# DISTRICT COURT OF QUEENSLAND

| | |
|---|---|
| CITATION: | *Close v Jetnikoff* [2007] QDC 090 |
| PARTIES: | **Amanda Jane Close**<br>*Appellant*<br>**v**<br>**Stephen Mark Jetnikoff**<br>*Respondent* |
| FILE NO: | 277 of 2006 |
| DIVISION: | Appellate |
| PROCEEDING: | Appeal from Magistrates Court |
| ORIGINATING COURT: | Magistrates Court, Maroochydore |
| DELIVERED ON: | 25 May 2007 |
| DELIVERED AT: | Maroochydore |
| HEARING DATE: | 4 May 2007 |
| JUDGE: | K.S. Dodds, DCJ |
| ORDER: | **Appeal is allowed** |
| CATCHWORDS: | Appeal, s 222 *Justices Act 1886* (Qld)<br>Complaint struck out when no evidence offered – Fresh complaint – Whether abuse of process justifying permanent stay. |

Cases considered:

*Jago v The District Court of New South Wales and Ors* (1989) 168 CLR 23

*R v Smith* QCA 566/96 9 May 1997

*Williamson v Traynor* (1992) 2 Qd R 572

*Moevao v Department of Labour*(1980) 1 NZLR 464

*Walton v Gardiner* (1993) 177 CLR 378

*Drozd v Court of Appeal Queensland* (1993) 67 A Crim R 112

*House v The King* (1936) 55 CLR 499

COUNSEL: T. D. Gardiner for the appellant

P.W. Hackett for the respondent

SOLICITORS: Queensland Police Service Solicitor for the appellant

Dennis and Company Solicitors for the respondent

[1] This is an appeal against a magistrate's decision handed down on 14 September 2006. His Honour ruled that a complaint sworn 24 July 2006 charging the respondent with two offences; possession of a dangerous drug namely cannabis sativa and unlawful possession of a crossbow were an abuse of process and ordered proceedings on the complaint be stayed indefinitely.

[2] The history of the matter is as follows:

a. On 21 February 2006 the respondent was charged with the two offences referred to above.

b. The charges first came before the Magistrates Court on 7 March 2006. The respondent entered a plea of not guilty. There were two further adjournments and the matter was set down for hearing on 21 July 2006.

c. On 21 July 2006 when the matter was called on the prosecutor commenced by saying "I don't want to foreshadow anything he has to say but he's advised me he's withdrawing his application for an adjournment--". The respondent who was appearing on his own behalf interrupted and said "That's so your honour". In answer to the Magistrate's question the defendant indicated he was ready to proceed to trial. The magistrate then asked the prosecutor if he was ready to proceed. The prosecutor apologised and said he was not in a position to "provide any evidence to substantiate either charge this morning". Asked why, he said "Two witnesses involved in the matter aren't available this morning. One is working but he's an hour away. I was unaware of this. And given that the member has not-- no attempt has been made to contact the other member given that the primary investigator has not satisfied the needs of the court and the defendant's needs to have him here for the trial immediately". The magistrate asked "Are you asking for an adjournment" to which the prosecutor replied "In all honesty your Honour, I don't believe that would be a proper course for my credibility". After some further exchanges the magistrate said "So you're not in a position to produce any evidence" to which the prosecutor replied "No your Honour, I offer no evidence in both charges". The defendant when provided with an opportunity to speak said "I make an application under those circumstances that both charges be dismissed your Honour". The

> magistrate then said "Very well, no evidence being offered to the-- no evidence being before the court or being offered to the court in respect of either charges, both charges are struck out. You're discharged from your bail obligations in respect of them. Your may go now Mr Jetnikoff".

[3] In summary then, when the matter was called on for trial the prosecutor did not seek an adjournment and offered no evidence. The magistrate then struck the charges out.

[4] On 24 July 2006 a complaint was sworn charging the respondent with the same two offences returnable before the Magistrates Court on 16 August 2006. On that day the respondent appeared and apparently applied to have the charges in the complaint stayed as an abuse of process. The matter was adjourned to 14 September 2006 for consideration of the application.

[5] In arriving at his decision to stay the charges in the complaint the magistrate referred to a number of decisions of other courts where a stay of proceedings to prevent an abuse of the court's process had been discussed. Amongst others he referred to *Jago v The District Court of New South Wales and Ors* (1989) 168 CLR 23 and *R v Smith* QCA 566/96 9 May 1997. In those cases it was said that to justify a stay there had to be some conduct on the part of the prosecuting authority prejudicing an accused person from obtaining a fair trial. Later in his decision he returned to *Jago* and said that "one essential consideration in determining the conduct amounts to an abuse of process is the matter of fairness to all parties involved". He then proceeded to consider the case of *Williamson v Traynor* (1992) 2 Qd R 572 ultimately concluding that he would not distinguish the matter before him from that case. He observed that when a prosecution offers no evidence and an adjournment has been refused the court can consider whether or not subsequent

proceedings are an abuse of process. He concluded that the decision to institute proceedings by way of complaint and summons on 16 August 2006 came within the principles outlined in *Williamson* and ordered an indefinite stay of the proceedings.

[6] *Williamson* was an appeal against conviction for assault occasioning bodily harm. Williamson had been arrested for an assault offence. After a number of adjournments the matter had been set down for trial. On the trial date it seems that the complainant and another civilian prosecution witness were available but the arresting officer and his corroborating officer were not. One was ill and other on his honeymoon. The prosecutor applied for an adjournment. The solicitor appearing for the appellant objected. The defence had a witness present who was about to leave the state who it was said could corroborate a version of events to be put forward by Williamson raising defences of provocation and self defence. The magistrate refused the application for adjournment. The matter was then stood down at the request of the prosecution. Some time later the prosecutor appeared again before the magistrate and advised that the prosecution proposed to present no evidence in the light of the refusal of the adjournment. Thereupon the "complaint" was dismissed.

[7] In the interim between the refusal of the adjournment and the prosecutor informing the court the prosecution would present no evidence, the prosecutor had asked the solicitor for Williamson whether Williamson would sign "an indemnity" if the prosecution did not proceed with the charge. That was agreed to and the indemnity signed. The indemnity resulted in the prosecution being quarantined against a costs order.

[8] Subsequent to these events a complaint and summons was sworn out re-charging Williamson with the offence for which the charge had earlier been dismissed.

When this complaint came on for hearing the solicitor for Williamson sought to stay the hearing on the basis it was an abuse of process of the court to continue with the charge. This application was refused and after a hearing Williamson was convicted. It was this conviction which was the subject of the appeal.

[9] The appeal was allowed and the conviction and orders made thereon set aside. The court was of the view the proceedings taken by complaint leading to the conviction amounted to an abuse of the process of the Magistrates Court.

[10] There are significant differences between what occurred in *Williamson* and the present case. In *Williamson* an adjournment was sought and refused. Here no such thing occurred. In *Williamson* an indemnity was sought and given before offering no evidence protecting the prosecution from an adverse costs order. Here no such thing occurred. In *Williamson* the defendant's corroborating witness was allowed to leave the State and could not be located for the trial on the complaint and summons. Here no such factor was in play.

[11] An abuse of a court's process occurs when those processes are misused. As Richardson J in *Moevao v Department of Labour*(1980) 1 NZLR 464 at 482 (cited with approval by Mason J in *Jago* at 30) put it; when the court's processes are used "for ulterior purposes or in such a way—as to cause improper vexation and oppression". It is only appropriate in extreme or exceptional circumstance for a court to order a stay of a criminal prosecution; *Jago* at 31 per Mason J. *Walton v Gardiner* (1993) 177 CLR 378 at 392 per Mason CJ, Deane and Dawson JJ, *Drozd v Court of Appeal Queensland* (1993) 67 A Crim R 112 at 115. The question whether to grant a permanent stay requires a weighing and balancing of such factors as "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" *Walton v Gardiner* at 395-6.

[12] In *Moevao* Richardson J said the justification for the stay is "that the court is obliged to take that extreme step in order to protect its own processes from abuse. It does so in order to prevent the criminal processes from being used for purposes alien to the administration of justice under law. It may intervene in this way if it concludes from the conduct of the prosecutor that the court processes are being employed for ulterior purposes or in such a way as to cause improper vexation or oppression. The yardstick is not simply fairness to the particular accused. It is not whether the initiation or continuation of a particular process seems in the circumstances to be unfair to him. That may be an important consideration. But the focus is on the misuse of the court processes by those responsible for law enforcement. It is whether the continuation of the prosecution is inconsistent with the recognised purposes of the administration of criminal justice and so constitute and abuse of process of the court".

[13] When *Williamson's* case is considered in the light of the above remarks it is immediately apparent why it was considered there had been an abuse of the court's processes justifying a permanent stay.

[14] The present case is different. There was no adjournment sought and refused by the court which order would be undermined or countermanded by issuing a further complaint. There was no defence witness unavailable for the trial as a result of the prosecution offering no evidence when the adjournment was refused. There was no request for an indemnity if no evidence was offered quarantining the prosecution from a costs order.

[15] The only similarity is that the original charge/s were "dismissed" or "struck out" when no evidence was offered.

[16] The present case did not call for a permanent stay to prevent an abuse of the court's process. *Williamson* did not compel the magistrate to take that view.

[17] Counsel for the respondent rightly submitted that the magistrate's decision involved the exercise of a discretion. He submitted that exercise should not be interfered with simply because the court reconsidering the matter may come to a different view. It must be shown the discretion miscarried, that some error was made in its exercise; *House v The King* (1936) 55 CLR 499.

[18] I have come to the view the magistrate's discretion miscarried. The magistrate seemed to consider *Williamson* bound him to find there was an abuse of the court's process such that he should order a permanent stay. *Williamson* was based upon its own peculiar facts. This matter was different. *Williamson* did not constrain the exercise of the magistrate's discretion.

[19] The appeal is allowed and the magistrate's order is set aside.