SUPREME COURT OF QUEENSLAND

CITATION:	*R v Shea* [2010] QCA 339
PARTIES:	**R** **v** **SHEA, Warren Thomas** (respondent)
FILE NO/S:	CA No 120 of 2010 DC No 2086 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	A-G's Appeal under s 669A(1A) Criminal Code
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	7 December 2010
DELIVERED AT:	Brisbane
HEARING DATE:	22 November 2010
JUDGES:	Holmes, Chesterman and White JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal is allowed.** **2. The stay is set aside.**
CATCHWORDS:	CRIMINAL LAW – PROCEDURE – ADJOURNMENT, STAY OF PROCEEDINGS OR ORDER RESTRAINING PROCEEDINGS – STAY OF PROCEEDINGS – ABUSE OF PROCESS – IN GENERAL – where the Crown sought to appeal the permanent stay of an indictment pursuant to s 669A(1A) of the *Criminal Code* 1899 (Qld) – where 33 days passed between the decision and the filing of the appeal – where there is no prescribed time limit for the bringing of an appeal under s 669A(1A) – whether 33 days amounts to an "undue delay which may work an unfairness" CRIMINAL LAW – PROCEDURE – ADJOURNMENT, STAY OF PROCEEDINGS OR ORDER RESTRAINING PROCEEDINGS – STAY OF PROCEEDINGS – ABUSE OF PROCESS – IN GENERAL – where respondent convicted of two counts of refusing to answer a question at an examination by the Australian Crime Commission – where respondent received another summons to appear before the Commission whilst serving his sentence for the conviction – where the summons was in relation to the same investigation – where respondent once again refused to answer questions at the subsequent examination – where respondent charged in

relation to this second series of refusals – where the learned primary judge ordered a stay of the indictment on the bases that the second prosecution was an abuse of process and was akin to "double jeopardy" – where the factual bases for second set of questions were entirely distinct from those of the first – whether the second prosecution amounted to an abuse of process – whether trial judge erred in the exercise of his discretion in ordering a permanent stay of the indictment

Acts Interpretation Act 1954 (Qld), s 38(4)
Australian Crime Commission Act 2002 (Cth), s 24A, s 25A(6), s 28, s 30(2), s 30(2)(b), s 24A, s 25A(6), s 28, s 30(2)
Criminal Code 1899 (Qld), s 16, s 669A(1), s 669A(1A), s 669A(2), s 669A(2A)

R v B; ex parte A-G (Qld) [2002] 1 Qd R 274; [2001] QCA 59, distinguished
R v Gordon; ex parte Cth DPP [2009] QCA 209, distinguished
R v KU; Ex parte Attorney-General (Qld) (2008) 181 A Crim R 58; [2008] QCA 20, distinguished
Walton v Gardiner (1993) 177 CLR 378; [1993] HCA 77, applied

COUNSEL: A MacSporran SC for the appellant
C Reid for the respondent

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

[1] **HOLMES JA**: The respondent was charged on indictment with two counts of refusing to answer a question at an examination, an offence under s 30(2)(b) of the *Australian Crime Commission Act* 2002 (Cth). He had previously been convicted of and sentenced for similar offences. The learned judge at first instance held that the proceedings on the indictment before him were, in the words used in *Walton v Gardiner*:

> "… unjustifiably vexatious and oppressive for the reason that it is sought to litigate anew a case which has already been disposed of by earlier proceedings."[1]

Consequently, he ordered a stay of proceedings on the indictment. The Commonwealth Director of Public Prosecutions has appealed that order pursuant to s 669A(1A) of the *Criminal Code* 1899 (Qld).

The delay in appealing

[2] The order appealed against was made on 16 April 2010. The appellant signed the notice of appeal on 14 May in Sydney and it was filed in Brisbane on 19 May. Although appeals against sentence by the Attorney-General under s 669A(1) of the

1 *Walton v Gardiner* (1993) 177 CLR 378 at 393.

Code must be brought within a calendar month of the date of sentence,[2] no time is prescribed for either an appeal against a stay order under s 669A(1A) or a reference of a point of law under s 669A(2) or (2A). Section 38(4) of the *Acts Interpretation Act* 1954 (Qld) says:

> "If no time is provided or allowed for doing anything, the thing is to be done as soon as possible ..."

[3] The respondent argued that the appeal had not been commenced as soon as possible, the appellant not having explained why more than one calendar month was required to file it. He referred the court to two decisions where Attorney-General's appeals against sentence had been filed late: *R v KU; ex parte Attorney-General (Qld)*[3] and *R v Gordon; ex parte Cth DPP*.[4] In *KU* the court observed that "double jeopardy" considerations were important, especially where the Attorney-General was obliged to seek an exercise of the court's discretion in extending time for an appeal. A similar consideration was identified in *Gordon*; in that case the court declined to exercise the discretion in favour of the Attorney-General because the delay had not been satisfactorily explained. But that consideration has no application in the present case where the respondent has never been called upon to plead to the indictment and has not faced either trial or sentence.

[4] A third case referred to by the respondent, *R v B; ex parte A-G (Qld)*[5] is of similarly limited assistance because it contains no more than an observation by Mackenzie J that it is desirable that a reference under s 669A(2) be made promptly where it is intended to proceed again with charges, notwithstanding the entry of a nolle prosequi, if a favourable answer is given. His Honour went on to observe that it was not necessary, in that case, to decide the question of

> "what remedy, if any, is available in the event of undue delay which may work an unfairness on an accused person".[6]

[5] It may be accepted that the Attorney-General should file an appeal under s 669A(1A) promptly; but I doubt that what occurred here can be characterised as "undue delay which may work an unfairness". There is no time limit which the appellant has failed to meet and of which he requires an extension. The expression "as soon as possible" is not one which allows of any clear identification of a date beyond which an appeal may not be brought; it is simply a question of degree. Substantial delay might raise questions of abuse of process, but that is not this case. I do not think that the lapse of 33 days between the decision and the filing of the appeal could warrant a refusal by this Court to exercise its jurisdiction to hear the appeal.

The Australian Crime Commission Act 2002 (Cth)

[6] Under pt 2 div 2 of the *Australian Crime Commission Act*, an examiner may conduct an examination for the purposes of a special investigation;[7] at that examination counsel may examine or cross-examine any witness on any matter

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2 Section 671(2).
3 (2008) 181 A Crim R 58.
4 [2009] QCA 209.
5 [2002] 1 Qd R 274.
6 At 277.
7 Section 24A.

relevant to the investigation.[8] The examiner has power to summon witnesses.[9] It is an offence for a person appearing as a witness at an examination before an examiner to refuse to answer a question the examiner requires him or her to answer.[10] The person appearing as witness may claim, before answering, that the answer may tend to incriminate him or her or make him or her liable to a penalty and, in that case, the answer is not admissible in evidence against the witness, except in confiscation proceedings or proceedings in relation to a false answer.[11]

The history of the examinations in this case

[7] On 3 September 2007, the respondent appeared under summons to give evidence of

> "… federally relevant criminal activity involving the unlawful possession or conveyance of prohibited drugs, money laundering and connected incidental offences …".

The transcript of what occurred that day is not before us, but the salient parts are set out in the ruling of the learned judge at first instance. The applicant answered questions seeking his name, date of birth and address and, after an initial refusal to answer, confirmed that he had received the summons. The questioning then proceeded as follows:

"*Ms Smith:* *Mr Shea, what do you do for a living; what's your occupation?*

Mr Shea: *I'm not answering any questions, that's it.*

Ms Smith: *Not answering any questions?*

Mr Shea: *No.*

Mr Boulton: *Alright. I'll have you ask a very material question directed specifically to dealing in amphetamines, if you would frame a question like that to Mr Shea please, and give him the opportunity then of answering that question.*

Ms Smith: *Yes, Sir, certainly. Mr Shea, have you ever been involved in the manufacturing of amphetamine type substances at all?*

Mr. Shea: *I'm not answering any questions.*

Ms Smith: *Have you ever?*

Mr Boulton: *Alright, well I'll now direct you to answer that question and your response is?*

Mr Shea: *I'm not answering any questions. I've given my name, address, date of birth, that's all I'm prepared to answer.*

Mr Boulton: *If you like to frame one (1) other very material question for Mr Shea?*

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8 Section 25A(6).
9 Section 28.
10 Section 30(2).
11 Section 30(4) and (5).

Ms Smith: *Yes, Sir. Mr Shea, do you know anyone by the name of Brendan Shivella?*

Mr Shea: *Not answering any questions.*

Mr Boulton: *I direct you to answer that question and is your response the same that you--*

Mr Shea: *Yeah.*

Mr Boulton: *Will not answer that question--*

Mr Shea: *That's right.*

Mr Boulton: *I directed you to answer?*

Mr Shea: *Yeah.*"

[8] In consequence of that exchange, the respondent was charged with two counts of refusing to answer questions, one count relating to his refusal to answer whether he had ever been involved in manufacturing amphetamine-type substances and the other, presumably, as to whether he knew anyone by the name of Brendan Shivella. On 28 May 2008, he pleaded guilty and was sentenced to 12 months imprisonment, to be released on recognizance after serving three months. On 16 July 2008, while the respondent was still serving the custodial portion of his sentence, he was served with another summons in similar terms to the first. He appeared in answer to it on 5 August 2008. According to what is contained in the ruling, he answered questions about his address and a change of name, rent he had paid, moneys he had borrowed, his gambling habits, his plans for the future, his purchase of houses and some business enterprises. In particular, he was asked questions about travelling to Melbourne and said that he had "heaps of friends" there. Asked to list them, he gave names including that of a Mark Perry.

[9] After an adjournment, however, the respondent's attitude changed and the examination took the following course:

"*Mr Shea:* *Over lunch I had a chance to speak to my lawyer and I respectfully decline to answer any more of the questions.*

Mr Boulton: *Alright. Well, there's some matters we just need to go through. If you'd like to take a seat. Mr McDougall, would you ask a material question of Mr Shea in respect of drug trafficking since his last appearance here?*

Mr McDougall: *Yes, Sir. Mr Shea, have you been involved in drug trafficking matters since your last appearance before the Commission on the third of September two thousand and seven (03/09/2007)?*

Mr Shea: *I decline to answer any.*

Mr Boulton: *I direct you to answer that question and is your position that you won't answer that question?*

Mr Shea: *That's correct.*

MrBoulton: *Alright.*

> *Mr McDougall: Is it also your position, Mr Shea, that you will refuse to answer any question that I ask you about drug trafficking matters since your last appearance here?*
>
> *Mr Shea: That's correct.*"

[10] Some discussion then occurred between counsel assisting the examiner and Mr Shea's legal representative about an intercepted telephone conversation to which the respondent was a party. He refused to answer any question about its content. The examination resumed:

> "*Mr McDougall: Mr Shea, what has been your relationship with Mark Perry?*
>
> *Mr Shea: I refuse to answer any questions.*
>
> *Mr Boulton: I direct you to answer that question and is your position that you will refuse to answer it?*
>
> *Mr Shea: That's right*."

[11] The counts on the stayed indictment concerned the respondent's refusal to answer whether he had been involved in drug trafficking since his last appearance and his refusal to answer as to his relationship with Mark Perry. The Australian Crime Commission examiner gave evidence at first instance. He responded as follows to counsel for the respondent's questions:

> "And so can we take it that for all intents and purposes the investigation that was being conducted on the first occasion, on the first hearing, was the same investigation that was still being conducted on the second - at the second hearing?-- Yes, except for this, that there was evidence available between the two hearings of further drug trafficking on the part of your client.
>
> Which relates to the first question he was asked?-- Yes."

The ruling

[12] The learned judge summarised the respondent's contentions before him. Firstly, it was an abuse of process to re-summons a witness where he had previously made it clear that he would refuse to answer any questions and had been charged with, convicted of and served time in custody for offences in respect of his refusal to answer. Secondly, the proceedings were "akin to double jeopardy". Thirdly, it was an abuse to lay a charge in respect of the "Mark Perry" question, when the respondent had already answered it earlier in the examination by nominating Perry as a friend.

[13] The learned judge set out in his ruling a passage from *Walton v Gardiner* which, because of its equal relevance to the issues here, I reproduce:

> "The inherent jurisdiction of a superior court to stay its proceedings on grounds of abuse of process extends to all those categories of cases in which the processes and procedures of the court, which exist to administer justice with fairness and impartiality, may be converted into instruments of injustice or unfairness. Thus, it has long been established that, regardless of the propriety of the purpose of the

person responsible for their institution and maintenance, proceedings will constitute an abuse of process if they can be clearly seen to be foredoomed to fail. Again, proceedings within the jurisdiction of a court will be unjustifiably oppressive and vexatious of an objecting defendant, and will constitute an abuse of process, if that court is, in all the circumstances of the particular case, a clearly inappropriate forum to entertain them. Yet again, proceedings before a court should be stayed as an abuse of process if, notwithstanding that the circumstances do not give rise to an estoppel, their continuance would be unjustifiably vexatious and oppressive for the reason that it is sought to litigate anew a case which has already been disposed of by earlier proceedings. The jurisdiction of a superior court in such a case was correctly described by Lord Diplock in *Hunter v. Chief Constable of the West Midlands Police* as 'the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people'.

In *Jago v. District Court (N.S.W.)* at least three of the five members of the Court clearly rejected 'the narrower view' that a court's power to protect itself from an abuse of process in criminal proceedings 'is limited to traditional notions of abuse of process.' Mason C.J. considered that a court, 'whose function is to dispense justice with impartiality and fairness both to the parties and to the community which it serves,' possesses the necessary power to prevent its processes being employed in a manner which gives rise to unfairness. His Honour quoted, with approval, the following remarks of Richardson J. of the New Zealand Court of Appeal in *Moevao v. Department of Labour*:

> '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. It is contrary to the public interest to allow that confidence to be eroded by a concern that the Court's processes may lend themselves to oppression and injustice.'

Deane J. expressed a similar view in his judgment in *Jago*:

> 'The power of a court to stay proceedings in a case of unreasonable delay is not confined to the case where the effect of the delay is that any subsequent trial must necessarily be an unfair one. Circumstances can arise in which such delay produces a situation in which any

> continuation of the proceedings would, of itself, be so unfairly and unjustifiably oppressive that it would constitute an abuse of the court's process. Multiple prosecutions arising out of the one set of events but separated by many years or a renewed charge brought years after the dismissal of earlier proceedings for want of prosecution could, in a case where the relevant material had been available to the prosecution from the outset and depending on the particular facts, provide examples. Where such circumstances exist, the power of a court to prevent abuse of its process extends to the making of an order that proceedings be permanently stayed.'
>
> In her judgment in *Jago*, Gaudron J. stressed that the power of a court 'to control its own process and proceedings is such that its exercise is not restricted to defined and closed categories, but may be exercised as and when the administration of justice demands.' Her Honour added the comment 'that, at least in civil proceedings, the power to grant a permanent stay should be seen as a power which is 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.' Subsequently in her judgment, her Honour made clear that, subject to some refinements which she identified, that comment was also appropriate to be adopted in relation to criminal proceedings."[12]
> (Citations omitted.)

[14] The learned judge recognised the importance of the Australian Crime Commission's statutory role in investigating serious crime and the extraordinary powers it was given for that purpose. Its role was very different from a court, making relevant the warning of Brennan J in *Walton*:

> "... where a perceived unfairness results from a lawful exercise of power conferred by statute, the mere unfairness does not empower the court to set aside the exercise of the power. A fortiori, if there be a duty to exercise the power."[13]

[15] His Honour concluded (correctly, with respect) that the respondent could not plead autrefois convict, nor autrefois puni under s 16 of the *Criminal Code*. His reasons for staying the proceedings were as follows. Although the respondent was twice summonsed, there was, in essence, only a single Australian Crime Commission inquiry involving him. He had made it clear at the first hearing that he did not intend to answer questions. He was punished for refusing to answer two specific questions. The same punishment was imposed in respect of each count and would not have been more had there been more counts. Had the refusals to answer which were the subject of the current indictment occurred at the first hearing, no greater penalty would have been imposed. In the absence of any appeal against the sentence already imposed on the respondent, it was to be taken that he had been appropriately punished. Those factors led his Honour to the conclusion set out in my first paragraph: that the proceedings

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12 At 392-395.

13 At 407.

> "if continued, would be 'unjustifiably vexatious and oppressive for the reason that it is sought to litigate anew a case which has already been disposed of by earlier proceedings'".[14]

The submissions on appeal

[16] The appellant pointed out that the statutory framework given by the *Australian Crime Commission Act* was designed to facilitate the investigation of serious criminal offences, and prosecution for an offence was, at the relevant time, the mechanism for dealing with those who obstructed the Commission's work by refusing to answer. The question about drug trafficking was directed to evidence which had come to light in the interval between the two hearings and the question concerning Mark Perry involved an exploration of a topic not dealt with at the first hearing. The ruling, if upheld, would mean that this respondent would gain complete immunity in refusing to answer questions, regardless of what evidence might be gathered over time against him. Counsel went so far in written submissions as to assert that it could never be vexatious or oppressive to prosecute an individual who refused to answer questions asked by an examiner in the exercise of powers under the Act.

[17] The respondent submitted that the court plainly had the power to control oppressive and vexatious prosecutions based on Australian Crime Commission questioning. Although the evidence of the telephone intercept involving the respondent had become available after the first hearing, the conversation occurred on 29 November 2007, not long after the respondent was originally charged. The prosecutor could have refrained from proceeding with the prosecution until any further examination in relation to that evidence had been concluded. The question about Mark Perry which resulted in the other count did not arise from new evidence. In any case, the nature of the questions asked on the second occasion was not relevant to the unfairness of prosecuting when the Australian Crime Commission had used its power to re-summon the respondent knowing, from his conduct at the first examination, that he would not answer questions. Nothing showed that the learned judge's exercise of discretion had miscarried.

Conclusions

[18] The appellant's assertion in written submissions (but not adhered to in oral argument) that it could never be vexatious or oppressive to prosecute an individual refusing to answer questions asked in the exercise of powers under the Act cannot be accepted. But it does not follow, on the other hand, that the mere fact that the respondent was brought back for questioning when he had previously refused to answer questions and been prosecuted and punished meant that any resulting prosecution must be unfair. It is necessary to consider what occurred in the second proceedings.

[19] In fact, the respondent did display a willingness to co-operate at the second examination, including mention of the man Perry, up to the adjournment, although it may be accepted that the questions asked at that point were not on such sensitive matters as that immediately asked after the adjournment, about drug trafficking. That question was not repetitive; it asked about trafficking, as opposed to

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[14] *R v Shea*, unreported, District Court of Queensland, No 2086 of 2009, 16 April 2010 citing *Walton v Gardiner* (1993) 177 CLR 378 at 393.

manufacturing (as the question in the earlier examination had done), and it was the product of new information in the form of the telephone intercept. The second question, about the respondent's relationship with Mark Perry, arose out of the answer he had earlier given, naming the man as a friend. It was reasonable, having been given that intimation, that the questioner should seek to explore the nature of the relationship, which was relevant to a current inquiry. Neither question amounted to a repetition of any question that the respondent had previously been asked and refused to answer.

[20] The suggestion that the proper course for the prosecuting authorities was to delay proceeding on the first set of charges against the respondent until the completion of any further examination in relation to the content of the telephone intercept has no substance. The conversation was recorded on 29 November 2007. There is no evidence as to when officers of the Australian Crime Commission first appreciated that its content warranted further examination, much less that anyone in the office of the Director of Public Prosecutions knew of its existence. And it would be an odd approach to prosecuting to desist from proceeding with an indictment on the supposition that the accused might yet want to commit some more offences to add to it.

[21] Nothing in the evidence suggested that the officers of the Australian Crime Commission were doing anything other than proceeding in a proper exercise of their powers to question the respondent further about matters relevant to their investigation; nor does the learned judge at first instance appear to have made any such finding. It was not, in my view, incumbent on them to assume that, having previously been unco-operative and punished, the respondent would inevitably be obdurate on his second examination. Indeed, at least for the first session of the examination, it appeared otherwise. This was not in any sense a case already disposed of by earlier proceedings. It did not entail "multiple prosecutions arising out of the one set of events". The factual bases for the second set of charges were entirely distinct from those of the first.

[22] It does not, with respect, assist to say that had the questions the subject of the counts on the stayed indictment been asked in the first examination and the respondent there refused to answer them, the penalty might have been no greater. That is not what occurred; what did occur was conduct constituting an offence at a significant interval from the first episode in circumstances where the respondent had ample time to reflect on his choice as to whether to speak and its consequences. And the fact of the respondent's previously having been punished for similar offences might go to sentence (whether to mitigate or aggravate), but it did not bear on whether there should be a trial at all.

[23] With respect, I think that the learned judge did err in the exercise of his discretion. The conclusion that the prosecution amounted to litigating anew a matter already deal with was not open on the material before him; all that had happened was that the respondent had previously been sentenced for similar conduct. The conclusion that the second indictment constituted an abuse of process could not properly be reached.

Order

[24] The appeal should be allowed and the stay order set aside.

[25] **CHESTERMAN JA**: I agree with the orders proposed by Holmes JA for the reasons given by her Honour.

[26] **WHITE JA:** I have read the reasons for judgment of Holmes JA and agree with those reasons and the orders proposed by her Honour.