Ms Maxwell's committal had concluded. The documents were received by the DPP on 3 October 2006.

[6] Counsel for the respondent accepts that the respondent should have been aware of the applicants' committal on 3 October 2006 and that any lack of knowledge resulted from "inadvertence or carelessness". It is accepted that staff of the Cairns office of the DPP had actual knowledge of the committal once the call over list for the November call over of the District Court was received. The call over was conducted on 24 November 2006.

[7] Senior Sergeant Wynne-Jones, the police officer in charge of the Cairns Police Prosecution Corps, explained that he had communications in relation to the subject charges with an officer of the respondent, Mr Connelly, between the committal of the applicants and the committal of Ms Maxwell. He assumed that the respondent had received transmission sheets in relation to the applicants' committal.

[8] After the committal of Ms Maxwell, Senior Sergeant Wynne-Jones had the mistaken belief that "holding indictments" had been presented in relation to the applicants. There is evidence that Mr Connelly was similarly mistaken. Senior Sergeant Wynne-Jones explains that in October 2006 through to January 2007 he was busy with a range of matters to which he gave priority in the belief that indictments had been presented. He was told in mid-January 2007 by an officer of the respondent that the indictments had not been presented and that the respondent had not received cover sheets in relation to the relevant files. Senior Sergeant Wynne-Jones was then in the process of completing a summary of relevant evidence. The task was not completed before his departure on leave on 17 February 2007. On his return from leave on 12 March 2007 he worked on the subject matters but, because of pressure of work and unavailability of staff, he was obliged to attend to other matters.

[9] On 21 March 2007 he was requested to assist another officer of the respondent in compiling a brief in respect of the subject matter. In the course of this process he

found a number of documents were missing and noticed errors which required correction. Because of his background in the matter and its perceived complexity he considered that he should continue with the work himself. The date on which he concluded his task and the date on which matters were put in train to make the application under s 590 are undisclosed. The application was filed on 26 March 2007.

[10] The grounds relied on by the applicants and a summary of the arguments advanced in support of them are as follows.

**Error in the interpretation of s 590(3) of the *Criminal Code* – the applicants' contentions**

[11] The primary judge regarded the interpretation of "good cause" in s 590(3) as an exercise which involved a choice between two alternatives:

(a) Good cause for the failure to present an indictment; or

(b) Good cause why an extension of time should be granted.

The primary judge concluded in favour of alternative (b).

[12] The primary judge, in formulating a test by which the question of good cause was to be resolved, had reference to "considerations which were not … addressed by Parliament".

[13] The purpose of s 590 is "to put some pressure on the Director of Public Prosecutions" and to "focus and concentrate more effort and resources within the Director of Public Prosecutions' office on getting these cases brought to trial".[2] That purpose will be frustrated if the respondent is allowed to disregard prescribed timeframes and "distract attention from its failure by invoking notions of public interest" and considerations such as the strength of the prosecution case. It is only delay which engages the section and it is only delay which must be explained. If the "public interest in the disposal of the charges or the merits" can be invoked the legislation will be frustrated. Such matters can be invoked "in every single application of this nature" and the requirement that good cause be shown would be superfluous.

**The primary judge took into account irrelevant considerations – the applicants' submissions**

[14] The primary judge erred in having regard to:

> "A. When the alleged offences are said to have occurred and the lapse of time between they are alleged to have occurred and when the respondent was first charged (sic)
>
> B. The delay between the respondent was charged and when the respondent was committed for trial in respect of the offences and if the time is of considerable length any explanation for the delay (sic)"

[15] Such matters are of no relevance to the matters for consideration under s 590.

[16] Delays will be occasioned frequently by matters over which the DPP has no control. It is unlikely that it was ever contemplated that to show "good cause" the DPP could

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2 *Hansard*, 25 March 1997, pp 810-811; s 14B *Acts Interpretation Act* 1954.

be required to conduct investigations into such matters. Section 590 is concerned only with post committal matters. "The strength of the prosecution case" is not included in them. Reference to that consideration amounts "to an invitation to the DPP to prioritise matters according to an assessment of the available evidence". The fact that a magistrate had determined that there was a case to answer and that there were no submissions that the case against the accused was weak are irrelevant. Committal by a magistrate will be a circumstance against which every application under s 590 will take place. If the strength of the case is relevant, that issue will need to be litigated. It is, however, inappropriate that the accused go into evidence and recount personal circumstances.

[17] It is unlikely that it was contemplated that in order to show good cause the DPP could be required to conduct investigation into and produce evidence about matters with which it was completely unconcerned. Section 590 is concerned only with matters occurring after committal.

**No good cause was shown – the applicants' submissions**

[18] Irrespective of the test to be applied, the court should not have found that "good cause" had been shown. The DPP was informed about the status of the applicants' committal. The DPP had received everything necessary prior to the expiration of the six month period. An indictment had to be presented "even if preparation (was) incomplete".[3] There was no valid explanation offered as to why an application for an extension of time was not made between 3 and 10 October 2006. The unexplained delay after 10 October is "quite extraordinary". There was no evidence of the existence of any system. Whatever "cause" the respondent might have been able to show it was not a "good" one. The discretion of the primary judge miscarried for the above reason.

**The construction of s 590**

[19] Section 590 requires an indictment to be presented no later than six months after the date on which an accused is committed for trial.[4] If the indictment is not presented within time, the accused is entitled to be discharged "from the consequences of his or her committal".[5] Subsections (2) and (3), however, permit a court to grant an extension of time within which to present the indictment "if satisfied that good cause is shown and no miscarriage of justice is likely to result".

[20] The words "good cause" in s 590 are to be construed with regard to the scope and purpose of s 590 and the mischief it was intended to overcome.[6] The purpose of the time limit in s 590(1) and the consequence of its non-observance provided for in subsection (4) would appear to be twofold: to ensure that persons committed for trial are indicted within a reasonable time[7] thus facilitating the prompt disposition of criminal proceedings and to encourage the prosecuting authority to prosecute indictable offences expeditiously. In the course of the second reading speech, the then Attorney remarked:

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3 *Hansard*, 4 December 1996, p 4875
4 Subsection (1).
5 Subsection (4).
6 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408.
7 *R v Foley* [2003] 2 Qd R 88 at 95, 96.

> "Currently, the Director of Public Prosecutions is not locked into any time limit at all. We are hoping that this will speed up the processes of justice. … this was one of those particular recommendations which was designed to put some pressure on the Director of Public Prosecutions and speed up the issue of having trials heard. … We believe that … this will focus and concentrate more effort and resources within the Director of Public Prosecutions office on getting these cases brought to trial."[8]

[21] The words "good cause" in contexts not dissimilar to the subject context have been regarded as equivalent to "good reason".[9] In my view "good cause" in s 590 has that meaning. What amounts to a good reason needs to be determined by reference to the facts and circumstances of each case as it arises, not by reference to some judicially formulated words or guidelines which fetter the exercise of the statutorily conferred discretion.

[22] The following observations of Walsh JA in *Witten v Lombard Australia Ltd*[10] referred to with approval by Moffitt P in *Stollznow v Calvert* [11] and by Pincus JA in *Cooper v Hopgood & Ganim*[12] felicitously explain the approach courts should take to the exercise of discretions such as the subject one:

> "… the exercise of the Court's discretion should not be fettered 'by rigid rules', but required 'a decision to be reached, upon a balance of the relevant circumstances'".
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> …
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> "Everything must depend upon the circumstances disclosed in each particular case. It is, of course, proper to consider whether any explanation or excuse has been offered for the delay, and whether any explanation or excuse that has been offered is credible and satisfactory. It is proper to consider whether or not there is evidence of particular prejudice to the opposing party by reason of the delay. When all relevant factors have been taken into account, a decision is then to be reached as to the manner in which the discretionary power should be exercised.
>
> I have made these observations because it appears to me that there are some statements in the recent judgments of the English Court of Appeal which tend to restrict to some degree the exercise of the discretion in cases of this kind, so that it becomes something less than the exercise of a full judicial discretion in accordance with what justice seems to require in the circumstances of the particular case. There is a tendency to propound rules which are to govern the exercise of the discretion in the sense that it will be fettered by them. It is entirely proper that, in the exercise of a judicial discretion, guidance should be sought and obtained from decided cases of a similar kind, but I think that care must be taken to ensure that a discretionary power is not trammelled by set rules, by means of

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8 *Hansard*, 25 March 1997, pp 810-811.

9 *Kleinwort Benson Ltd v Barbrak Ltd* [1987] AC 597; *R v Central Criminal Court*; *ex parte Abu-Wardeh* [1997] 1 All ER 159 at 164 and *R v Crown Court at Manchester, ex parte McDonald* [1999] 1 All ER 805.

10 (1968) 88 WN (Pt 1) (NSW) 405 at 412.

11 [1980] 2 NSWLR 749 at 751, 752.

12 [1999] 2 Qd R 113 at 118.

> which one conclusion is to be automatically reached, regardless of other factors in the case which may point to the opposite conclusion. Therefore, I do not wish to be taken as assenting without qualification to everything that has been said in the recent English cases." (751, 752)

[23] The construction advanced on behalf of the applicants to the effect that "good cause" relates only to "the reasons why no indictment has been presented" imposes a limitation on the discretion conferred by subsection (3) which is not to be found in the words of the subsection. The application referred to in subsection (3) is an application by the respondent or a Crown prosecutor "for an extension of time within which to present an indictment". It is in respect of that application that "good cause" must be shown.

[24] The words "good cause" are very general in nature and are not confined to causes of any particular nature or description.

[25] The circumstances which will arise for consideration on applications under s 590 are infinitely variable, or virtually so. For the reasons explained in the above passage from the reasons in *Witten v Lombard Australia Ltd*, it is undesirable to attempt to define what may constitute "good cause".[13] It is desirable also to resist the temptation to devise lists of relevant considerations lest they be perceived as quasi rules to be applied on the hearing of such applications.

[26] A court's role on the hearing of such an application is to determine on the facts before it whether it is satisfied that good reason has been shown for the requested extension of time. If satisfied that good reason has been shown and that no miscarriage of justice is likely to result, it may grant the extension it considers just.

[27] The length of the delay and the reasons for it will normally be the focus of attention on such applications but the court is not confined to those considerations. As counsel for the respondent pointed out in his oral submissions, the fact that an application under s 590(2) can operate where no delay has occurred does not assist the applicants' construction.

**Did the primary judge take into account irrelevant considerations or otherwise err in the exercise of his discretion?**

[28] I do not accept that the gravity of the offences and the strength of the prosecution case are irrelevant considerations. It may be accepted that these matters, of themselves, cannot constitute good cause as the section applies equally to all charges irrespective of the gravity of the offences and the strength of the Crown case. It does not follow though that such considerations are irrelevant. Could it have been the intention of the legislature that the discretion conferred by s 590(3) not be able to be exercised to extend time where, as a result of incompetence and absence of appropriate systems in the office of the DPP, there was substantial and unexplained delay in the presentation of an indictment in respect of a charge of murder, in respect of which the Crown case was overwhelming and the accused's deeds particularly abhorrent? Many other such illustrations could be given.

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[13] See also the observations of Lord Brandon of Oakbrook in *Kleinwort Benson Ltd v Barbrak Ltd* [1987] AC 597 at 622, 623.

[29] I do not consider it likely that the legislature intended that a court making a determination under s 590(3) ignore the public interest in ensuring that persons charged with criminal offences be dealt with according to law. In this regard the learned primary judge, appropriately in my view, referred to observations of Mason CJ in *Jago v District Court (NSW).*[14] As Brennan J put it in *Jago*:[15]

> "The community has an immediate interest in the administration of criminal justice to guarantee peace and order in society. The victims of crime, who are not ordinarily parties to prosecutions on indictment and whose interests have generally gone unacknowledged until recent times, must be able to see that justice is done if they are not to be driven to self-help to rectify their grievances."

[30] Toohey J, in *Jago*[16] spoke of "the public interest that charges of serious offences be disposed of but that they be disposed of at a hearing which is fair and not oppressive to the person charged".

[31] As a general proposition the less serious the charge the less it will be against the public interest that there not be prosecution of it to finality. It is also reasonable to conclude that the strengths or weaknesses of the Crown case may bear on the public interest in prosecuting a matter.

[32] The assessment of the strength of the prosecution case ought not present any particular difficulty. It is a matter which courts address on an almost daily basis on bail applications. In the civil area, broad assessments of a party's likely prospects of success on trial are routinely made in interlocutory hearings on, for example, applications for security for costs and caveat removal.

[33] The primary judge, referring to a previous unreported decision of his, set out a check list of "some of the factors relevant to being satisfied that good cause is shown". Factors A and B of the primary judge's list[17] are criticised. I do not consider that there is anything to be gained by a detailed analysis of the list. It appears to me that his Honour was identifying, not the matters to which he had regard in determining the subject application, but those matters which, in his view, were generally of relevance to s 590 applications. I reach this conclusion because, after setting out the list, his Honour proceeded to deal with the application on the merits, specifying those matters which he took into account.

[34] In relation to items A and B on the list, I content myself with the observation that the history of matters the subject of the offences and of criminal proceedings prior to committal cannot be said, necessarily, to be irrelevant to a determination under s 590. The consequences of the delay in presenting the indictment will normally be a relevant consideration. The evaluation of those consequences should not be made in a factual vacuum.

[35] I accept that the fact that an accused has been committed for trial cannot be a factor in favour of the DPP on an application under s 590. Committal is a precondition to the operation of the section. I am not persuaded though that the primary judge took a contrary view when paragraph [24] of his reasons is considered as a whole. The

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14 (1989) 168 CLR 23 at 33.
15 At 49-50.
16 At 72.
17 Reproduced in paragraph [14].

substance of the point he was making in that paragraph is that there was no challenge to the appropriateness of the magistrate's determination arrived at after an extensive hearing or any suggestion that the Crown case was a weak one. These matters although peripheral, are not irrelevant. They go to the strength of the Crown case.

**Conclusion**

[36] There were two sets of offences referred to in evidence as the "Tully offences" and the "Atherton offences", the latter of which includes frauds dating from 2002 in Rockhampton and Atherton. The prosecution alleged that Ms Maxwell was involved in the latter offences. Ms Maxwell was ill and unable to attend the committal hearing but the proceedings against the applicants continued. The police prosecutor requested that the applicants not be formally committed until "Maxwell was available" but the learned magistrate did not accede to that request. Ms Maxwell was committed on 29 September 2006.

[37] The police prosecutor and officers of the DPP appeared to have been somewhat overwhelmed by what they perceived to be the complexity of the proceedings. Delays commenced as a result of the materials in respect of the applicants' committal not being forwarded to a "Crown prosecutor in (the far northern) district" as soon as was practicable in accordance with the requirements of s 126 of the *Justices Act* 1886 (Qld). An opportunity to avert undue delay was missed when the matters were not listed on the call over list of the Cairns District Court soon after committal in accordance with the usual practice. When officers of the respondent were aware of the committals they sought the assistance of the police prosecutor in "untangling the web of evidence". The committals had generated a considerable mass of material and there was a need to identify the evidence relating to the various charges. Also some of the evidence was in a state of disarray and, for example, pages of the transcripts of the committal proceedings were found to be missing.

[38] Senior Sergeant Wynne-Jones' work was interrupted by other urgent matters. Initially, he and Mr Connelly did not appreciate that the subject indictments had not been presented. The offences are serious in nature. No suggestion was raised at the hearing at first instance that delay had caused any prejudice to the applicants who were on bail in respect of which no onerous conditions had been imposed.

[39] Whilst aspects of the conduct of the respondent in failing to present the indictments within time are unsatisfactory as is the evidence as to the delay in bringing the application, I am not satisfied, having regard to the above matters, that the exercise by the primary judge of his discretion miscarried.

[40] The matter having been argued and considered on its merits, I would give leave to appeal and order that the appeal be dismissed.

[41] **CULLINANE J:** I have read the reasons of Muir JA in this matter and agree with those reasons and the orders proposed.

[42] **LYONS J**: I have had the advantage of reading the reasons for judgment of Muir JA and the facts are fully set out in those reasons. I agree that the purpose of s 590 is to ensure that indictments are presented within a reasonable time and to encourage the expeditious prosecution of indictable offences. The words "good

cause" however in that section should not be read down to mean that "good cause" only relates to the reasons why the indictment has not been presented within the time prescribed by the section. The question is whether some good reason has been shown for the extension and whether if such an extension is granted a miscarriage of justice is likely to occur.

[43] There are an infinite variety of circumstances in which such good cause may possibly arise. Whilst the reasons for the delay will usually be a consideration such reasons are not the only consideration.

[44] I agree with the reasons and the orders proposed by Muir JA.