APPLICATIONS FOR A PERMANENT STAY IN CRIMINAL PROCEEDINGS: A GUIDE TO PREPARATION AND APPLICABLE LEGAL PRINCIPLES

"The right of every man to a fair hearing before he is condemned lies at the root of the tree of justice"[1]

Where there has been a long delay between the time of an alleged offence and the date that the trial takes place defence lawyers should give serious consideration as to whether or not an application should be made for a permanent stay of proceedings on the basis that it is impossible for a fair trial to take place by reason that significant prejudice has arisen by reason of the delay. There was an explosion in the case law about this issue during the 1980's and 1990's.[2]

The "explosion" appears to have commenced with the case of R –v- Hakim.[3] In that case Mr Hakim was granted a permanent stay of proceedings. The trial judge was of the view that, in light of the medical evidence as to the state of health of the accused, to allow the trial to proceed would be out of accord with "common humanity". Later that year the High Court delivered judgment in Jago –v- The District Court of New South Wales and Ors.[4] Since that time there have been numerous appeals against the refusal of trial judges to grant a permanent stay of proceedings or, alternatively appeals by the Crown where the trial judge has granted a stay. An examination of unreported decisions of the Court of Criminal Appeal of New South Wales reveals that appeals by accused persons under section 5F of the Criminal Appeal Act 1912 (NSW) are rarely successful.

The purpose of this paper is to examine both the law on stay applications and what an accused needs to demonstrate in order to be successful on such an application. In Jago it was held that a permanent stay is a remedy of last resort, only used in the most exceptional circumstances, where any trial would

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1 Rowe –v- Australian United Steam Navigation Co Ltd (1909) 9 CLR 1.

2 S Henchliff "Abuse of Process and Delay in Criminal Prosecutions – Current Law and Process" (2002) 22 Australian Bar Review 18 at page 18.

3 (1989) 41 A Crim R.

4 Hakim was decided on 12 May 1989 and the judgment in Jago (168 C.L.R. 23) was delivered by the High Court on 12 October 1989.

involve such oppressive fairness incapable of being overcome that it would be an abuse of process. More recently, Hodgson JA expressed the opinion that that applicant for such a "extra ordinary remedy" bears a "heavy onus".[5]

In Jago Deane J expressed the view that it is not practicable to seek to precisely identify in advance the various factors which may be relevant in determining whether, in the circumstances of a particular case, unreasonable delay has produced the extreme situation in which any further proceedings should be permanently stayed. His Honour concluded that the "starting point" would be a consideration of the question of whether the delay is so prolonged that it is unreasonable in the context of a particular case.

His Honour referred to five "heads" that provide convenient reference points to answer the question as to whether or not the effect of a delay in a particular case is such to bring about a situation where any trial would necessarily be an unfair one from the accused's point of view in that a situation arises where the continuation of proceedings would be so unfairly oppressive that it would constitute an abuse of process. These five heads are as follows:

1. The length of the delay.
2. The reasons given by the prosecution to explain or justify the delay.
3. The accused's responsibility for and past attitude to the delay.
4. Proven or likely prejudice to the accused.
5. The public interest in the disposition of charges of serious offences and in the conviction of those guilty of crime.[6]

The length of the delay between the alleged offence and the trial is clearly a relevant matter although, in itself, is not determative of the success or failure of a stay application. Delay of itself is not sufficient. Actual prejudice by reason of the delay must be shown and is not presumed.[7] The case of R –v-

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5 Littler [2001] NSW CCA 173 120A – Crim R 512 at 513.
6 Jago (supra) page 60.
7 R –v- Westley (unreported) NSW Court of Criminal Appeal BC (6 August 2004) 200405173 para 12.

Birdsall[8] demonstrates that a delay, in itself, will not support a stay application unless any prejudice is shown. In that case there was a delay of 28 years between alleged sexual offences and a complaint being made to the police. The trial judge granted a permanent stay of proceedings. The Court of Criminal Appeal held that, in the absence of specific prejudice being shown, the Crown appeal against a permanent stay being granted should be successful.

The second head referred to by His Honour was the reasons given by the prosecution to explain or justify the delay. Whatever the reason for the delay, a stay application is unlikely to be granted unless it causes the result that the trial will be unfair to the accused or, alternatively, that it will be so unfairly oppressive that it would constitute an abuse of process.[9] Being "not reached" on five occasions caused sufficient prejudice in R –v- Nicholson due to the oppressive conduct that the accused was subjected to by "the District Court and its system".[10]

However, it is emphasised that whatever the reasons given by the prosecution to explain a delay those reasons will only be of assistance in a stay application where the delay causes significant prejudice to the accused or causes the commencement the trial to be an abuse of process.

The third head considered by His Honour was the accused's responsibility for and past attitude to the delay. If an accused is personally responsible for the delay in their prosecution, the courts will not permit them to rely on the effects of this delay to found an abuse of process argument.[11]

The fourth head referred by Deane J was the proven or likely prejudice to the accused. In preparing a stay application one needs to isolate and identify areas of actual prejudice. It is emphasised that unless there is such prejudice a stay application will not be successful even if the delay is considerable. It is

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8 Unreported NSW CCA 3 March 1997 BC 9701099
9 See reasoning of Deane J in Jago [supra] at page 6.
10 R –v- Nicholson BC 9803291 27 July 1998.
11 See Henchliffe [supra] page 23.

this fourth head to which His Honour refers that defence lawyers need to concentrate upon in order to isolate areas of likely prejudice to the accused and gather evidence to prove such prejudice. It is convenient to deal with a number of prejudicial matters that frequently arise by reason of delay. These are as follows:

1. loss of witnesses/death of witnesses;
2. loss of documents, records or other similar evidence;
3. the deteriorating physical health of the accused; and
4. the mental capacity of the accused to remember the circumstances of the matters alleged against him and to cope with the trial.

It is convenient to deal with a number of these issues:

Loss of Witnesses/Death of Witnesses

Even if a number of witnesses have died and/or are demented, as a result of the delay, it is particularly difficult to obtain a stay on this ground.

In R –v- Adler[12] Gleeson CJ (with whom the other members of the court agreed) expressed the view that:

> "The fact that a witness who is potentially able to corroborate an accused is, for one reason or another, such as death, disappearance or disability, unavailable at trial does not normally produce the result that the accused cannot obtain a fair trial and it has not been shown to produce the result in this case".

This passage would suggest that if a single witness goes missing such a situation will not justify a permanent stay. However, the passage leaves open the question as to the effect of the loss of several witnesses. The passage could be read to suggest that the more witnesses that have gone missing and/or are dead or demented, the greater the likelihood of that a stay application will be granted.

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[12] Unreported New South Wales Court of Criminal Appeal 60727/91 – 11 June 1992.

However, in McCarthy[13] Gleeson CJ (with whom the other members of the court) said that

> "Time and time again it happens in criminal proceedings that for any one of a variety of reasons witnesses who may be regarded as important by one side or the other dies, or become ill, or lose their memory or lose documents. If the result of that were that nobody could obtain a fair trial, and that proceedings had to be permanently stayed, it would go a long way towards solving the problems of delay in the criminal lists in this state. However, the position is that it is well recognised that an occurrence of that kind does not of itself mean that a person cannot obtain a fair trial and that the proceedings need to be stayed."

Notwithstanding the matters referred to above, it is submitted that in preparing a stay application those acting for the accused should specify the witnesses that are unavailable because of the delay and try and isolate the evidence that they could have given on specific issues in order to demonstrate prejudice. The potential to be able to demonstrate prejudice sufficient for a court to order a permanent stay will be increased where the police and/or prosecution authorities have not conducted a comprehensive investigation into the alleged offences by searching for potential material witnesses and the defence cannot get access to such witnesses by reason of delay.

In R –v- Littler, a case involving a delay of 38 years, Adams J said as follows:

> "The investigating police have a duty, in my view, to search out contemporaneous witnesses who might be able to shed light on the relevant circumstances. It is not appropriate to leave this investigation to the defence or, of course, to the complainant. Although in a sense, therefore, it is for the applicant to establish such prejudice as would justify a stay of proceedings, this should be in the context of a full and adequate investigation by the prosecuting authorities which provides a context that enables the court to evaluate in a sensible way the extent of the prejudice affecting the accused."[14]

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13 Court of Criminal Appeal (NSW) 60122/94 - 12 August 1994.

14 Littler [supra] page 516.

Nevertheless, it is important that one try and ascertain what evidence the dead or missing witnesses could have given. The absence of such knowledge caused difficulties in Tolmie[15] where Hunt CJ at CL pointed out that it was not possible to assess the prejudice that the accused might have suffered as a result of the missing evidence since nothing was known of what evidence, if any, the two unavailable witnesses could have given. Accordingly, the accused could not demonstrate a prejudice sufficient to justify a stay. It is therefore important, when preparing a stay application, that details of the anticipated evidence that a particular witness should have given should be specifically identified together with how delay in the prosecution has caused the loss the particular witness or, alternatively the witness's incapacity to give evidence.

Loss of Evidence

The loss of documents and records by reason of the delay between the date of an alleged offence and the date of trial can often make a fair trial impossible. However, it is essential that, if relying solely on this ground, the missing evidence needs to be identified and the effect of its loss examined. An application for a permanent stay based on this ground has no real prospect of success unless it can be demonstrated that such material would have assisted in the defence of the accused or, alternatively, the accused is seriously prejudiced by reason of its loss.

The effect of a failure to identify the effect of the loss on a stay application was demonstrated in R –v- VPH[16]. In that case a stay of proceedings was refused in relation to offences alleged to have been committed 30 years previously. It was accepted that the delay had resulted in the absence of relevant records. However, the accused was unable to demonstrate any disadvantage arising from the lack of records that would result in unfairness. The stay application was refused. It is important, if relying on loss of real evidence, to be able to demonstrate that the evidence that has been lost goes

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15 Unreported Court of Criminal Appeal NSW No 60503 of 7 December1994

16 Unreported NSW CCA 4 March 1994

to the substantive issue in the proceedings and not peripheral matters.[17] In R –v- Dodds & Harris ex parte Attorney General[18] there were allegations of sexual assault, some ten years previously. A statement made by the complainant to the police in 1986 and the entire police file had been lost. In 1994 the victim had made another statement to the police. It was argued by counsel for the accused that the loss of the original statements to the police was a matter causing prejudice. However, this application failed because there were original notes taken by the Department of Family Services in 1986 together with the notes of a doctor who first examined the alleged victim.

This situation is to be contrasted with R –v- Davis[19]. In that case a retired doctor was charged with indecent assault in that thirteen individual complainants alleged that the doctor carried out a vaginal examination in an inappropriate manner. It was alleged that the offences had occurred between 1960 and 1974. It was not until 1994 that charges were laid against the doctor. By the time his medical records had been destroyed. It was held that there was a special prejudice occasioned by the destruction of the medical records and, that without such records, it would be impossible for the doctor to check whether and why he had made an internal examination or give instructions to his counsel about the allegations. Although it was held that delay alone would not justify a stay, the fact that a special prejudice had arisen by reason of the loss of the medical records was sufficient for the stay application to be successful. The Court held that there is no public interest in bringing allegations of serious criminal conduct to trial where to do so would result in irreparable unfairness to the accused.

Deteriorating Physical Health of the Accused

Where there has been a decline in the health of the accused resulting from the delay in commencing a prosecution the accused can argue that, by reason of his deterioration of health, proceeding with a prosecution would be

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17 Unreported QCA 18 October 1996
18 Unreported QCA 18 October 1996
19 (1985) 82 A Crim R 156.

an abuse of process and that a permanent stay of proceedings should therefore be granted.

An example of a permanent stay being obtained on this ground is R –v- Hakim[20]. In that matter the accused was charged with events alleged to have taken place in 1983. The accused had a long history of heart disease, complicated by a complete heart block and had undergone a bypass operation in 1981. On the medical evidence he suffered a range of physical, neurological and psychological conditions and his prognosis was poor. His memory had been affected by his condition and subsequent treatment. Lee J noted that, at the time of the bringing of the stay application, the accused had been in the jail hospital for six months. Lee J granted a permanent stay. His Honour held that in light of the continuing deterioration of the accused it would be out of accord with common humanity to allow the charges to stand. His Honour held that, in such circumstances, the continuation of the prosecution would be an abuse of process.[21] A Crown appeal was dismissed.

This is to be contrasted with the decision of the Supreme Court of Western Australia in Austin[22]. In that case the accused was 87 years of age. He sought a stay in relation to ten counts of sexual offences involving female relatives. The delay in bringing proceedings in relation to those counts was extraordinarily long. The first of the matters was alleged to have taken place 48 years previously and the last of the alleged matters to have occurred approximately 16 years prior to the accused being charged.

The accused suffered from a number of physical ailments including arthritis, Menier's syndrome (a disease characterised by deafness, vertigo and tinnitus) and polythycemia vera (a form of hypertension characterised by thickening of the blood and diabetes). The court refused a stay application and concluded that there were mechanisms short of frustrating the prosecution entirely that

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20 (1989) 41 A Crim R.
21 41 A Crim R 379 at 377.
22 84 A Crim R 374.

could go a long way towards ensuring the fairness of the trial. The mechanism in question were a specific directions to the jury

In Bruce[23] the accused was 81 years of age. There was a 35 year delay in bringing proceedings. In the meantime the accused had developed prostate cancer, had suffered one small heart attack, was afflicted with atrial fibrillation and suffered from lymphatic leukaemia. The trial judge found that the medical evidence showed that the applicant was "quite unwell". His Honour concluded that this, on its own, did not establish that, from a physical point of view, the condition of the accused was such as to prevent him from standing trial or, further, that a trial would offend common humanity by reason of the physical condition of the accused.

The Mental Capacity of the Accused to Remember the Circumstances of the Matters Alleged against Him and to Cope with a Trial

Delay in bringing a prosecution has often resulted in the accused's mental capacity to withstand a trial being significantly reduced. Such a development is something that can usefully be relied upon as a ground to substantiate an application for a permanent stay.

However, it is essential that such incapacity was not self induced. In R –v- Richards[24] the accused, after having been interviewed by the police and denying allegations of unlawful sexual intercourse, attempted suicide by hanging. A neuro-psychologist gave evidence that the accused suffered a very severe prominent memory disorder consistent with the anoxia injury he had suffered by reason of the attempted suicide. A psychiatrist also gave evidence that the accused suffered from a severe memory impairment. Mullighan J held that

> "Lack of memory of the part of the accused could not justify the extreme step of a permanent stay particularly when it was in no way caused by or associated with any conduct by the part of the police or prosecuting authorities".

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23 Unreported 25 January 2006

24 64 SASR 42

This is to be contrasted with the situation with R –v- Littler[25] where the accused was 74 years of age at the time he made an application for a permanent stay. Mr Littler was facing trial for offences alleged to have occurred between 38 and 46 years prior to the commencement of the trial.

Although Mr Littler alleged prejudice by reason of the delay and unavailability of a number of witnesses, he also alleged a mental incapacity caused by the delay. The trial judge refused to grant a stay after hearing expert evidence from psychiatrists and psychologists called in the case of both the prosecution and the defence.

In that case the trial judge had concluded that

> "Whilst he may be handicapped by forgetfulness, I am not persuaded that the lack of memory is greater than it would have been in any other person of his age and that any memory problems have not been significantly affected by depression, anxiety, any medical condition or cognitive deficit".[26]

On appeal, Adams J concluded that His Honour had erred in finding that the relevant issue was whether the extent of the applicant's memory problems were no greater than other persons of the same age as the accused. Adams J concluded that

> "I consider that, in the end, the significance of any substantial difficulty likely to have an impact on the ability of accused to give evidence must be evaluated irrespective of its causes".[27]

Clearly, Adams J was quick to find that the trial judge had erred in this regard. His Honour simply concluded the trial judge was wrong to determine that the "relevant issue" was whether the extent of Mr Littler's memory problems were

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25 120 A Crim R 512
26 Littler [supra] page 527
27 Littler [supra] page 527

no greater than other persons of his age. On this issue Adams J concluded that:

> "The ability to give evidence coherently and fluently, without substantial hesitation and qualifications, to remember the evidence previously given in the trial by other witnesses as well as one's own testimony, quickly understand questions asked both in examination in chief and cross-examination and formulate responsive and consistent answers are all vital to an accused. In all of this, concentration and short term memory are crucial. Juries are quick to see hesitation as playing for time, qualifications as lack of candour and inconsistencies of proof of fabrication …. This will not necessary mean that the trial will be unfair, let alone that it should be stayed but, where it results from or is connected with any substantial delay not due to the accused, it must be considered, together with other substantial prejudicial circumstances to which I have referred, in determining whether a stay ought be granted. These problems are not merely cumulative, but each multiplies on the significance of the others".[28]

After having mentioned the effect of delay upon the applicant's ability to remember with reasonable reliability what Adams J called "the contextual facts" His Honour made the following comment:

> "To make a rather obvious point, if the applicant had committed the alleged offences, it seems likely that he could remember doing so, at least in general terms (thought it is important to note that specific offences are alleged). If, on the other hand, he did not commit the alleged offences, then his knowledge of and recollections about the complainants, his interactions with them and the surrounding circumstances might well be extremely vague".[29]

Greg James J made a similar point when he stated:

> "Trials as were here indicated in which, after so many years, each complainant is called without any other evidence which might reflect upon the credibility of his account, and in which the accused is affected by the problems the evidence here shows he is affected by, would in my view be unfair. What could the accused do to test the evidence after so long, if he were not guilty? All he could do would be, as he has here, to assert his lack of memory and a general denial".[30]

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28 120 A Crim R 512 at 527

29 Litter [supra] page 522

30 Littler [supra] page 514

Similarly, in R –v- Bruce (District Court unreported) Donovan DCJ dealt with an application by the accused for a permanent stay of the proceedings.[31] In that case the accused was 81 years of age and there was a delay, as at the time of the application between 33 and 35 years in the matters coming to court. The accused relied not only upon ill health and death of witnesses that could be called in his defence, but also upon his mental and physical condition to support his application. Donovan DCJ concluded that, notwithstanding he found that the accused was afflicted with prostrate carcinoma, regular chest pain, shortness of breath, leukaemia, an ulcer on his buttock and had suffered a heart attack, and further that he found the accused to be "quite unwell",[32] he did not think that the applicant's condition was of such seriousness that for him to stand trial would "offend common humanity".

Nevertheless, His Honour, after hearing evidence from the accused and his general practitioner, concluded that he was not persuaded that he could draw the inference that the accused could "handle himself" in the witness box, at "least at times". His Honour noted that the medical evidence was that his performance "in memory and mentally is variable"[33]

In Bruce the Crown asserted that the Court did not know what the effects of the disabilities suffered by the accused were compared to the average 81 year old or what effect those disabilities would on the ability of the accused to properly deal with the trial. Nevertheless, Donovan DCJ, referring to Littler indicated that it was appropriate for him to look at the overall situation of the accused and not just look at those matters which are "additional deterioration above the average".[34] On the basis of evidence from a neuropsychologist, called in the defence case, Donovan DCJ made a number of findings about the limitations of "mental condition" of the applicant.

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31 25 January 2006 (unreported)
32 Judgment of Donovan DCJ at page 8 transcript 27 January 2006.
33 Judgment 27 January 2006 page 12.
34 Judgment 27 January 2006 page 20.

Donovan DCJ, having found that he was concerned by the "psychological condition" of the accused, then proceeded to determine whether or not an adequate direction could cure the mental difficulties with which the accused was afflicted. His Honour found that there were no directions he could give to the jury to avoid the prejudice suffered by the accused and granted a permanent stay of the proceedings.

The Adequate Directions Test

Even if the delay in the prosecution is such that it causes a significant prejudice to the accused in the conduct of his trial, a permanent stay application will not be granted unless such prejudice is incapable of being remedied by a direction or a number of directions to a jury.

This principle is illustrated in Littler where Adams J concluded

> "In the end I do not see how adequate directions could be cast in terms adequate to deal with the difficulties in this case resulting from the delay, the absence of relevant evidence, the possibility of the loss of potential witnesses and the health and psychological condition of the applicant".[35]

Similarly, in Littler Greg James J concluded

> "For myself, I would add that the circumstances of the case are so unusual, the time since the event so long, and the applicant's prospects as proved by the evidence, of remembering so doubtful, that I am unable to propose a direction that would enable a fair trial to be had".[36]

Furthermore, Donovan DCJ in Bruce ultimately concluded that:

> "I have turned my mind to the question of what directions could be given to the jury in the present case and one of the difficulties that I find is that even if with the possible directions I have considered there would be some contradictions between them. This matter, in my view, involves an extremely difficult decision.

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35 Litter [supra] page 529.

36 Littler [supra] page 514.

> Ultimately I have come to the view that the totality of the circumstances concerning this application are such that I do not think there are adequate steps available to ensure that a fair trial would take place and therefore I have come to the conclusion that a stay should be granted".[37]

Matters to Note in the Preparation of an Application for a Permanent Stay

(a) **More than one application may be made for a stay**

In Bruce a previous application for a permanent stay had been bought by the accused by way of Notice of Motion in May 2005. This Motion was dealt with by Donovan DCJ on 11 August 2005 when His Honour dismissed the application. The original application sought a permanent stay soley on the basis of the accused's health. In the subsequent Notice of Motion, filed on 18 November 2005, additional bases for the permanent stay were argued being firstly, the death of and/or deterioration of available defence witnesses and, secondly, the deteriorating memory of the accused. On the second occasion the application was successful. Had there been no evidence of neuropsychologist in the defence case, it is questionable whether or not His Honour would have granted the stay.

The important principle is that more than one application can be made for a permanent stay. However, it was the presence a substantial amount of new material, on the occasion of the second stay application, that played a vital role in His Honour exercising his discretion to hear the second permanent stay application. His Honour noted that proceedings for a stay are "in the nature of an interlocutory order."[38] His Honour found that there had been no estoppel between the parties as there was "a substantial amount of new material". His Honour found that

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37 Bruce [supra] judgment 27 January 2006 page 31.

38 Judgment 25 January 2006 page 3.

> "The ultimate test in an application such as this is whether a fair trial can take place. It seemed to me that it was necessary to permit the application to proceed in order to determine whether in the circumstances a fair trial was possible."

Although the Crown submitted that the second stay application should be limited to the new material which was not before the judge on the previous occasion, His Honour found that, in order to decide whether a fair trial could take place, he would have to look at the totality of the material. On this basis His Honour concluded that it was appropriate to hear the second stay application as if it were a "fresh application" and consider "the totality of the evidence which has been brought before me".

Similarly, in Regina –v- VPH[39], Gleeson CJ, forming part of the Court of Criminal Appeal, held that the decision of the District Court Judge to refuse to grant a permanent stay demonstrated no error. Nevertheless, His Honour noted that it may be that, as the trial developed, and the evidence takes a certain course, there would be scope for a further application for a stay of proceedings. It is submitted that His Honour was clearly adverting to the fact that more than one stay application could be made even after the Court of Criminal Appeal had upheld that there was no error by the trial judge in initially refusing an application for a permanent stay.

(b) **The need to file affidavit evidence supporting the stay application**

In **Bruce** the accused filed an affidavit setting out the conditions with which he was afflicted paying particular attention to the difficulties that he had with his memory. He elected to be subject to cross examination on this document. The decision for the accused to take this course was based on the comments of Hodgson JA in Littler where His Honour said that he would feel a sense of "injustice to complainants" if a person charged with such offences could apply for and obtain a permanent stay "without going so far as to state on oath" what his difficulties are in dealing with the allegations. His Honour noted that if such an affidavit

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[39] Unreported Court of Criminal Appeal 4 March 1994 60599/93

were put on and the application for a stay refused, the affidavit would be material which could be used against the accused at a trial, subject to discretionary considerations. His Honour noted that an applicant on a stay would not have to submit to cross-examination on the affidavit, unless he or she elected to do so but that, if an election was made not to be cross examined on the document, it could be used as an exhibit. Similarly,in Littler Hodgson JA encouraged the applicant to put on an affidavit which he ultimately did although he elected not to be cross examined upon it. Similarly, Greg James J also concluded that, in an application for a permanent stay, sworn evidence from the applicant should be available.

Accordingly, in the event that an application is made for a permanent stay it should be supported by an affidavit setting out the case for the accused on the stay application.

(c) **The need to prepare a summary of the evidence that it is anticipated that dead and/or demented witnesses could give but for the delay**

In Bruce part of the applicant's case on the stay application was that the accused had suffered serious prejudice in that a number of witnesses were dead and several in such a demented state, or their health was such that they were unable to give evidence. In Bruce there were six witnesses who had died prior to the commencement of the first stay application. Additionally, two witnesses were critically ill, one of whom died between the first stay application and the second stay applicant. Donovan DCJ requested counsel for the applicant to prepare relevant matters which it was anticipated that each of the dead witnesses could have given and the terminally ill could have given in order to isolate the prejudice caused to the applicant.

On this basis, it is submitted that when making a stay application on the basis of dead and/or missing witnesses and/or evidence, it would be appropriate to prepare evidence that it was anticipated that that person could have given had they still be alive or in a condition to give evidence.

(d) **The need for expert evidence**

When preparing a stay application on the basis that an accused has suffered a significant deterioration in his health and/or mental capacity, by reason of the delay in instituting proceedings, it is necessary that expert evidence be obtained as to the effect of such disability. It is important to emphasise that in Littler the accused based his case upon expert evidence from a neuropsychologist. Similarly, in Bruce the first stay application failed in circumstances where there was no expert evidence from a neuropsychologist but succeeded, on the second occasion when such evidence had been obtained. It is important, when gathering such evidence, to direct to neuropsychologist to express an opinion as to how the accused compares to the whole population, by reason of his disability, and not just to those in his age group.

(e) **The need to take statements from witnesses**

Frequently, by reason of the delay in commencing a prosecution witnesses in the defence case may become ill or be rapidly declining in health, particularly in cases where the delay is significant. Section 294 of the Criminal Procedure Act makes provision for a Judge, Justice of the Peace who is a Registrar of the Local Court or Drug Court and a Justice of the Peace who is an employee of the Attorney Generals Department to take a deposition from a witness who is dangerously ill in circumstances where that person's evidence will probably be lost, if not immediately taken. In Bruce one of the witnesses was in such a condition and a deposition taken at a hospital by a Registrar of the Local Court. By the time that the second stay application came before the Court that witness had died and the deposition taken by the Registrar was used. This particular experience highlights to the need to take advantage of Section 284 or, alternatively, to take a statement from a witness who is deteriorating, have it witnessed and then to utilise the provisions of the Evidence Act 1995 to have that statement introduced into evidence.

Conclusion

From an examination of the authorities discussed in this paper it is apparent that a number of important principles can be deduced from those cases which are of assistance in considering whether or not to make a stay application. Those principles are as follows:

(a) Generally as a prosecutor has as much right as a defendant to demand a verdict of a jury on an outstanding indictment and the jurisdiction to stay proceedings is exceptional.
(b) A stay should never be granted where the delay has been caused by the complexity of the proceedings.
(c) It would be rare for a stay to be imposed on the absence of fault on the part of the prosecutor or complainant.
(d) Delay contributed to by the actions of the defendant would not found a basis for the stay.
(e) Memory difficulties encountered by an accused person as a result of actions taken by him that have affected his memory will be of no assistance on an application for a permanent stay.
(f) The accused bears a heavy onus in conducting an applicant for a permanent stay of proceedings which will only be granted in exceptional circumstances.
(g) Delay in itself is insufficient to support an application for a permanent stay. The delay must result in significant prejudice to an accused which cannot be cured by directions to a jury.
(h) The defendant needs to show on the balance of probabilities that owing to the delay he would suffer serious prejudice to the extent that no fair trial could be held and further that the prejudice which a defendant would have to show to justify a grant of a stay is prejudice which could not be cured by the appropriate ruling in the course of a trial or by judicial exclusion of evidence or an appropriate direction of the jury.
(i) Loss of evidence and/or the death or deterioration in memory of witnesses will only result in a successful permanent stay application in exceptional circumstances and only where significant prejudice can be

demonstrated which is not capable of being eliminated by a direction to the jury.

(j) That any prejudice arising to an accused by reason of delay in commencing criminal proceedings will only result in a stay application being granted if such prejudice cannot be corrected by a direction to the jury.[40]

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[40] Several of these principles were formulated by Donovan DCJ in Bruce. I have added to the list created by His Honour which can be found at page 26 of his judgment delivered 27 January 2006.