DISTRICT COURT OF QUEENSLAND

CITATION:	*Volkers v R* [2020] QDC 25
PARTIES:	**SCOTT ALEXANDER VOLKERS** (applicant) **v** **THE QUEEN** (respondent)
FILE NO/S:	236/2019
DIVISION:	Criminal
PROCEEDING:	Application
ORIGINATING COURT:	District Court, Brisbane
DELIVERED ON:	10 March, 2020
DELIVERED AT:	Brisbane
HEARING DATE:	22 January, 2020 and further written submissions of 28 and 31 January 2020
JUDGE:	Reid DCJ
ORDER:	**The proceedings on indictment number 236 of 2019 be permanently stayed**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – STAY OF PROCEEDINGS – ABUSE OF PROCESS – UNDUE DELAY - where the applicant was charged with a number of indecent treatment of children under 16 in 1980's –applicant arrested in 2002, a no true bill entered in 2002- in 2004 one of the complainant's sought leave under s 686 of the *Criminal Code* to commence private prosecution against the applicant – where the application was dismissed -where the ODPP decided to recommence the prosecution in 2017 – where applicant seeks a permanent stay of the committal proceedings against him on the grounds of abuse of process - whether a permanent stay should be granted – Human Rights Act *Human Rights Act* (Qld), s 13, s 29(5)(b), s 31, s 32(2)(c). *Attorney-General Reference (No 2 of 2001)* 2004 AC 72. *Barac v DPP* [2006] QSC 421, and, on appeal [2009] 1 Qd R 104.

Connelly v DPP [1964] AC 1254.

Jago v District Court (NSW) (1989) 168 CLR 23.

Moevao v Department of Labour [1980] 1 NZLR 464.

Nona v The Queen (2013) 236 A Crim R 28.

R v Davis (1995) 81 A Crim R 156.

R v Mills (2011) 210 A Crim R 43.

Williams v Spautz (1992) 174 CLR 509.

Williamson v Trainor [1992] 2 Qd R 572.

Walton v Gardiner (1993) 177 CLR 378.

COUNSEL: P R Boulten SC and T.R. Morgans for the applicant
P J McCarthy QC for the respondent

SOLICITORS: Fisher Dore for the applicant

The Office of the Director of Public Prosecutions for the respondent

Introduction

[1] The applicant appeals for the permanent stay of an indictment charging him with 5 counts of indecent dealing with 2 complainants who were at the time of alleged offences under the age of 16. He seeks a permanent stay of the indictment.

Background

[2] The applicant is a former Australian swimming coach. It is alleged that in 1984 and 1985, when he was about 26 years of age, he indecently dealt with a female swimmer then 13 years of age. It is also alleged that in 1987 he indecently dealt with another swimmer, then aged 12.

[3] On 26 March 2002 he was arrested in relation to the alleged offending against the younger complainant. He was charged on 16 June 2002 with offending against the older complainant. His arrest was subject to extensive media coverage.

[4] On 25 July 2002 he was committed to stand trial on seven counts of indecent dealing involving the two complainants.

[5] Subsequently, in September 2002, the then director of the ODPP entered a no true bill in relation to each of the charges. The decision to do so followed a meeting between officers of the ODPP, including the then Deputy Director, and the applicant's then legal advisers. On the day of that meeting the applicant's lawyers gave to the ODPP 20 redacted statements of witnesses the applicant proposed to rely on at any trial. Those statements, by swimmers trained by the applicant and by some parents, were in part to the effect that the applicant did not have ready opportunity to leave the pool deck during training sessions, and in fact did not do so, and so lacked the opportunity to commit offences during that time. They also attested to his good character. It is fair to say they also contained inadmissible hearsay and opinion evidence.

[6] The decision to file a no true bill attracted significant publicity. The decision was commented on, adversely, by the then Premier. The then opposition leader also made public comments about the matter. The matter was referred to the CMC who investigated and provided a detailed report. It is included in the trial bundle and contains much useful information, including a chronology of events. That report was critical of the DPP decision not to proceed with the prosecution and of the nature of ODPP examination of the matter.

[7] In December 2003 the director asked her New South Wales equivalent, Mr Nicholas Cowdery QC, to advise about the matter. He in turn engaged a senior New South Wales prosecutor, Ms Margaret Cunneen, to consider the matter.

[8] In due course Mr Cowdery QC, in two advices, advised the Queensland director that in his opinion there was not sufficient evidence to consider recharging the applicant. He was not then recharged.

[9] From the point of view of the ODPP the matter then lay dormant until the events that led to the current indictment number 236 of 2019.

[10] In November 2004 the older complainant herself sought leave under s 686 of the *Criminal Code* to present an indictment against the applicant in relation to some of the alleged offending against her.

[11] Holmes J, as the current Chief Justice then was, dismissed the application on 16 December 2004.[1] In doing so her Honour was significantly influenced by the extensive publicity about the matter and each party's role in that publicity.

[12] It is unnecessary to set out in detail the nature of all such publicity. The material before me refers only to some small part of the overall publicity, but in her judgment in the application before her the current Chief Justice set out details of some of the publicity up to the time of her judgment – see in particular paragraphs 29 to 37 thereof.

[13] The publicity was both extensive and often inflammatory. It did emanate from both the applicant's then lawyers, and from a number of complainants, including the applicant in that matter. It included statements of the current applicant's step brother, prejudicial to the applicant before me. One complainant was shown in tears during a Four Corners program, too distressed to answer questions. A doctor interviewed on that program indicated the fact that one complainant had disclosed she had experienced orgasm made her more credible. The complainants were also the subject of an episode of Australian story.

[14] At paragraph 45 of her Honour's judgment, the current Chief Justice said:

> The factor which convinces me that leave ought not to be given is the publicity given to the case and the way it has been presented. That publicity includes the dissemination of information strongly adverse to the respondent which would not be admissible in any trial: particularly the statements attributed to the respondent's stepbrother and other unidentified complainants on the *Four Corners* programme and website. The existence of prejudicial material in the public forum would not of itself dissuade me from granting leave: courts seldom stay trials because of adverse publicity, considering that appropriate directions can largely obviate the prejudice caused. But this case is, I think, in rather a different category."

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1 [2004] QSC 436.

[15] The "different category" her Honour was there referring to was not just the nature and extent of the publicity, but the fact that it was proposed that the applicant in the matter before her would be the prosecutor. Her Honour said at paragraph 46:

> The ordinary trial is conducted by an independent prosecutor with the distance and authority of the Crown. In this case, that will not occur. The effect of the media coverage, beginning with Mr Shield's remarks and reinforced particularly by the *Four Corners* programme, has been to characterise the allegations of sexual misconduct as a contest between the applicant and the respondent, both seeking public support, with the applicant, apparently, considerably more successful in that endeavour. The positioning of applicant and respondent as protagonists is exacerbated by the fact that the applicant's case is to be funded by public campaign; from the website one gets the impression of the applicant and her supporters bringing the charges, with a strong note of grievance that the respondent remains in an important position."

[16] The complainants have given extensive interviews about the matter to Australian media outlets. Internet searches attached to an affidavit of the applicant's solicitor reveal some of the public commentary about the matter. It is I think fair to say there has been extensive publicity by or supportive of both sides in the matter.

[17] In July 2014 the Royal Commission into Institutional Responses to Child Sexual Abuse (hereinafter "the Royal Commission") held hearings in which each of the complainants gave evidence. Their evidence was again subject to extensive media coverage, and public commentary.

[18] Subsequently each complainant, and a third complainant, made submissions to the DPP for the prosecution of the applicant to be reinstituted. The director advised the applicant of that on 9 June 2016.

[19] On 13 November 2017 the current proceedings were in fact commenced. In November 2018 the applicant was committed to stand trial on four counts involving

the older complainant in late 1984 and early 1985, and to one count involving the younger complainant in the summer of 1986/87.

[20] Prior to making the decision to recommence proceedings police were asked to further investigate the matter. A significant number of new statements were obtained from potential witnesses. To understand the significance of these new statements to this application it is necessary to consider also the nature of the redacted statements provided by the applicant's lawyer to the ODPP in 2002.

[21] The applicant's then solicitors had provided to the ODPP some 20 statements which, it is said, showed the improbability of the applicant having the opportunity to commit the alleged offences, or at least counts one and two involving the older complainant. They also related to the applicant's alleged good character. Those statements were redacted so that the witnesses could not be identified. The applicant's counsel contends that the decision to enter a no true bill was influenced by the content of those statements and the effect they were likely to have on the prospects of securing a conviction. Whether that is so I am unable to decide.

[22] It is also of importance that all of those statements were, I gather by agreement, placed in a sealed envelope. There was a dispute about the terms of the undertaking of the ODPP about those statements but it is not necessary to resolve that issue. The envelope was not opened again, I gather by agreement, until very recently, in October 2019, and not until after the police had obtained the significant number of further statements to which I have referred.

[23] The applicant's counsel submits that by the applicant providing those statements he effectively "displayed his hand" in a successful attempt to have the Crown withdraw the charges in 2002.

[24] At a time more than seven years after the decision to enter the no true bill (or perhaps after the decision of the now Chief Justice in 2004), the applicant's then solicitors, in accordance with their usual practice, destroyed their file. That file included the original statements, redacted copies of which had been provided to the Crown. Consequently the only known copies of those statements are those that had been redacted and placed in the sealed envelope. The file included photos and memos and may also have included other documents of which no one now has any

real memory. Whether any such document would have been of forensic advantage to the applicant is also unknown.

[25] The applicant and his current solicitors have recently considered those 20 redacted statements with a view to contacting the deponents. It is said only 10 of those deponents have been able to be identified by the applicant, and of those, the applicant has been able to provide contact details of only four. Only two of them have in fact been contacted and now swear to the contents of their earlier statements. Some of the testimony that the applicant would, or might, have relied on at any trial, has, it is submitted, thus been permanently lost.

[26] The Crown now wishes to rely on the evidence of the 84 persons who were engaged in the applicant's swimming coaching and who have provided recent statements to the police. These statements are from people who were familiar with the applicant's swimming coaching routines at the relevant time. Statements about that issue had not been obtained by the crown in 2002, when the no true bill was entered, but the evidence would, I assume, have been available if the deponents had been asked to provide statements.

[27] A selection of these statements have been provided to me (see pages 951 to 1012 of the trial bundle). The respondent's written submission also includes Schedule A, a summary of these witness statements. For the purpose of this application it is not necessary they be traversed in detail. The statements suggest it would be open to a jury to conclude the applicant had opportunity to leave the pool deck during training and to be with a swimmer in the massage room without inciting undue interest. In saying that it would be open to a jury to so conclude, I am mindful that some of the statements say, in fact, that he did not ever leave the pool deck and to have done so would have drawn attention to that fact. I am merely indicating that there is evidence both ways in respect of that issue, and so such a conclusion would be open to a jury.

[28] This view of the evidence is of course contrary to the view said to be represented by the redacted statements provided to the ODPP in 2002, which statements suggest the applicant had no opportunity to leave the pool deck and commit the alleged offending.

[29] My own experience would suggest it would be somewhat difficult for a jury to accept that a swimming coach, such as the applicant, would not have the opportunity, on occasions, to leave a pool deck, perhaps even for a somewhat protracted period, without attracting undue interest. I have little doubt any coach – even a keen and committed one – would from time to time have had a need to leave the pool deck. His doing so would in my view be unlikely to have been so unusual as to have attracted the interest of other swimmers or their parents. In my view a jury might well have significant difficulty in accepting evidence to the contrary.

The Applications

[30] The applicant's senior counsel submitted that the stay ought to be allowed on two separate but related grounds, namely lack of fairness and oppression amounting to an abuse of process by the prosecuting authority. Each relates closely to the significant delay in the prosecution of the matter.

[31] The submission on behalf of the applicant concerning unfairness is primarily that he is prejudiced because he has lost the opportunity to lead evidence from other swimmers or their parents who earlier gave statements as to whether the applicant had the opportunity to leave the pool deck for sufficient time to commit the first the two charged acts, which occurred at the swimming pool, without arousing undue suspicion. It is also said that he has lost the opportunity to call evidence from those persons as to the appearance of locations relevant to the charged acts and to collect considered accounts from witnesses collated with the benefit of conference notes and photographs which were available in 2002 and 2003 but destroyed by the solicitors 7 years after their involvement in the matter ended.

[32] It is said that such loss is specifically identifiable because many of the 20 deponents who originally provided statements to the applicant's then solicitors are not able to be identified or contacted. Further, the delay up to 35 years since the alleged offences means, it was submitted, that the complainant's life experience, character and motivations, which may significantly influence their evidence, is entirely or largely unknown to the applicant.

[33] Counsel also submitted that the provision of the defence statements to the DPP in 2002 "enabled the investigation in 2017 to focus on potential defence evidence" and was thus prejudicial to the applicant.

[34] I do not accept that to be so. I was told by senior counsel for the respondent, and accept, that in fact the redacted statements were left in the envelope and not read by anyone from the ODPP until very recently, and well after the 84 statements. I have earlier referred to had been obtained by police tasked with reinvestigating the matter. The specific content of the redacted statements therefore did not inform the investigations.

[35] A possible question remains whether a general knowledge of the content of those redacted statements – passed down over more than 15 years by discussion within the ODPP or otherwise – may have caused the police to obtain those statements or influenced the content of the new statements. I do not know how, if at all, the content of the redacted statements may have indirectly influenced the content of the 84 new statements. But I do not think the issue of importance. The statements are very general. The issue of opportunity is one that arises only in relation to counts 1 and 2 of the present indictment. I do not conclude that it would be unfair to the applicant to allow the crown to use the 84 statements.

[36] In addressing the issue of whether it would be "unfair" to allow the prosecution of the current indictment to continue, it is important to have regard to the approach of courts to applications to stay proceedings on the basis of unfairness on the one hand, and because of oppression on the other. Whilst unfairness is relevant to both, the nature of the unfairness to be considered in each case is different.

[37] In *Barac v DPP*[2] the primary judge approached the exercise of discretion to stay proceedings on the basis that to do so was rare and the public interest in the prosecution of crime should be impeded only where, for exceptional circumstances, the prosecution cannot fairly proceed. Her Honour held that a fair trial could be held in the circumstances of that case. That finding was not disputed on appeal.

[38] What was in dispute in the appeal was:

1. Whether the appellant would nevertheless be prejudiced by the DPP being allowed to resile from an earlier agreement not to prosecute the appellant for serious drug offences, including trafficking; and
2. The issue of whether public interest considerations required the DPP be held to that agreement.

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2 [2006] QSC 421, and, an appeal [2009] 1 Qd R 104.

[39] The matter was determined against the appellant. The court (Keane JA, as his Honour then was, with whom McMurdo P and Jerrard JA agreed) noted that the prejudice enunciated (cost to the appellant and disruption of his life) was not the kind of prejudice addressed in statements concerning a stay because of prejudice to a fair trial.

[40] His Honour said, at paragraph [24] of his judgment:

> "The kind of prejudice which has been regarded as enlivening the discretion to stay a prosecution is that prejudice which detracts from the prospects of a fair trial."

[41] His Honour said that it had never been suggested that the personal consequences to a defendant of being charged "alone and without more" could justify a stay. His Honour continued:

> "The strong public interest in the conviction and punishment of serious offences may be displaced by 'the paramount public interest' that the administration of criminal justice proceed fairly in a case where a prosecution is pursued for an improper purpose or with no prospects of success; but in a case where a decision not to prosecute has been reversed simply because the prosecution believes that stronger evidence has become available to it, the paramount public interest is not engaged. In such a case, absent some real and incurable adverse effect upon the accused's prospects of a fair trial, a mere change of mind on the part of the prosecution is not, of itself, a sufficient basis for ordering a stay of proceedings."

[42] His Honour was dealing with a submission concerning prejudice personal to the appellant as being a basis for a stay on the basis of unfairness of a trial.

[43] The issue identified in *Barac* as the public interest ground, related to issues of oppression and public confidence in the administration of justice, was then considered. Before turning to the courts consideration of that ground, it is necessary to put such consideration in historical context.

[44] Prior to the decision of the High Court in *Jago v District Court* (NSW)[3] and its subsequent consideration in *Walton v Gardiner*[4] there was uncertainty over whether a court's power to prevent abuse of process by safeguarding an accused person from oppression extended to stopping a prosecution by granting a permanent stay of proceedings to prevent unfairness generally (as contrasted to a stay to prevent an unfair trial).

[45] The unsettled state of the law in England concerning the issue was analysed by Mason CJ in his Honour's judgment in *Jago* (see especially pages 27 and 28 thereof).

[46] In *Connelly v DPP*[5] Lord Pearce said a court had a duty to stop a prosecution which "created abuse or injustice". Lord Morris of Borth-y-Gest and Lord Hodson took a narrower view of the power, being of the opinion that whilst a court had power to safeguard an accused from oppression, it did not extend to doing so by stopping a prosecution.

[47] Mason CJ in *Jago* characterised this narrower view of the power as underpinned by the need for the court to "keep out of the arena", especially in circumstances where there was no legislative limitation period for criminal charges. The Chief Justice's view was that such an approach misconceived the question – which was not whether the prosecuting authority ought to have brought a prosecution, but whether the court should permit its processes to be employed in a way which gave rise to unfairness. His Honour referred with approval to the judgment of Richardson J in the New Zealand Court of Appeal decision of *Moevao v Department of Labour*[6] where his Honour noted two related aspects of public interest. The first was the public interest in the due administration of justice and its extension to ensuring the court's processes were used fairly, by state and citizen. The second aspect of public interest was in the maintenance of public confidence in the administration of justice. The Chief Justice said at page 30 of his decision in *Jago*:

> "In essence then, the power to prevent an abuse of process in this context is derived from the public interest, first that

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3 (1989) 168 CLR 23.
4 (1993) 177 CLR 378.
5 [1964] AC 1254.
6 [1980] 1 NZLR 464.

> trials and the processes preceding them are conducted fairly and, secondly, that, so far as possible, persons charged with criminal offences are both tried and tried without unreasonable delay. In this sense, fairness to the accused is not the sole criterion when a court decides whether a criminal trial should proceed."

[48] The Chief Justice then said:

> "The continuation of processes which will culminate in an unfair trial can be seen as a "misuse of the Court process" which will constitute an abuse of process because the public interest in holding a trial does not warrant the holding of an unfair trial.
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> Ultimately, it does not matter whether the problem is resolved in this way, by invoking a wide interpretation of the concept of abuse of process, or by saying that courts possess an inherent power to prevent their processes being used in a manner which gives rise to injustice. In either event the power is discretionary, to be exercised in a principled way, and the same considerations will govern its exercise. And in each case the power will be used only in most exceptional circumstances to order that a criminal prosecution be stayed."

[49] Importantly for this matter his Honour continued:

> "In appropriate cases, orders may be made to prevent injustice notwithstanding that there is no reason to suspect the actual trial, when held, will not be fair".

[50] In relation to the exercise of the discretion to make orders designed to achieve fairness his Honour said at page 33:

> "The test of fairness which must be applied involves a balancing process, for the interests of the accused cannot be considered in isolation without regard to the community's right to expect that persons charged with criminal offences are brought to trial. (citations omitted) At the same time, it

> should not be overlooked that the community expects trials to be fair and to take place within a reasonable time after a person has been charged. The factors which need to be taken into account in deciding whether a permanent stay is needed in order to vindicate the accused's right to be protected against unfairness in the course of criminal proceedings cannot be precisely defined in a way which will cover every case. But they will generally include such matters as the length of the delay, the reasons for the delay, the accused's responsibility for asserting his rights and, of course, the prejudice suffered by the accused. (citations omitted) In any event, a permanent stay should be ordered only in an extreme case and the making of such an order on the basis of delay alone will accordingly be very rare. (citation omitted)
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> To justify a permanent stay of criminal proceedings, there must be a fundamental defect which goes to the root of the trial "of such a nature that nothing that a trial judge can do in the conduct of the trial can relieve against its unfair consequences."

[51] In his judgment in *Jago* Deane J noted that whilst some delay in the prosecution of criminal proceedings is inevitable, delay can be so prolonged that it becomes unreasonable. Whether, in a particular case, delay can be said to be unreasonable depends on the particular circumstances but can in an appropriate case justify an accused in claiming the proceedings are unjustifiable. His Honour said (at page 56):

> Once a court is seised of criminal proceedings, it has control of them. In the absence of applicable express statutory provision, that control includes the power - either inherent or implied - to ensure that the court's process is not abused by the proceedings being made an instrument of unfair oppression. (citations omitted) The accused in such proceedings is entitled to invoke that power if he is being subjected to unreasonable delay in bringing on the trial. … There could be circumstances in which the effect of

> unreasonable delay is that any subsequent trial of the accused will necessarily be an unfair one. In such a case, an order that the trial be brought on would be inadequate and inappropriate."

[52] In considering what might constitute such unfairness his Honour said at the following page:

> It is, however, possible to formulate examples of cases in which the effect of default or impropriety on the part of the prosecution would necessarily be that any subsequent trial was unfair to the accused. Thus, one can envisage circumstances in which calculated and unreasonable delay on the part of the prosecution in bringing proceedings to trial had so unfairly and permanently prejudiced the ability of an accused to defend himself that no subsequent trial could be a fair one."

[53] His Honour made clear at page 58 that the power to stay proceedings extends beyond cases of an unfair trial:

> 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."

[54] His Honour then identified five key factors to be considered when determining whether proceedings should be stayed on the grounds of prosecutorial delay causing unfairness. He enumerated them in these terms:

1. Length of delay.
2. Prosecution reasons to explain or justify delay.
3. The accused's part in any delay.
4. Proven or likely prejudice.
5. Public interest in the disposition of serious criminal charges and the conviction of the guilty.

[55] His Honour said these should not be treated as a code and that their consideration should not divert attention from the fact that a consideration involves forming a value judgment involving the nature and seriousness of the offences in the relevant circumstances. The factors identified by His Honour are of course closely related to those factors identified by the Chief Justice in the passage set out in [50] thereof.

[56] These two judgments, of Mason CJ and Deane J, are of particular importance because in the subsequent case of *Walton v Gardiner,* Mason CJ, Deane and Dawson JJ in a majority judgment (Brennan and Toohey JJ dissenting) endorsed what I might call this wide interpretive view of the power to stay proceedings.

[57] A narrower view of the power was formulated by Brennan and Toohey JJ in *Jago.* It is, because of the subsequent decision in *Walton v Gardiner* (supro), unnecessary to consider in detail those judgements but it is important to note, in my assessment, 2 relevant issues.

[58] First is the reference to the fact that courts can, and traditionally do, address obstacles to a fair trial not by staying proceedings but by appropriate directions, appropriate interlocutory orders or rulings on evidence.

[59] Second the legitimate interest of persons other than the defendant alone, including victims of crime and the community, must be recognised.

[60] Brennan J warned of the adverse effect on public confidence in the administration of justice if stays were to become common place. Ultimately his Honour concluded

that no abuse of process occurs merely from delay on the part of the prosecution by reason of inadvertence or by negligence in presenting an indictment. His Honour said at page 54:

> … It may be different if the prosecution were to delay deliberately in presenting an indictment in order to prevent an accused from making an effective defence but, even in such a case, the remedy may lie not in permanently staying the proceedings but in bringing them to a conclusion with a direction which nullifies the effect of the tactic."

[61] Gaudron J also adopted the wider interpretation of Mason CJ and Deane J, noting the power of a court to control its own processes and proceedings and said this was not restricted to defined or closed categories. Her Honour however held, consistent with all other judges, that a permanent stay was not appropriate in the circumstances of that particular case.

[62] The decision in *Jago* was subsequently considered in *Walton v Gardiner*. In that case, Mason, Deane and Dawson wrote a joint judgment Brennan and Toohey JJ dissented.

[63] The case concerned the conduct of three doctors in treating patients at a New South Wales hospital between 1973 and 1977. The Health Department submitted that the jurisdiction to order a stay arose only where a court was satisfied that any hearing would be unfair, or where proceedings had been started for an improper purpose.

[64] It was in fact not suggested the Department had instituted proceedings for an improper purpose and the Court of Appeal also accepted it would be possible for the tribunal to achieve a fair hearing.

[65] The Health Department's submission, described by the majority in *Walton v Gardiner* as being a "narrow view" of the court's jurisdiction to order a stay, was not accepted in the Court of Appeal or in the High Court. In the Court of Appeal, Gleeson CJ and Kirby P (as their Honours then were) considered that the Court of Appeal "has power to make an order staying proceedings if it is satisfied that the continuation of the proceedings would be 'so unfairly and unjustifiably oppressive' as to constitute an abuse of process." Their Honours made plain that the court would only be so satisfied in an exceptional or extreme case.

[66] Mahoney JA, who ultimately dissented on the application of the test, adopted a similar approach. For his Honour the test was whether the proceedings "would involve unacceptable injustice or unfairness".

[67] The majority of the High Court approved of the Court of Appeal's approach (see the comment to that effect at page 392.9). Their Honours said:

> "….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."

[68] Their Honours continued at page 393:

> "….. 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."

[69] Their Honours approved the approach of Mason CJ, Deane and Gaudron JJ in *Jago,* holding that the power extends to preventing the courts processes being used so as to cause unfairness and specifically approved of the comments of Deane J in *Jago*, at page 58 of the judgement earlier set out.

[70] Furthermore, their Honours specifically disavowed the suggestion that a stay could only be ordered on the grounds of improper purpose or no possibility of a fair trial. At page 395 their Honours said, when referring to particular comments in *Williams v Spautz*:[7]

> "When those comments are properly understood in context, however, there is nothing in them which supports the proposition that a permanent stay of proceedings can only be ordered on the ground of either improper purpose or no possibility of a fair hearing. Indeed, careful examination of them discloses that they lend some support to a denial of that proposition."

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7 (1992) 174 CLR 509.

[71] Their Honours then added:

> "As was pointed out in Jago, the question whether criminal proceedings should be permanently stayed on abuse of process grounds falls to be determined by a weighing process involving a subjective balancing of a variety of factors and considerations. Among those factors and considerations are the requirements of fairness to the accused, the legitimate public interest in the disposition of charges of serious offences and in the conviction of those guilty of crime, and the need to maintain public confidence in the administration of justice."

[72] It is then appropriate to return to *Barac* which also involved a decision by the DPP not to continue with a prosecution, only to see that decision reversed, albeit after only a short passage of time. In respect of the issue of oppression as a ground for granting permanent stay, Keane JA said, emphatically:

> "It is simply not the case that there is an absolute rule that the court must grant a stay to prevent the prosecution from resiling from an agreement of the kind in question."

[73] His Honour emphasised that the issue of whether to stay proceedings as an abuse of process was not a rule of law question, but concerned the proper exercise of a judicial discretion related to the preservation of confidence in the administration of justice.

[74] His Honour noted that in *Walton v Gardiner*, it had been said that the discretion involved:

> "a subjective balancing of a variety of factors and considerations including the requirements of fairness to the accused, the public interest in the disposition of charges of serious offences and the conviction of those guilty of crime, and the need to maintain public confidence in the administration of justice."

[75] His Honour also considered the decision in *Williamson v Trainor*,[8] in which a prosecution decision, indeed agreement, not to proceed with a prosecution resulted

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8 [1992] 2 Qd R 572.

in a critical defence witness not being available for a proposed subsequent trial. In relation to that matter, his Honour said:

> "It can be seen that the circumstances in *Williamson v Trainor* were such that the second prosecution of the accused in that case was indeed apt to undermine public confidence in the administration of justice."

Consideration

[76] In this case, the question is whether the prosecution of the defendant is likely to result in an unfair trial or is such as to undermine public confidence in the administration of justice, i.e. whether a decision to further prosecute now, contrary to the 2002 decision not to do so, has that effect, when there is no critical new evidence to justify a change of view.

[77] That second question is to be determined by applying the facts of the case to the key factors identified by Deane J in Jago and set out in [54] thereof.

[78] An affidavit of Michael Byrne QC (at the time the new proceedings were instituted by then DPP and now Judge Byrne QC of this court) was filed in the proceedings. It was he who determined, in June 2016, to institute these new proceedings against the applicant. The affidavit sets out material he had regard to in coming to that determination, including a change in the director's guidelines concerning when a decision to discontinue a prosecution could be reversed. It is important to note that Mr Byrne, as his Honour then was, recognised that the guidelines are "just that: guidelines" and do not have the force and effect of a statute. Ultimately he concluded that whilst there was not new or fresh evidence, unavailable at the time of the original decision to file no true bill, available in October 2016, and of course no suggestion of fraud, there was, in his view, an enlivening of the third criteria justifying a change – namely, a material error of law or fact that would lead to a substantial miscarriage of justice.

[79] It is in the circumstances unnecessary in my view to further consider whether there was such an error, other than to note it as an historical fact which motivated the decision to renew the prosecution.

[80] I have already noted that in my assessment the inability of the applicant to identify many of the persons whose 2002 statements were redacted, and the fact there are now 84 new witnesses all of whom have different recollections of the applicants training methods, will be unlikely to be critical to a jury's determination.

[81] It is inevitable, especially after over 30 years, that people's recollection of such detail will vary. In my view the same would have applied in 2002. It would in my assessment be surprising indeed if the applicant did not have the opportunity to commit the alleged offences. As I have already said, I mean by that, that it would be surprising indeed if the nature of his training was such that he never left the pool deck for an extended period or, if he had, that such an absence would have been noted and commented upon, and now recalled, 35 years later.

[82] My assessment is that the likely absence of evidence from many, or at least some, of the deponents of the redacted statements, like the evidence of the 84 or so swimmers and their families who have now provided variable statements about the issue of whether or not the applicant had the opportunity to leave the pool deck, is unlikely to be a critical issue for the jury or critical to the outcome of the trial. I do not conclude that the inability of the applicant to now identify those persons, or many of them, will result in any trial being an unfair one.

[83] In assessing the issue of whether it would be unfair to allow the prosecution of the current indictment to continue it is important to have regard to the approach of courts to applications to stay proceedings on the basis of unfairness. I have referred already to the decision of the Court of Appeal in *Barac*.

[84] Courts have been reluctant to conclude that delay, even delay in circumstances where relevant evidence is lost, justifies a court in staying a prosecution. It is true that in *R v Davis*[9] it was recognised that unfairmess can justify a stay where delay has resulted in the destruction of documentary evidence crucial to the defence. I am unaware of the destruction of any crucial evidence in this case. So too in *Williamson v Trainor* (supro). A critical witness was unavailable due to the Crown's delay.

[85] In *R v Edwards* (2009) 83 ALJR 717; 255 ALR 399 the pilot and first officer of a Qantas aircraft were charged with reckless operation of an aircraft contrary to the

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9 (1995) 81 A Crim R 156.

Civil Aviation Act. The Launceston Airport, where they landed and took off from, was unmanned. It was the responsibility of the two accused to activate airport lighting to land and takeoff. When they took off a number of people reported the lighting was not activated.

[86] Importantly, evidence in the form of an electronic record of the activation of the lights on the aircraft monitor, and on the aircraft flight data recorder, had, as a result of delay, been lost. The High Court, in quashing an order for a stay of proceedings in the Tasmanian Supreme Court, said:

> "It is not necessary to consider whether there may be circumstances in which the loss of admissible evidence occasions injustice of a character that would make the continuation of the proceedings on indictment an abuse of the process of the court. This is not such a case. The content of the monitor list and the recording made by FDR is unknown. In those circumstances it is not correct to characterise their loss as one occasioning prejudice to the respondents. The lost evidence serves neither to undermine nor support the Crown case."

[87] The court also said:

> "Trials involve the reconstruction of events and it happens on occasions that relevant material is not available; documents, recordings and other things may be lost or destroyed. Witnesses may die. The fact that the tribunal of fact is called upon to determine issues of fact upon less than all of the material which could relevantly bear upon the matter does not make the trial unfair."

[88] In the circumstances of this case I am unpersuaded that the loss of the knowledge of the identity of a significant number of the deponents whose redacted statements were provided to the DPP in 2002, or the fact that the Crown has now obtained statements from a significant number of further witnesses, who may be called at a trial, and whose evidence is variable is not such as to make the trial unfair. The destruction of the file while unfortunate, does not make the trial unfair when there is no evidence of lost crucial evidence. So too the fact of the delay since the 1980's when the alleged offending occurred, and the effect of that on witnesses ability to accurately recount exactly what occurred, is not such as to cause me to conclude any trial would not be fair. The need for a judge to direct the jury about the effect of

such delay and the almost inevitable need for a suitable Longman direction would very significantly ameliorate any unfairness which might arise from such delay.

[89] I would decline to order a stay on the grounds the trial would be unfair.

[90] I turned then to the question of abuse of process or oppression.

[91] The history of this matter of course includes not only the earlier charges disposed of prior to indictment presentation by the filing of no true bill, but also the decision of the now Chief Justice to refuse the application of the older complaint for leave to bring a private prosecution. It can fairly be said, I think, that the sense of justice which inspires the doctrine against double jeopardy is present in this case because of that history. Even though in neither case did the applicant face a trial he has been confronted by the burdens of these various prosecutions, including the risks to his personal liberty and disruption of his life, legal costs and uncertainty, to adopt some of the effects of a criminal charge identified by Deane J at the commencement of his judgment in *Jago*, twice previously. He has also faced extreme public commentary about him over many years.

[92] In this case the effect of the long delay has been very significant. The delay between the alleged occurrences of the offences and the applicant being charged in 2002 is not unusual – indeed, such delay is understandably common place in matters involving sexual abuse of minors. Indeed, delay of over 30 years, as has now occurred, is itself not particularly unusual.

[93] What is significant is that since 2002 when the ODPP first took charge of the matter, another 17 years has passed and the applicant has still not been brought to trial. He has not been responsible for the delay. The explanation for the delay by those now responsible for bringing and continuing the prosecution is that the earlier considered decision of the then director, supported by the opinion of the New South Wales director, involved an error of fact or law. No explanation is given as to why it has taken so long to come to that conclusion. The director responsible for the original decision left her role, on appointment to this court, in 2008. There have been two directors since then.

[94] Although I have concluded a trial could now be conducted fairly, the applicant has satisfied me that he will have suffered very significant prejudice if the matter were now allowed to proceed.

[95] In *Jago*, Deane J referred at the start of his judgement, to adverse consequences on a party charged with serious criminal offences. He identified some of them. Here the applicant has incurred significant financial and emotional cost arising from his being charged, facing committal and ultimately having the no true bill entered in 2002. He incurred further such costs as a result of the older complainant's unsuccessful application for leave to present an indictment, a decision that she did not appeal. As a result of his being charged in 2002, and following the significant publicity surrounding that matter, the applicant's successful career as a swimming coach in Australia has been lost. The prejudice he alleges is set out [45] of his written submissions. This submission appears to be based on assertions in a letter from applicant's then solicitor of the 29th June 2016. This assertions repeated in written submissions were not challenged before me. He has had to live and work overseas, for 5 years I gather in Brazil. Even his ability to do so has been thwarted by his exclusion from accreditation at Australian swimming meets and from a number of high level international competitions including the 2016 Olympics. There has been widespread publicity about the matter and consequential emotional trauma.

[96] To say these things is of course not to diminish the hurt, humiliation and upheaval in the lives of the complainants. They too have had to withstand the glare of publicity. In my work I see, almost daily, the devastating effects of child abuse. I am very conscious of observations of judges about the importance of bringing the perpetrators of such matters to justice. For example, in *Nona v The Queen*[10] Dowsett J quoted observations of Burns J in his trial judgement;

> "I have already alluded to the very real public interest in ensuring that allegations of sexual assault against children are determined by a court. In the present case this public interest outweighs any prejudice to the (appellant), especially as any such prejudice will not preclude the (appellant) obtaining a fair trial."

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10 (2013) 236 A Crim R 28.

[97] This factor is often an overwhelming one favouring the rejection of an application for a stay involving cases of abuse of children.

[98] In this case however, balancing the various factors, I am persuaded that it is appropriate to grant a permanent stay of the proceedings. To allow the prosecution to proceed is in my view unfairly and unjustifiably oppressive of the applicant, in the particular and very unusual circumstances of this case. To allow it to now proceed, after two earlier failed attempts at prosecution and after the passage of 18 years from when he was first arrested for crimes alleged to have been committed more than 15 years before then would amount to an abuse of the court processes pursuant to which a trial without unreasonable delay is fundamental.

[99] During the course of oral submissions, senior counsel for the Crown very properly and fairly raised the issue of the applicability of the *Human Rights Act* (HRA). I therefore made directions for the parties to file further written submissions about that issue. In written submissions counsel for the applicant noted that although the prosecution had been commenced prior to the enactment of the HRA, the continuation of the proceedings involved the ODPP, a public entity under the Act, acting in a manner said to involve a breach of ss 29(5)(b) and 32(2)(c) of the Act, being the right to a trial "without unreasonable delay" and of s 31, namely the right to a fair trial.

[100] The submission accepted that pursuant to s 13 of the Act, the ODPP's actions in continuing to prosecute are compatible with human rights if they limit a human right only to the extent that is reasonable and demonstrably justifiable, introducing a test of proportionality spoken of in the relevant human rights cases.

[101] Counsel accepted that in considering whether there has been a breach of the right to a fair trial pursuant to s 31 of the Act, it would be necessary for the court to find that the applicant's trial would be unfair at common law and that consequently the factors relevant to the court's determination of that issue at common law are relevant to the consideration of s 31. Having regard to my finding about that matter, I do not find that there has been a relevant breach of the provisions of s 31 of the Act.

[102] In relation to the issue of unreasonable delay counsel relied on observations of Lord Bingham in Attorney-General's reference (No. 2 of 2001)[11], where his Lordship said:

> "There may well be cases where the delay is of such an order … as to make it unfair that the proceedings against the defendant should continue."

[103] Counsel submitted that the question of prejudice to the applicant was thus relevant to the remedy applicable if there was a finding of undue delay. Counsel referred also to the decision of Sopinka J in *R v Morin*[12] where his Honour enumerated factors to be considered in determining what constitutes unreasonable delay – such as the length of the delay, waiver and reasons for delay and prejudice. I note the similarity between these matters and those identified by Deane J as relevant to the exercise of the discretion referred to in *Jago* and set out by me earlier.

[104] If, as the applicant's counsel urged I should, I were to find that in this case the trial has been unreasonably delayed, then one must consider the proportionality issues provided for in s 13A of the HRA in determining what remedy is to be imposed.

[105] Similar considerations were before the court in *Nona v The Queen* (supro). In that case the ACT Court of Appeal dismissed an appeal against the refusal of the trial judge to grant a stay of proceedings. Dowsett J referred in his judgment to the trial judge's reliance and observations of Lord Bingham in *R v Attorney-General's Reference (No. 2)* of (2001) (supra) that it would not be appropriate to stay or dismiss proceedings unless either:

(a) there could not be a fair trial; or

(b) it would otherwise be unfair to try the defendant.

[106] Furthermore, his Lordship emphasised that the prosecutor, and the court, do not act incompatibly with the convention right in continuing with the proceedings after a breach is established unless one or other of those conditions is met.

[107] It appears to me that such a position effectively means that under the Act the position reflects the common law position, namely a stay could only be ordered if

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11 *Attorney-General Reference (No 2 of 2001)* 2004 AC 72).

12 [1992] 1 SCR 771.

there could not be a fair trial or it would otherwise be unfair to try the defendant because of the consequences of the unreasonable delay.

[108] Dowsett J in his judgment referred to the judgment of Higgins CJ in *R v Mills*[13] where his Honour said that in arriving at the appropriate remedy for the breach of the right under the HRA to a trial within a reasonable time "it is necessary to weigh the reasons for the proscription of delay … against the societal interests in prosecuting offenders."

[109] Such an approach again appears to me to mirror the approach of the common law.

[110] Ultimately Dowsett J, as I have said, agreed that the trial judge's refusal to grant a stay was justified.

[111] His Honour noted that the trial judge rejected the appellant's submission that by continuing to prosecute him "where a breach of his rights (to a trial without undue delay) had been established, the prosecuting authority acted unlawfully".

[112] Dowsett J found that whilst the appellant's rights under the *Human Rights Act* had been breached, that did not justify a stay, but rather a proportionate response in the form of a public acknowledgment of the breach and a determination to have the further conduct of the proceedings determined without delay.

[113] In the circumstances of this case I would find that the delay since 2002 has been such as to amount to a breach of the appellant's rights under the HRA to a trial without unreasonable delay. Unlike the circumstances in *Nona* the breach of the Act is appropriately dealt with in this case by dealing with it in the way I have determined at common law-namely by granting a permanent stay of the prosecution because to allow the prosecution to now proceed would be unduly oppressive and an abuse of process requiring the applicant to face, in effect, his third prosecution and in circumstances of widespread adverse publicity and significant adverse effects on the applicant's ability to live and work.

Orders

[114] I order that proceedings on indictment number 236 of 2019 be permanently stayed.

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13 (2011) 210 A Crim R 43.