SUPREME COURT OF QUEENSLAND

CITATION:	*R v Handlen, Paddison & Nerbas* [2012] QSC 433
PARTIES:	**R** **v** **DALE CHRISTOPHER HANDLEN, DENNIS PAUL PADDISON, KELSEY JAMES NERBAS** **(**Applicants)
FILE NO/S:	87/12
DIVISION:	Trial
PROCEEDING:	Pre-trial hearing
ORIGINATING COURT:	Supreme Court, Brisbane
DELIVERED ON:	30 April 2012
DELIVERED AT:	Cairns
HEARING DATE:	18 April 2012
JUDGE:	Henry J
ORDER:	**Applications refused**
CATCHWORDS:	CRIMINAL LAW – ABUSE OF PROCESS – where the applicants seek an order that further proceedings on the indictment against them be permanently stayed – where delay of five and a half years – whether this will cause prejudice to the applicants so grave as to warrant a permanent stay of prosecution CRIMINAL LAW – ABUSE OF PROCESS – where the applicants seek an order that further proceedings on the indictment against them be permanently stayed – where first trial proceeded where there existed no legal foundation for liability – where the applicants argue if that error had been realised a successful no case submission could have been made *Island Maritime Ltd v Filipowski* (2006) 226 CLR 328 *R v Taufahema* (2007) 228 CLR 232
COUNSEL:	W Abraham QC and M Ho for the Crown P Smith for Handlen E Wilson for Paddison M Chowdhury for Nerbas

SOLICITORS: Fisher Dore Lawyers for Handlen
Mackenzie Mitchell Solicitors for Paddison
Russo Mahon Lawyers for Nerbas

[1] The applicants seek an order that further proceedings on the indictment against them before the Supreme Court be permanently stayed as an abuse of process.

[2] The applicants rely in the main upon the consequences of delay and the course and consequence of events at their ill-fated first trial.

The indictment(s)

[3] There are actually two indictments against the applicants before the Supreme Court.

[4] The old indictment charges Handlen, Paddison and Nerbas co-jointly with two counts of importing a commercial quantity of border controlled drugs contrary to ss 307.1 and 311.1 of the *Commonwealth Criminal Code* ("the Code") and one count of attempted possession of a commercial quantity of border controlled drug contrary to s 307.5 of the Code. It also charges Handlen and Nerbas separately with identical counts of possessing a commercial quantity of border controlled drugs contrary to ss 307.5 and 311.1 of the Code. In each instance, the drugs are alleged to be cocaine, ecstasy and methamphetamine.

[5] The new indictment charges them with the same offences, except each accused is now charged separately with the offences with which they were charged co-jointly in the old indictment and the first of the between dates in the earliest offences charges has been changed from 1 August 2005 to 6 April 2006. Also, in the new indictment s 11.2(1) of the Code (aid, abet, counsel or procure) now features in the sections in the margin against the importation and possession charges, whereas it was not included in the old indictment.

[6] These variations are inconsequential to the application's breadth, in that its complaint is against the continued prosecution of the applicants for the same alleged criminal misconduct with which both indictments are concerned. The application proceeded on the understanding it related to both indictments.

Background by chronology

[7] The chronology is:

6/4/06-2/9/06	The alleged offending occurred. Briefly, it involved the importation from Vancouver to Brisbane of cocaine, ecstasy and methamphetamine hidden in the cathode ray cubes of computer monitors and the possession and attempted possession of the drugs. The facts are summarised at greater length in the appeal case judgments related to this matter cited below.
8/8/07	The applicants were committed for trial.
24/11/08 -18/12/08	The applicants stood trial on the old indictment. Nerbas changed his pleas to guilty on day 9 and Handlen and Paddison were convicted by the jury. Handlen was

sentenced to life imprisonment and Paddison to 22 years imprisonment. The High Court later observed:

> *"The trial was conducted on the mistaken assumption, shared by the parties and the trial judge, that guilt of the importation offences could be established by proof the appellants were parties to a joint criminal enterprise to import the drugs into Australia. At the date of the appellants' trial, participation in the joint criminal enterprise was not a basis for the attachment of criminal responsibility respecting a substantive offence under the laws of the Commonwealth."*[1]

23/12/10	The Court of Appeal dismissed the appeals of Handlen and Paddison against conviction and refused their application for leave to appeal sentence.[2] The Court acknowledged the mistaken assumption on which the trial had proceeded but applied the proviso in s 668E(1A) *Criminal Code 1899* (Qld) concluding the failure to direct as to the correct basis for liability, namely aiding, had not involved a fundamental departure from a trial according to law.
18/3/11	An application by Nerbas to withdraw his guilty pleas was refused.[3]
14/7/11	Nerbas' appeal against the refusal to allow his withdrawal of guilty pleas was allowed and he was given leave to withdraw his guilty pleas.[4]
8/12/11	The High Court allowed the appeals of Handlen and Paddison concluding it was not open to the Court of Appeal to apply the proviso and ordering "*a new trial be had*".[5]
24/12/12	The new indictment was presented.

The power to stay

[8] It is well established the Court has inherent jurisdiction to stay its proceedings on the grounds of abuse of process.[6] The power to stay is not confined to grounds of improper purpose or no possibility of a fair hearing[7] or limited to traditional notions of abuse of process or defined and closed categories.[8]

---

1 *Handlen & Anor v R* [2011] HCA 51 8 December 2011
2 *R v Handlen & Anor* (2010) 247 FLR 261, [2010] QCA 371
3 *R v Nerbas* [2011] QSC 41
4 *R v Nerbas* [2011] QCA 199
5 *Handlen & Anor* VR [2011] HCA 51 8 December 2011
6 *Walton v Gardiner* (1993) 177 CLR 378
7 Ibid at 395
8 *Jago v The District Court of New South Wales* (1989) 168 CLR 23

[9] The onus of satisfying the court that there is an abuse of process is a heavy one and lies upon the party alleging it.[9] The power to grant a stay is a drastic remedy and ought only be exercised in the most exceptional or extreme circumstances of unacceptable injustice or unfairness.[10]

[10] The question whether the power should be exercised:

> "*…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."*[11]

Delay

[11] The applicants submit there has been a significant delay, not caused by the applicants, which will cause prejudice to the applicants so grave as to warrant the permanent stay of the prosecution.

[12] The length of the delay to date of about five and a half years and probably six years by the time of retrial, is of itself unfortunate but unremarkable. Much older alleged offences are regularly tried before the criminal courts.

[13] Very often such older cases, for example involving sex offences against children, involve the accused person being charged many years after the alleged offence when there is little prospect of the defence being able to access or obtain independent objective evidence against which the accuracy of the prosecution case might be tested. Here, the applicants were arrested near in time to their offending. This is not a case in which it can be said potential evidentiary trails could not be explored because the defendants were not on timely notice of the alleged offending conduct. To the contrary, they would have been aware of the essential allegations of misconduct soon after their alleged occurrence.

[14] The prosecution evidence includes that of an accomplice, Mathew Reed. Mr Handlen's solicitor has deposed to a variety of recent unsuccessful inquiries he has made in search of evidence such as surveillance footage and electronic records which could if available be inspected to check whether events described by Mr Reed actually occurred. His counsel's outline at paragraph 50 contains a lengthy list of such unavailable potential evidence.

[15] There is some dispute as to whether all items of evidence listed in this exercise are actually unavailable but in any event it was for several reasons an exercise of dubious significance to the present application.

[16] Firstly, it was an exercise which could have been initiated by Mr Handlen long before this year. Secondly, it is not contended there is any actual prejudice in the sense that if available, the evidence would show Mr Handlen, or the other

---

9 *Williams v Spoutz* (1992) 174 CLR 509 at 529

10 *Walton v Gardiner* supra at 392, *Jago v The District Court of New South Wales* supra at 34, *Dupas v R* (2010) 241 CLR 237 at 245, 250

11 *Walton v Gardiner* supra at 395, 396

applicants, were not involved as alleged by Mr Reed.[12] At best, the applicants have shown evidence which is possibly relevant is not available to them. In such a situation it is not correct to characterise the absence of such evidence as occasioning prejudice to the applicants.[13] Thirdly, the absence of such corroborative evidence in respect of an accomplice can be highlighted before the jury to the advantage of the defence.

[17] The delay of which the applicants complain is not so exceptional as to compel an inference or presumption of prejudice and has not caused a loss of evidence the absence of which gives rise to such unfairness, prejudice or oppression that a fair trial cannot be held.

[18] There is no substance to this limb of the application and there is no logical basis upon which it can bolster the other limb to which I now turn.

The course and consequences of the first trial

[19] The second limb of the application, in the sense it could potentially found a stay, is that it is oppressive to allow a continuation of the proceeding where, if there had been a trial according to law there would have been a no to case answer submission at the close of the prosecution case which would have been upheld, resulting in either a directed verdict of acquittal or a nolle prosequi without prospect of a successful reinstitution of proceedings.

[20] The argument in effect is that:

(a) the particulars of the prosecution case,[14] as they related to the importation offences, alleged liability for participation in the joint enterprise of importing the drugs;
(b) there existed no such foundation for liability in that participation in a joint enterprise was not an offence known to the Code;[15] and
(c) accordingly, at the close of the prosecution case there ought to have been a successful no case to answer submission.

[21] The argument requires some suspension of disbelief. It is artificial to contemplate, had defence counsel realised the erroneous legal basis on which the trial of the importation charges was proceeding, that they would have sat silently by and allowed the tender of evidence the admissibility of which was assessed by reference to a flawed legal premise. Had they realised the trial was not proceeding according to law, as distinct from the prosecution merely failing to prove its case, their duty to the Court would likely have resulted in them alerting the trial Judge forthwith.

[22] The argument is also of doubtful relevance as it relates to Nerbas. Nerbas had pleaded guilty during the trial and thus could not have been the beneficiary of a no case to answer ruling. Counsel for Nerbas contends he only pleaded guilty because of the erroneous approach to his change of instructions as to a critical matter of fact and that he was thus wrongly deprived of the hypothetical chance of acquittal which should have flowed from the no case ruling which should have been made. He has argued the consequent oppression to him is greater rather than less than that

---

12 This aspect was properly acknowledged by Mr Handlen's counsel when raised with him in argument at 1-6 & 1-7

13 *R v Edwards* (2009) 83 ALJR 717 at 723, also see *Police v Sherlock* (2009) 103 SASR 147

14 Ex 5

15 *R v Handlen & Anor* (2010) 247 FLR 261 [2010] QCA 371

suffered by his co-accused. I disagree. Giving full force to the argument he was wrongly deprived of a chance of his trial continuing and thus assuming the hypothetical question presently under consideration ought apply to him, his hypothetical position and any alleged oppression cannot logically be worse than that of his co-accused. I am prepared for the sake of the argument to consider it as if Nerbas had not pleaded guilty and was in the same situation as his co-accused at the close of the prosecution case. As will be seen, this makes no difference to my ruling.

[23] The problems confronting the applicants' argument are formidable.

[24] The argument only applies to the importation offences and not to the possession and attempted possession offences. The High Court ordered a retrial in respect of the possession and attempted possessions offences, notwithstanding that there had been no error of law relating directly to them, because the directions concerning proof of the "*group exercise*" did not discriminate between proof of guilt of the importation offences and the other counts in the indictment. Had the error relating to the importation offences been identified as at the close of the prosecution case the trial judge would have been able to ensure the error did not infect directions subsequently given to the jury in the summing up. At best for the defence, they may have been able to persuade the trial judge to order a mistrial on the basis that evidence had already been admitted before the jury on the false premise of it being relevant to the proof of a joint enterprise. It is unnecessary to analyse what ruling might have occurred in that regard although it ought be borne in mind the existence of a joint enterprise, while not here a foundation for liability, can if certain preconditions are met, provide a basis for the cross admissibility of evidence of the words and deeds of accomplices carried out in furtherance of a common criminal purpose.[16]

[25] Further, a no case to answer submission of the kind now hypothetically advanced would have been very unconventional. Ordinarily a no case to answer submission contends there is no evidence taken at its highest capable of proving an element of the offence charged. Ordinarily particulars are taken to confine the charge and are effectively read as part of the charge.[17] Following the conventional pattern, the hypothetical submission might have been that the prosecution had failed to prove the charge as confined by the particulars. However, that submission would have failed because there was ample evidence to prove the charge as particularised. The real problem here was that the particulars confined the charge so as to allege a basis for liability not known to law.

[26] To argue that problem, identified by the Court of Appeal and High Court, would, if realised at the close of the prosecution case, have resulted in a ruling of no case to answer misconceives the nature of the error as explained by the High Court. That error was that the trial proceeded on a basis for which the law did not provide, that is, it was so fundamental a departure that there had not been a properly conducted trial.[18]

[27] Against that background the logical remedies would have been to either allow an amendment of the particulars so the particulars alleged a proper basis of liability

---

16 *R v Tripodi* (1961) 104 CLR 1, *R v Ahern* (1988) 165 CLR 87.

17 See for example *R v Lewis* [1994] 1 Qd R 613

18 *Handlen & Anor v The Queen* [2011] HCA 51 8 December 2011 at [1] and [47]

according to law and proceeded with the trial or, if the amendment occasioned prejudice,[19] declare a mistrial and order a retrial of the case, properly particularised according to law.

[28] Such oppression as the case on proper analysis involves is not that the applicants were wrongly deprived of what should, but for legal errors have, been an acquittal, but that they were subject to a trial on a basis not known to law. They were not wrongly deprived of a chance at acquittal at a trial conducted according to law. They will in due course have that chance. As unfortunate as the delay in reaching that point is, it is, as already explained, not a delay of such a nature as to justify the extreme step of permanently staying the prosecution.

[29] The position has some similarity to that considered by the High Court in *Island Maritime Ltd v Filipowski*[20] where the owner and master of a ship were prosecuted on summonses which were fatally flawed at law. The High Court held proceedings on a second set of properly formulated summonses were not barred by the principle of autrefois acquit and did not constitute an abuse of process since the owner and master had not stood in jeopardy of lawful conviction on the charges in the first summonses.

[30] Conceptualising the issues in the above discussed manner demonstrates how uncontroversial the approach of Senior Counsel for Handlen and Paddison was in the High Court in apparently conceding a retrial was the appropriate order. It was not possible to sensibly contend there ought not be a retrial when the very premise of their argument why the proviso ought not have been applied was that the error was so fundamental that there had not been a trial according to law.

[31] I have approached deliberation upon this application on the basis the High Court's order of a retrial cannot preclude a different order by another court seized of information not before the High Court. However, the point of critical importance to the present argument is not materially removed from the point before the High Court. I am fortified in that view by the reference in argument and in the judgment to *R v Taufahema*[21] in support of the order for a retrial. This alone, provided a powerful if not determinative basis to reject the applications without considering them on their merits.

[32] In any event, I have considered the applications on their merits and, for the reasons discussed, they should be refused.

Order

[33] Applications refused.

---

19 It may be the defence could have identified prejudice flowing from the wrongful admission of some evidence had its admissibility been gauged by reference to a proper basis for liability.

20 (2006) 226 CLR 328

21 (2007) 228 CLR 232