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ABUSE OF JUDICIAL PROCESS IN CRIMINAL PROCEEDINGS[1]

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INTRODUCTION

1. Lawyers will be aware of the concept of abuse of process and the remedy of a permanent or temporary stay of proceedings.

2. Courts have long held they have the power to unilaterally terminate criminal prosecutions that inflict unfairness or tend to undermine the legitimacy of the judicial branch of government. Such prosecutions are considered to be an abuse of process and can be terminated, either permanently or conditionally, by way of a stay of proceedings being ordered on the charge or indictment.

3. The purpose of this paper is to assist lawyers in identifying when an abuse of process may be occurring in a criminal prosecution, when an application for a stay might be appropriate and how to make such an application.

4. The paper analyses a mixture of Fijian, Australian, New Zealand, United Kingdom and international case law. Abuse of process is entirely judge made law, uncodified by statute, and it is only through understanding case law that one can understand the doctrine.

5. Part one of the paper overviews the concept of 'abuse of process' and analyses what the courts have regarded as the relevant values, principles and other considerations to balance in determining whether such an abuse is occurring.

6. Part one necessarily contains an analysis of various provisions of the Constitution of the Republic of Fiji and how they might impact upon a court's consideration of whether an abuse of process has occurred and whether a stay of proceedings should be granted.

7. Part two of the paper attempts to set out in an accessible form a summary of the recognized circumstances when a judicial officer can order a stay of proceedings on the basis of an abuse of process. This part of the paper divides abuse of process into various categories which have been posited in the case law.

8. Part two must however be read with the caveat that the categories of abuse of process are not closed and courts will apply the doctrine flexibly and as required and without necessary reference to previous case law dealing with a particular factual circumstance. It should also be read with the caveat that the particular constitutional context of Fiji may mean that the existing categorization is inaccurate in some instances.

9. Part three of the paper explores some procedural aspects of applications for a stay and examines questions of jurisdiction, onus, standard, procedure and evidence. The applicable court rules that govern procedural matters are also discussed.

WHAT IS ABUSE OF PROCESS

Purpose and History

10. The concept of abuse of process, as an actionable wrong and a basis for a stay of proceedings has been developed by the courts of the common law world over an extended period. The fundamental purpose of the doctrine is preventing the judicial system being used in a way that is inconsistent with its fundamental values, purposes and principles. It has a number of different fields of operation depending on the legal context.

11. Abuse of process has a long history in the civil law[3], but a much more recent lineage in the criminal law. It's applicability in criminal matters was first accepted by the House of Lords in *Connelly v DPP*[4] in 1964 and in Australia by the High Court in *Barton v R*[5] in 1980, albeit in *obiter dictum*.

12. Subsequent to these decisions, (which concerned double jeopardy and the deprivation of committal proceedings, respectively), there has been somewhat of an explosion in case law defining and extending the reach of abuse of process. The abuse of process doctrine now existing as part of the criminal law would be barely recognizable to a lawyer from the Nineteenth Century or indeed one from the early parts of the Twentieth Century.

13. This explosion led one learned commentator in 2007 to describe abuse of process, "*one of the largest growth areas of law in the criminal trial jurisdiction*".[6] Fiji has been no exception in this regard and the case law here contains a large number of cases where abuse of process has been found to attend criminal prosecutions.

14. In *Connelly*[7] Lord Devlin posed two powerful questions:

> *"Are the courts to rely on the Executive to protect their process from abuse? Have they not themselves an inescapable duty to secure fair treatment for those who come or are brought before them? To questions of this sort there is only one possible answer. The courts*

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[3] See *Metroplitan Bank v Pooley* (1885) LR 10 App Case 210 Lord Blackburn said, "from early times (I rather think, though I have not looked at it enough to say, from the earliest times) the Court had inherently in its power the right to see that its process was not abused".
[4] [1964] AC 1254
[5] *Barton v R* [1980] HCA 48; (1980) 147 CLR 75 (5 December 1980)
[6] Bray, R. 'Beckford and Beyond. Some Developments in the Doctrine of Abuse of Process' (2007) 19 Denning Law Journal 69, 69.
[7] [1964] AC 1254

cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the process of law is not abused."

15. Recent judicial history in the common law world provides emphatic answers to both questions, as this paper will attempt to demonstrate. While it has varied from jurisdiction to jurisdiction, and judge to judge, generally it can be said that the courts have risen to Lord Devlin's challenge.

16. As such, abuse of process is an essential part of the modern criminal law and as such, an essential part of the armory of the modern criminal lawyer, whether they be a public lawyer, or a private practitioner.

17. In the criminal law abuse of process can be understood as a concept descriptive of circumstances attending a prosecution such that the prosecution should be pre-emptively terminated by the court with jurisdiction to hear the matter. This termination can be either permanent (the "permanent stay") or conditional upon certain action by the prosecution (the "temporary stay").

18. In the civil law however abuse of process is both a tort and a phrase descriptive of the circumstances when an action will be stayed.

19. The common premise to each of these expressions of the doctrine is the circumstance of judicial process being misused by a party either to inflict unfairness upon a party, or to make it unfair in a broader societal sense, for the action to proceed.

20. By misuse is meant conduct inconsistent with recognized rights, values and principles protected by the legal system. It has been said that preventing such misuse is necessary to prevent unfairness, but also to defend the very existence of the courts, because their existence depends on the maintenance of public confidence, which is eroded by such misuse.

21. In *Williams v Spautz*, Mason CJ, Dawson, Toohey and McHugh JJ pointed to two important reasons for the existence of the doctrine, at 520:

> *"The first is that the public interest in the administration of justice requires that the court protect its ability to function as a court of law by ensuring that its processes are used fairly by State and citizen alike. The second is that, unless the court protects its ability so to function in that way, its failure will lead to an erosion of public confidence by reason of concern that the court's processes may lend themselves to oppression and injustice."*

A Doctrine Resting on Fundamental Values and Principles

22. Because the doctrine is uncodified and rests on underlying values discerned often by intuitive judgment it is necessary to understand some of the underlying values, purposes and principles of the criminal law to understand

abuse of process; and when a court will remedy it by ordering a stay of proceedings.

23. It is suggested these include:

- Accountability according to law – Achieved through the conviction and punishment of offenders.

- Finality – This has a central place in the criminal law. It finds expression in the principles of *autrefois acquit* and *autrefois convict*. In the civil context issue estoppel, *res judicata* and promissory estoppel are based on the finality principle. Finality is also a central consideration in abuse of process.

- Respect for the rule of law - Not just by citizens, but also by the state itself. In this sense the criminal law values achieving accountability, but only through proper and lawful means.

- Protection of individual rights – The criminal law operates in the context of a free and democratic society and its concern for accountability is generally tempered by respect for individual rights.

- Fairness and equality before the law - Perhaps the most important manifestation of this underlying value is fair trial principles.

24. It is seen below that in almost every instance where a stay has been granted the court has needed to balance some, or all, of these values, purposes and principles.

25. Resting as it does on an assessment of the consistency of a prosecution with fundamental values and principles the doctrine is necessarily imprecise and requires the making of fine judgments by courts.

CATEGORIES OF ABUSE OF PROCESS IN THE CRIMINAL LAW

26. Courts in various parts of the common law world have attempted to broadly categorize the types of circumstances where a court should refuse to allow a criminal prosecution to proceed because to do so would constitute an abuse of process.

27. While the categorization may vary somewhat the fundamental considerations are the same.

28. In *Hui Chi Ming*[8] Lord Lowry described abuse of process as [at 57] :

8 [1992] 1 AC 34

"..something so unfair and wrong that the court would not allow a prosecutor to proceed with what is in all other respects a regular proceeding"

29. In *R. v. Beckford*[9] Lord Justice Neill of the Court of Appeal of England and Wales stated at 100:

"The jurisdiction to stay can be exercised in many different circumstances. Nevertheless two main strands can be detected in the authorities:

a) Cases where the court concludes that the defendant cannot receive a fair trial;

b) Cases where the court concludes that it would be unfair for the defendant to be tried."

30. In *Canadian Union of Public Employees v City of Toronto and Attorney General of Ontario*[10] Arbour J of the Supreme Court of Canada stated:

"Judges have an inherent and residual discretion to prevent an abuse of the court's process. This concept of abuse of process was described at common law as proceedings "unfair to the point that they are contrary to the interest of justice" (R. v. Power, [1994] 1 S.C.R. 601, at p. 616), and as "oppressive treatment" (R. v. Conway, [1989] 1 S.C.R. 1659, at p. 1667). McLachlin J. (as she then was) expressed it this way in R. v. Scott, [1990] 3 S.C.R. 979, at p. 1007:

. . . abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice".

31. In *R v Rogers*[11] Mason CJ of the High Court of Australia stated at [256[:

These statements indicate that there are two aspects to abuse of process: first, the aspect of vexation, oppression and unfairness to the other party to the litigation and, secondly, the fact that the matter

9 (1996) 1 Cr. App. R. 94

10 2003 SCC 63

11 (1994) 181 CLR 251

complained of will bring the administration of justice into disrepute. This led the majority in Walton v. Gardiner to state that the question whether criminal proceedings should be permanently stayed was to be determined by a weighing process involving a balancing of a variety of considerations ((12) (1993) 177 CLR at 395-396.). Those considerations, which reflect the two aspects of abuse of process outlined above, include ((13) ibid. at 396.):

"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".

32. More recently in *Moti v The Queen*[12] the High Court (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) confirmed two broad purposive categories of abuse of process at [57]:

"The third basic proposition is that, as pointed out in the joint reasons of four members of this Court in Williams v Spautz[76], two fundamental policy considerations affect abuse of process in criminal proceedings. First, "the public interest in the administration of justice requires that the court protect its ability to function as a court of law by ensuring that its processes are used fairly by State and citizen alike"[77]. Second, "unless the court protects its ability so to function in that way, its failure will lead to an erosion of public confidence by reason of concern that the court's processes may lend themselves to oppression and injustice"[78]. Public confidence in this context refers to the trust reposed constitutionally in the courts to protect the integrity and fairness of their processes. The concept of abuse of process extends to a use of the courts' processes in a way that is inconsistent with those fundamental requirements".

33. Various authorities from Fiji have similarly posited discrete categories of circumstances where abuse of process will be held to exist.

34. Bruce J in *Takiveikata v State*[13] adopted a broad division of two categories:

"It is common ground that the High Court of Fiji, being a superior court of record, has an inherent jurisdiction to stay proceedings which are determined by the Court to be an abuse of the process of the court. Generally speaking, the circumstances in which this court might consider the imposition of a stay of proceedings are:

(1) circumstances are such that a fair trial of the proceedings cannot be had; or

[12] *Moti v The Queen* [2011] HCA 50 (7 December 2011)
[13] [2008] FJHC 315; HAM039.2008 (12 November 2008)

(2) there has been conduct established on the part of the executive which is so wrong that it would be an affront to the conscience of the court to allow proceedings brought against that background to proceed.

35. This paper separates out the two broad categories of abuse of process into four broad classes of cases:

- Proceedings that would inflict an unfair trial on an accused
- Proceedings that are vexatious or oppressive and would therefore be unfair in a broader sense
- Proceedings that are brought for a collateral purpose
- Proceedings that otherwise bring the administration of justice into disrepute

36. Various examples of each category are detailed below.

37. To a very significant extent however any categorization of abuse of process will produce blurred boundaries with many of the well-established grounds for a permanent stay premised on more than one of the four categories above.

38. The law is clear that the categories of abuse of process are not closed and that the question of whether such an abuse is occurring must be determined by reference to the underlying values, principles and purposes of the law which the courts exist to uphold, not by reference to rigid categories or the limits of existing case law.

39. In *R v Carroll*[14] Gleeson CJ and Hayne J stated at 47:

"*The circumstances that may constitute oppression or an abuse of process are various. The discretionary considerations that may be relevant in dealing with them cannot be rigidly confined".*

40. As discussed above, and again below, the constitutional context of Fiji may also mean the existing categories become further blurred.

ABUSE OF PROCESS GENERALLY IN THE CIVIL LAW

41. Before moving on to discuss the various categories of abuse of process in the criminal context it is useful to briefly examine the doctrine in the civil context.

14 (2002) 213 CLR 635

42. In the civil law abuse of process is a civil wrong, actionable at law which can lead to the payment of damages.

43. The tort was described in this way by Prosser and Keeton at page 894[15]:

> *"Abuse of process differs from malicious prosecution in that the gist of the tort is not commencing an action or causing process to issue without justification, but misusing, or misapplying process justified in itself for an end other than that which it was designed to accomplish. The purpose for which the process is used, once it is issued, is the only thing of importance. Consequently in an action for abuse of process it is unnecessary for the plaintiff to prove that the proceeding has terminated in his favour, or that the process was obtained without probable cause or in the course of a proceeding begun without probable cause."*

44. In *Williams v Spautz*[16] Mason CJ, Dawson, Toohey and McHugh JJ stated at 523

> *"Central to the tort of abuse of process is the requirement that the party who has instituted proceedings has done so for a purpose or to effect an object beyond that which the legal process offers."*

45. The tort of abuse of process is fundamentally concerned with the concept of collateral purpose, where proceedings are initiated or maintained with an ulterior motive foreign to the law.

46. The tort however is not a mechanism by which a proceeding can be terminated at any early stage.

47. In this sense it does not play the same protective function as a permanent stay of proceedings based on abuse of process.

48. In *Williams v Spautz*[17] Mason CJ, Dawson, Toohey and McHugh stated at 520:

> *"Neither the action for malicious prosecution nor the action for collateral abuse offers the prospect of early termination of the subject proceedings. An action for malicious prosecution cannot be brought until those proceedings have terminated. Although an action for collateral abuse can be brought while the principal proceedings are pending, the action is at best an indirect means of putting a stop to an abuse of the court's process which the court should not permit to continue."*

15 Prosser and Keeton, Law of Torts (5th ed) 1984

16 (1992) 174 CLR 509

17 (1992) 174 CLR 509

49. In addition to constituting a tort, abuse of process can also be used to achieve an early termination of civil proceedings through the granting of a stay of proceedings.

50. In *Batistatos v Roads and Traffic Authority of New South Wales*[18] the judgment of Gleeson CJ, Gummow, Hayne and Crennan JJ stated at 8:

> *"It is accepted that the inherent power identified by Lord Diplock applies to both civil and criminal proceedings. However, the power does so with somewhat different emphases attending its exercise. In Williams v Spautz, Mason CJ, Dawson, Toohey and McHugh JJ identified two fundamental policy considerations affecting abuse of process in criminal proceedings. Their Honours said[21]:*
>
> > *"The first is that the public interest in the administration of justice requires that the court protect its ability to function as a court of law by ensuring that its processes are used fairly by State and citizen alike. The second is that, unless the court protects its ability so to function in that way, its failure will lead to an erosion of public confidence by reason of concern that the court's processes may lend themselves to oppression and injustice."*
> >
> > *These considerations are not present with the same force in civil litigation where the moving party is not the State enforcing the criminal law. Earlier, in Jago v District Court (NSW), Mason CJ had observed[22]:*
> >
> > *"[T]he criteria for determining what amounts to injustice in a civil case will necessarily differ from those appropriate to answering the question in a criminal context."*

ABUSE OF PROCESS AND CONSTITUTIONAL CONTEXT

51. The tension between executive and judiciary, in the context of claims of executive impingement on fundamental rights recognized by law, such as can occur in the context of the application of abuse of process doctrine, will be inevitably impacted upon by the legal character of those fundamental rights.

52. In Fiji of course there a broad array of internationally recognized civil and political rights that are constitutionally enshrined in Chapter 2 of the Constitution.

53. Any application of abuse of process doctrine in a criminal case in Fiji will therefore generally raise issues as to the role of these constitutional rights

18 [2006] HCA 27

(and their implementing mechanisms), in the decision of a permanent stay application.

54. In Australia by contrast the constitutional impact is minimal, with no constitutional bill of rights, we are left with some important constitutional express protections and implied restrictions, but generally are dependent on common law rights and protections as they inform the judicial discretion to stay proceedings.

55. Particularly relevant constitutional rights in the Fiji context, from the perspective of the well-established categories of abuse of process discussed below, would include:

- Rights to personal liberty[19]
- Freedom from cruel and degrading treatment[20]
- Freedom from unreasonable search and seizure[21]
- Rights of arrested persons[22]
- Right to silence[23]
- Protection against double jeopardy[24]
- Right to a fair trial [25]
- Right to a trial that begins and concludes without unreasonable delay[26]
- Right to consult with a legal practitioner and be represented[27]
- Right to executive and administrative justice[28]

56. Article 1 of the Constitution importantly states on what values the sovereign democratic republic of Fiji is founded upon.

57. They include:

- Common and equal citizenry

[19] Article 9
[20] Article 11
[21] Article 12
[22] Article 13
[23] Article 13 and 14(2)(j)
[24] Article 14
[25] Article 14 and 15
[26] Article 14
[27] Articles 13 and 14
[28] Article 16

- Respect for human rights, freedom and the rule of law
- An independent, impartial, competent and accessible system of justice
- Equality for all
- Human dignity and respect for the individual, personal integrity and responsibility
- Good governance, including the limitation and separation of powers
- Transparency and accountability

58. Article 2(4) makes it clear that the Constitution is to be enforced through the courts, to ensure that "law and conduct" are "consistent" with its terms, that "rights and freedoms are protected" and duties under the Constitution performed.

59. Article 3 (1) requires that any person interpreting or applying the constitution "*promote the spirit, purpose and objects of the Constitution, and the values that underlie a democratic society based on human dignity, equality and freedom*".

60. Article 6 (sitting within chapter 2) requires every person holding public office to, "*respect, protect, promote and fulfill the rights and freedoms*" contained in the chapter.

61. Article 7 speaks to the interpretation of chapter 2 and importantly limits judicial decision making, in that, under article 7(4) "*when deciding any matter according to common law, a court must apply and where necessary, develop common law in a manner that respects the rights and freedoms recognised*" in the constitution (my bolding).

62. This is not to suggest that rights are absolute and the Constitution contains provisions for the lawful and necessary limiting of rights in particular circumstances[29].

63. The existence and enforcement of these rights takes place in the context of a constitutional entrenchment of judicial independence, impartiality, accessibility and effectiveness.

64. While the constitution makes specific provision for redress for breach and enforcement of rights through action in the High Court, such action for enforcement is stated to be, *"without prejudice to any other action with respect to the matter the person concerned may have".*

[29] Article 6(5) generally and other specific sections particularly.

65. In any consideration of the way the judiciary responds to executive misconduct, or unfairness to an accused person, that give rise to the real possibility of a permanent stay being granted, consideration of relevant rights and values will generally, I would suggest, be important.

66. Firstly the constitutional entrenchment of rights could mean their breach carries greater weight in determining whether the relevant test of abuse of process is met.

67. Secondly the entrenchment may mean that the existing common law categories of abuse of process might eventually blur even further. Should for example it be necessary to demonstrate that a trial will be necessarily unfair before a stay is granted when the constitutional right to a trial without unreasonable delay has been violated? The categorization of abuse of process in criminal proceedings generally suggests so (as is discussed below). Could it be that this may not always survive the application of constitutional weight to the question, for example, could egregious delay in criminal proceedings alone mean the courts should dissociate themselves with the prosecution as a matter of public confidence, even when a fair trial is still possible?

68. This may be a more relevant question in recent times, as many common law countries become more flexible in their assessment of what constitutes a fair trial[30] and recognize many now accepted incursions into the previous rights of the accused person.[31] In the United Kingdom for example persons have been considered to have been fairly tried after delay of many decades in charge. A strict requirement that a fair trial is impossible before a stay will be granted may mean, depending on what view is taken as to fairness, that the constitutional right is almost never able to be vindicated by the powerful tool of the permanent stay.

69. Choo[32] has suggested that in respect of delay a stay should be granted, independent of fair trial questions, when a more amorphous test is met, when, "*the delay has, by causing the defendant to suffer oppression, anxiety, or concern, compromised the moral integrity of the criminal process to such an extent that the public interest still requires a stay of the proceedings*".

70. Alternatively could the new Constitution and its enforcement provisions justify a new 'category' of abuse of process in criminal proceedings, where the stay power is used to vindicate constitutionally entrenched rights in

[30] See in Wells, Colin. Abuse of Process. Second Edition. Discussion at 122-125 of the way in which courts in the United Kingdom have tailored trials to allow war crimes and historical sex crimes trials to proceed despite extremely lengthy delay.
[31] See discussion below regarding the operation of special legislature measures at trial in relation to sexual offences for example.
[32] Choo, Andrew L-T. Abuse of Process and Judicial Stays of Criminal Proceedings. Second Edition. Pg 93.

appropriate cases, independent in principle of trial fairness or public confidence issues?

71. This is not suggest that such constitutional rights will necessarily have determinative significance when permanent stay applications are considered. The constitution itself also protects the rights of people who become complainants in criminal matters and seems to create so called "horizontal rights" between citizens in some instances. This might well be considered relevant in counter balancing the importance of the rights of the accused in a criminal matter.[33]

72. For example Article 11 states, "*every person has the right to security of the person, which includes the right to be free from any form of violence from any source, at home, school, work or in any other place*" (my bolding). This right might legitimately weight in the balance in the consideration of whether a prosecution should be stayed on the basis of a violation of a constitutional right.

73. If the constitutional entrenchment of the rights of the person accused is considered relevant so to could the similar entrenchment of rights held by complainants and allegedly violated by the accused.

74. This is not to suggest that every question of abuse of process is susceptible to a balancing exercise, if for example a trial will be unfair it ought to be stayed, notwithstanding the impact of this on the rights of a complainant.

75. However in determining whether for example a prosecution undermines public confidence in the administration of justice fine questions of degree and fact are involved, particularly perhaps in the instance of less egregious rights violations. In this context it would seem proper that the rights of complainants might gain some relevance.

LEGAL CHARACTER OF THE POWER TO PREVENT AN ABUSE OF PROCESS

76. Being a necessary power (and one generally left uncodified by parliament), the power to prevent an abuse of process is generally described as one inherent in judicial power, rather than one bestowed expressly by statute, or necessarily implied from another express grant of power. It is generally sourced as arising from the court's inherent jurisdiction.

77. Mason CJ in *Jago v District Court of NSW*[34] stated at 25:

> *"It is convenient to commence by considering the inherent power of courts to prevent abuses of their process. It is clear that Australian courts possess inherent jurisdiction to stay proceedings which are an abuse of process: Clyne v. N.S.W. Bar Association [1960] HCA 40;*

[33] See articles 2(3) and section 6(3).
[34] (1989) 168 CLR 23

(1960) 104 CLR 186, at p 201; Barton v. The Queen [1980] HCA 48; (1980) 147 CLR 75, at pp 96, 107, 116"

78. The power to stop an abuse of process however also subsists in an inferior statutory court despite its lack of 'inherent jurisdiction'.[35]

79. In *Sahim v State*[36] Winter J held at [31-32]:

> *"I am satisfied that despite the limited statutory jurisdiction of a Magistrates Court an individual Magistrate does indeed have the ancillary power to act effectively within his or her jurisdiction. That must include the power were appropriate to entertain an application for abuse of process on the basis of delay. Such applications involve the exercise of the courts ancillary powers. The court could consider the constitutional jurisprudence for such applications but would of course only exercise ancillary powers in coming to a decision.*
>
> *These observations are not to be taken as in any way limiting an accused's right in appropriate circumstances to bring a pure constitutional redress application that would lift the matter out of the Magistrates Courts jurisdiction altogether. Application for such a redress of rights even in criminal matters has to be made to the High Court in its special constitutional jurisdiction (see Singh vs Director of Public Prosecutions, a decision of the Court of Appeal dated the 16th of July 2004, AAU0037 of 2003S)".*

80. In *DPP v Shirvanian*[37] Mason *P* described the power *as* "*an essential attribute of the exercise of the jurisdiction with which it is invested*" and stated at [185]:

> *"Since the principle which gives rise to the power in a proper case to grant a stay is that "the public interest in holding a trial does not warrant the holding of an unfair trial" (Jago (at 31; 311-312), per Mason CJ), it follows that such power resides in a magistrate of the Local Court hearing a (summary) trial unless excluded by clear words. The duty to observe fairness, at least in its procedural sense, is a universal attribute of the judicial function. Those aspects of a fair trial known as the principles of natural justice apply by force of the common law and the presumed intent of Parliament unless clearly excluded in a particular context. In my view, the same can be said about the power to prevent abuse of process as an incident of the duty to ensure a fair trial. And I can see no principled ground for excluding a power to grant a stay to prevent or nullify other categories of abuse of process.*

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[35] The issue of whether the Local Court of New South Wales has the power to permanently stay proceedings in indictable matters being dealt with summarily was recently considered by Magistrate Heilpern in *R v KF*[35]. His Honour, referring to the decision of Dawson J in *Grassby v The Queen*[35], held that "*where there has been no election by the DPP, the court is vested with the necessary power to permanently stay the proceedings*."[35]

[36] [2007] FJHC 119; HC CA No HBM 32 of 2006 (30 March 2007)

37 (1998) 102 A Crim R 180

81. There is a line of developing authority which suggests that the High Court of Australia may be attracted to the idea that the power to act against an abuse of process is a power to be implied from the constitution, arising from the grant of judicial power by Chapter 3 of the Constitution of Australia itself.[38]

82. In *Dupas v R*[39] the High Court stated at 15:

> *"Having regard both to the antiquity of the power and its institutional importance, there is much to be said for the view that in Australia the inherent power to control abuse of process should be seen, along with the contempt power, as an attribute of the judicial power provided for in Ch III of the Constitution. However, on the trial of the appellant the Supreme Court did not exercise federal jurisdiction and no question arises respecting the validity of any State legislation denying or limiting the inherent power of State courts to control abuse of their processes in matters not arising in federal jurisdiction"*

THE REMEDIES FOR AN ABUSE OF PROCESS IN CRIMINAL PROCEEDINGS

AN ORDER FOR A STAY OF PROCEEDINGS

83. As discussed one remedy for an abuse of process in criminal proceedings is the granting of a permanent stay. Such an order is a final order terminating criminal proceedings. It represents the refusal of a court to adjudicate on the dispute sought to be brought before it by the prosecutor. A lesser remedy is the granting of a temporary stay until the abuse of process is remedied. This will obviously only occur where the abuse of process is capable of being remedied, for example by the payment of costs, the calling of a witness, the disclosure of evidence or some other action that will then allow the proceedings to continue.

84. A permanent stay generally has the same effect as an acquittal. Though there is some authority that an application can be made for the rescinding of the permanent stay if the basis for the stay no longer exists.[40]

85. It is said that the remedy is an exceptional one[41], to be exercised on the discretion of the trial judge[42], but one that should be given if an abuse of process is demonstrated[43] and there is no lesser means to alleviate the abuse of process.

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[38] One significance of this constitutional charectarisation of the power would be that any legislative attempt to curtail the power would be beyond power.

[39] [2010] HCA 20

[40] *R v Griffiths* (1980) 72 Cr App R 307 (CA)

[41] *Jago v District Court of NSW* (1989) 168 CLR 23 at pg 76 per Gaudron J

[42] *R v Carroll* (2002) 213 CLR 635 at 657 per Gaudron and Gummow JJ

[43] *R v Carroll* (2002) 213 CLR 635 at 657 per Gaudron and Gummow JJ

86. The procedure for obtaining a stay of proceedings is discussed in part three of this paper.

ABUSE OF PROCESS AS A BASIS FOR EXCLUDING EVIDENCE OR GIVING CERTAIN DIRECTIONS

87. Another remedy for an abuse of process is the exclusion of evidence or the giving of particular jury directions designed to obviate the unfairness.

88. This follows as recognition of the fact that the remedy of a permanent stay is an 'exceptional remedy' which immunizes an accused from prosecution and frustrates the pursuit of accountability.

89. It also follows from the fact that much of the machinery and substance of the law is aimed at achieving the same ends as the abuse of process doctrine, namely a fair trial which maintains public confidence in the courts.

90. This is not to suggest that a trial will be allowed to proceed notwithstanding an abuse of process.

91. It will only be if the lesser remedy can cure, prevent or otherwise nullify the abuse that the lesser remedy will suffice.

92. In *R v Johannsen & Chambers*[44] Fitzgerald J stated at 135 (my emphasis):

> *"… there is a strong predisposition towards permitting prosecutions to proceed, with procedural and other rulings and directions moulded to achieve a fair trial which produces a result free of the taint of risk of miscarriage of justice ... A stay should not be granted if the prosecution can proceed, uninfluenced by improper purpose, without unfairness to the accused, with a legitimate prospect of success and, in the event of conviction, no significant risk that, because of delay or other fault on the part of the prosecution, an innocent person will have been convicted."*

93. In *R v Ferguson; ex parte A-G (Qld)*[45] the Queensland Court of Appeal stated at 19:

> *"The exceptional jurisdiction permanently to stay proceedings is truly residual in character in the sense that it falls to be exercised only in those cases where the other legal safeguards of the right of the accused to a fair trial are not apt to secure that right".*

44 (1996) 87 A Crim R 126

45 [2008] QCA 227

94. One example might be where the evidence sought to be admitted had the effect of controverting an acquittal obtained in earlier proceedings. If the evidence that had that tendency could be confined and excluded then the prosecution might be allowed to continue.

95. A further example might be the exclusion of evidence in circumstances where but for exclusion a trial would not be fair. Any number of examples could be considered. Similarly, tailored jury directions are generally considered suffice to cure the prejudicial effect of pre-trial publicity.

96. Conceptually it is perhaps helpful to view the common law and statutory powers of exclusion as resting on many of the same underlying policy considerations as the abuse of process doctrine and thus available as alternatives to the power to stay proceedings.

THE RELEVANCE OF ABUSE OF PROCESS TO THE EXERCISE OF DISCRETION

97. If the exercise of a discretion in a particular way will occasion an abuse of process then that discretion will be exercised so as to avoid the abuse of process.

98. An example of this in New South Wales is the power of a court to amend an indictment pursuant to section 20 of the *Criminal Procedure Act*.

99. In *R v Sepulveda*[46] the appellant appealed from orders allowing the amendment of an indictment and dismissing a consequent application for a permanent stay. Giles JA stated at 74:

> *"The appellant accepted that the considerations governing whether leave should be granted and whether there should be a stay of proceedings on terms were common to both. In substance, the submissions extended to both. It follows from what I have said that I do not think error has been shown in the judge's exercise of discretion in declining a stay of proceedings".*

AN EXCEPTIONAL POWER

100. The power to do stay a prosecution is generally considered an "exceptional" one. This exceptionality is perhaps twofold. Firstly, permanent stays are rare and have often been considered to depend on the existence of exceptional circumstances.

46 [2003] NSWCCA 131 at para 74

101. More conceptually however, the power for a court to effectively review the executive decision to bring a prosecution sits in tension with the separation of powers and judicial independence.

102. As Mason and Gibbs JJ) said in *Barton v R*[47] at [29]:

> *"It has generally been considered to be undesirable that the court, whose ultimate function it is to determine the accused's guilt or innocence, should become too closely involved in the question whether a prosecution should be commenced - see the speeches in Connelly v. Director of Public Prosecutions (1964) AC 1254 and Director of Public Prosecutions v. Humphreys (1977) AC 1 , to which we shall refer shortly - though it may be that in exercising its power to prevent an abuse of process the court will on rare occasions be required to consider whether a prosecution should be permitted to continue".*

103. Courts exist to determine the merits of disputes, rather than the merits of a decision to bring a dispute to a court at all. Ruling that a dispute between the parties, otherwise properly brought, cannot be tried at all, may as much undermine public confidence as declining to do so. Many words of judicial caution counsel against the too ready resort to this exceptional power.

THE CIRCUMSTANCES IN WHICH A COURT WILL ORDER A PERMANENT STAY OF CRIMINAL PROCEEDINGS

104. What follows is an attempted summary of the circumstances in which abuse of process has been considered to exist and where courts have decided that a permanent stay of proceedings was the appropriate remedy.

105. As noted above the categories of abuse of process are not closed and any consideration of whether an abuse of process exists should be done by weighing and analyzing the underlying values balanced in the existing case law, rather than by merely seeing if the facts in any given case can be brought within those contained in the case law.

PROCEEDINGS BROUGHT FOR A COLLATERAL PURPOSE

106. This category rests on the premise that the courts exist for certain purposes and that their processes should not be put to use for purposes fundamentally alien to those purposes.

107. In *Williams v Spautz*[48] the High Court was concerned with an appeal against a decision of the Court of Appeal quashing a permanent stay issued by Smart J at first instance.

[47] *Barton v R* [1980] HCA 48; (1980) 147 CLR 75 (5 December 1980)
[48] (1992) 174 CLR 509

108. Mr. Spautz the appellant had been dismissed by the University of Newcastle and had embarked on a spree of litigation against the university and his former colleagues. The charges stayed by Smart J were private prosecutions for allegations of conspiracy and criminal defamation.

109. Smart J had held that the prosecutions were brought for an improper purpose, being to, "to exert pressure upon the University of Newcastle to reinstate him and/or to agree to a favourable settlement of his wrongful dismissal case"[49] and stayed the informations.

110. The Court of Appeal quashed that order on the basis that the appellants could receive a fair trial and there was no evidence of prosecution misconduct in the conduct of the private prosecutions.

111. The High Court reinstated the stay order. The majority stating at 530:

> *"Although the primary judge did not express his findings in terms that the use of the proceedings was for an improper purpose, the findings are so expressed as to make it clear that Dr Spautz threatened to use the proceedings for an improper purpose and that his commencement and maintenance of the proceedings were, in pursuance of that purpose, undertaken predominantly to that end. There was therefore a relevant use of the proceedings for an improper purpose".*

PROCEEDINGS INVOLVING AN UNFAIR TRIAL

DELAY

112. This ground for a stay of proceedings is perhaps the most well-established in Australia. Ample case law also exists for delay being an established basis for a permanent stay of proceedings in Fiji.

113. In *Seru v State*[50] the Fiji Court of Appeal considered appeals involving fraud offences said to have been committed in 1992. The appellants were charged in 1994, but not tried until 1999. The court considered the delay in the context of section 29(3) of the 1997 Constitution, which provided that, "*every person charged with an offence and every party to a civil dispute has the right to have the case determined within a reasonable time*". This provision was in the same terms as the delay protection in the Canadian bill of rights.

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49 at 516

50 [2003] FJCA 26; AAU0041.99S & AAU0042.99S (30 May 2003)

114. The Court followed a decision of the Supreme Court in Canada in *R v Morin*[51] and adopted the following statements of principle as applicable in Fiji:

> *"The general approach to a determination as to whether the right has been denied is not by the application of a mathematical or administrative formula but rather by a judicial determination balancing the interests which the section is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of delay. As I noted in Smith [R v Smith (1989) 52 CCC (3d) 97], '(i)t is axiomatic that some delay is inevitable. The question is, at what point does the delay become unreasonable?' .... While the court has at times indicated otherwise, it is now accepted that the factors to be considered in analyzing how long is too long may be listed as follows:*
>
> *1. the length of the delay;*
>
> *2. waiver of time periods;*
>
> *3. the reasons for the delay, including*
>
> *(a) inherent time requirements of the case;*
>
> *(b) actions of the accused;*
>
> *(c) actions of the Crown;*
>
> *(d) limits on institutional resources, and*
>
> *(e) other reasons for delay, and*
>
> *4. prejudice to the accused"*[52]

> *"The judicial process referred to as "balancing" requires an examination of the length of the delay and its evaluation in the light of the other factors. A judicial determination is then made as to whether the period of delay is unreasonable. In coming to this conclusion, account must be taken of the interests which s. 11(b) is designed to protect. Leaving aside the question of delay on appeal, the period to be scrutinized is the time elapsed from the date of the charge to the end of the trial ....The length of this period may be shortened by subtracting periods of delay that have been waived. It must then be determined whether this period is unreasonable having regard to the interests s 11(b) seeks to protect, the explanation for the delay and the prejudice to the accused".*[53]

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[51] (1992) CR (4th) 1
[52] At 12-13
[53] At 13

115. Pain J in *State v Rokotuiwai*[54] held:

> *"It is a well-recognized common law principle that delay in the prosecution of a charge may justify a permanent stay. Likewise the infringement of a Constitutional right to a trial within a reasonable time may justify a permanent stay".*

116. In general the Fiji courts seem to have considered two questions in the context of delayed prosecutions:

- Whether the applicable constitutional or statutory right to a trial within a certain time frame has been breached; and

- Whether consequent upon that breach (and any other relevant factors) the prosecution ought to be stayed as an abuse of process.

117. The case law suggests that it is not necessary for an accused to demonstrate actual prejudice, i.e. that a fair trial will not be possible, in order to sustain a finding of a breach of the right. This mirrors the approach taken in the United Kingdom with respect to the similar right arising from European human rights law.[55]

118. The case law suggests however that it will however be necessary to demonstrate prejudice, such as to make a fair trial impossible, in order to obtain a permanent stay of proceedings. In this respect also the Fiji approach mirrors that taken in the United Kingdom.[56]

119. In *Seniloli v State*[57] the Court of Appeal considered a refusal to grant a stay application in circumstances of delay. The Court (Ward, P, Penlington and Wood JA) held:

> *"The defence application had related only to delay before the charging of the accused. There was no complaint about the length of time the case had taken to reach trial after charge and the learned judge clearly and properly distinguished between the effects of delay before and after charge. In the former, as occurred in this case, she correctly identified and applied the test that a stay will only be granted where the delay has resulted in serious prejudice to any accused such as would prevent him from being able to have a fair trial and that such a stay would be exceptional".*

120. Justice Byrne in *Mohammed Shariff Sahim v The State*[58] held that:

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[54] [1998] FJHC 196; Hac0009d.95s (21 August 1998)
[55] See *Eckle v Federal Republic of Germany* (1983) 5 EHRR 1 for the European approach. Then *Magill v Porter* [2001] UKHL 67 at 106 for its adoption in the United Kingdom, albeit not in criminal proceedings.
[56] *Attorney-General's Reference* (No 1 of 1990) [1992] QB 630
[57] [2004] FJCA 46; AAU0041.2004S (11 November 2004)
[58] [FCA Misc. Action No 17/2007; Decided on 25 March 2008]

The correct approach of the courts [in dealing with applications for stay] must therefore be two-pronged. Firstly, is there unreasonable delay and a breach of [common law right]? In answering this question, prejudice is relevant but not necessary where the delay is found to be otherwise oppressive in all the circumstances. The second question is if there has been a breach what is the remedy? In determining the appropriate remedy, absence of prejudice becomes relevant. Where an accused person is able to be tried fairly without any impairment in the conduct of the defence, the prosecution should not be stayed. Where the issue is raised on appeal, and the appellant was fairly tried despite the delay, his or her remedy lies in the proportionate reduction of sentence or in the imposition of a non-custodial sentence.

121. It is important however to appreciate that prejudice need not be express and can be inferred from the circumstances.[59]

122. In *Devi v State*[60] a prosecution for murder was permanently stayed on the basis of a delay of 6 years between 2003, when the accused was questioned following the death, and 2009, when she was charged. The delay was accepted as unreasonable by the prosecution.

123. Goundar J held a fair trial could not be had on account of delay, placing particular weight on the absence of psychiatric evidence, holding:

> "*I accept that there is some evidence upon which the court could make a determination of infanticide but I am satisfied that the effect of the delay is such that the applicant would not be able effectively to make a case for infanticide*."

124. In *Jago v District Court of NSW*[61] the High Court considered whether a stay should have been granted in circumstances where the appellant had been arrested on 19 October 1981, committed for trial on 16 July 1982, but his trial not listed until 9 February 1987. The majority of this delay was occasioned by the fact the Crown did not find a bill until May 1986. The appellant could not point to any substantial prejudice caused by the effluxion of time and the appeal against the refusal to stay the matter was dismissed by the High Court.

125. Deane J stated at 60:

> *"An order that proceedings be permanently stayed will only be justified in the exceptional cases which I have indicated, namely, where it appears that the effect of the unreasonable delay is, in all the circumstances, that any subsequent trial will necessarily be an unfair*

[59] *Bell v DPP of Jamaica* [1985] 2 ALL ER 585
[60] [2010] FJHC 132; HAM017.2009 (16 April 2010)
[61] (1989) 168 CLR 23

one or that the continuation of the proceedings would be so unfairly oppressive that it would constitute an abuse of process".

126. Deane J propounded[62] 5 criteria against with the existence of the two grounds could be determined:

(i) The length of the delay

(ii) Reasons given by the prosecution to explain or justify the delay

(iii) The accused's responsibility for and past attitude to the delay;

(iv) Proven or likely prejudice to the accused.

(v) The public interest in the disposition of charges of serious offences and in the conviction of those guilty of crime

127. The question of whether a stay should be granted in Australia on the basis of delay will, ultimately, turn on the question of whether jury directions and/or other mechanisms are capable of alleviating the unfairness caused by the delay. In Fiji the question is resolved on a similar basis and is subject to consideration and application of the constitutional context.

LOST OR DESTROYED EVIDENCE

128. Sometimes a stand-alone ground for a stay, but more often argued as part of delay (such as in *Devi* discussed above), is the situation where vital evidence has been lost or destroyed or become impossible to obtain and the accused's trial rendered unfair as a result.

129. In the case of *Chatfield v R*[63] the Court of Criminal Appeal considered an appeal against a refusal by the trial judge to grant a permanent stay of a charge of murder where the appellant was charged twelve years after the killing and where evidence had been lost in the interim. That lost evidence was as follows:

- The firearm (said to have been used in the killing)
- The clothing worn by the accused on the night of the shooting (and which she submitted could prove she was not the shooter if there was an absence of gunshot residue and/or blood spray (assuming the deceased was shot at a close distance))
- The clothing worn by the deceased when shot (which could have assisted in determining the distance from which he was shot)
- A woollen blanket which was partly covering the deceased when he was found

62 Pg 60-61

63 [1999] NSWCCA 340

- Glass from the room in which the deceased was found and on which were some bloodstains
- Counselling records relating to the main prosecution witness who alleged the accused had made admissions to him (which had caused him to seek counselling)

130. The Court of Criminal Appeal did not consider any trial would necessarily be unfair. Hulme J (with whom Sully and Hidden JJ agreed) stated at [38]:

> *"Although I have recognised that prejudice to the Applicant may have occurred in consequence of the loss of at least some material, it does not follow that any trial will be unfair. This is not a perfect world. Sometimes crimes are not discovered until long after they have occurred.; and as the passages quoted from R v Tolmie and R v McCarthy make clear[64], not infrequently some items of evidence or witnesses will not be available. Some assessment of the significance of not only the unavailable, but also the available, evidence is required".*

131. Hulme J was not satisfied the clear prejudice was irremediable, at [42]:

> *"The circumstances that a stay will only be granted where there exists 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"; and that the remedy is discretionary, mean that account must also be taken of the powers available to a trial Judge to eliminate or reduce the risk of unfairness. Within these are the various powers and discretions provided for by the Evidence Act. Without any attempt to be exhaustive, s135 empowers a Court to refuse to admit evidence if the probative value of the evidence is substantially outweighed by the danger that it might be unfairly prejudicial to a party while s137 obliges a Court to refuse to admit evidence adduced by the Crown if the probative value of the evidence is outweighed by the danger of unfair prejudice to an accused".*

132. Hulme J concluded at [62]:

> *"Notwithstanding the loss of Mr Peinecke's records and the other items to which reference has been made, and any prejudice to the Applicant which may have ensued in consequence, the circumstances of the case are such that the only appropriate decision at which Grove J should have arrived was to refuse a stay. That is not to say, of course, that at the trial the Judge should not properly limit pursuant to whatever powers are available, the evidence to be called. That will be a decision for whoever is the trial Judge. Nothing in these reasons is intended to restrict, or indeed to indicate, the way in which those powers should be exercised".*

64 *R v Tolmie* NSWCCA (unreported 7 December 1994; *R v McCarthy, McDonald & Isaken* NSWCCA (unreported 12 August 1994)

133. In *R v Smith (No 1)*[65] Buddin J considered and dismissed a permanent stay application made on, at [3]:

> *"..the basis that the applicant has been deprived of the opportunity of having a fair trial because of what is said to have been an inadequate police investigation, which included the failure to promptly investigate information that two persons had separately claimed responsibility for killing the deceased, together with the loss or destruction of physical exhibits and other documents".*

134. Buddin J examined many of the Australian authorities on this ground and His Honour's survey of the case law seems to suggest that obtaining a permanent stay on this ground is extremely difficult.

135. In New South Wales matters where delay is raised there will almost inevitably be a question of where directions under section 165B of the *Evidence Act 1995* (NSW) are capable of curing the unfairness.

136. Authority exists in Fiji for this ground being a basis for a permanent stay. In *State v Southwick*[66] the indictment was stayed on the basis of the prosecution having lost documents without which, in the view of Pathick J, "a fair trial was not possible".

PUBLICITY PREJUDICE

137. It is recognised that extensive adverse pre-trial publicity can justify a permanent or temporary stay of proceedings.

138. In *Takiveikata v State*[67] Bruce J acknowledged publicity prejudice as a possible basis for abuse of process in Fiji.

139. In *The Queen v Glennon*[68] Mason CJ and Toohey J stated at [598]:

> *"Apart from the unique case of Tuckiar v The King there has been no other instance in the judicial history of this country of an accused's conviction being quashed and a verdict of acquittal then entered on account of the potential prejudicial effect of pre-trial publicity."*

140. In *Dupas v The Queen*[69] the High Court considered whether the conviction of the appellant for the murder of Mersina Halvagis should be set aside on the basis that the trial judge had erred in not permanently staying the prosecution.

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65 [2011] NSWSC 725

66 [1999] FJHC 125; [1999] 45 FLR 292 (19 November 1999)

67 [2008] FJHC 315; HAM039.2008 (12 November 2008)

68 (1992) 173 CLR 592.

69 [2010] HCA 20 (16 June 2010)

141. The appellant had, prior to the trial, been convicted of the murder of two other woman and "*the killings of all three vulnerable women had been by knife attack and characterised by extreme violence and brutality*".[70]

142. The appellant had been subjected to much media comment, at [8]:

> *"In response to questions from the trial judge as to the currency of the pre-trial publicity and as to how easy it was to access, the appellant's counsel referred to three periods of intense media publicity – late 2000 (relating to the murder of Ms Patterson), late 2004 (relating to the murder trial where the victim was Ms Maher), and early 2005 (where the appellant was named as a suspect in the murder of Ms Halvagis); counsel referred also to material currently available on the internet and to the use of the Google search engine to access articles electronically stored on the World Wide Web. A summary of the pre-trial publicity can be found in the reasons of Ashley JA.. The essence of the appellant's submission before Cummins J was that "the ubiquity and pervasiveness of the accused's reputation as a serial killer, is such that no fair trial can now be had." It was contended that, if a permanent stay were not granted, any subsequent conviction would necessarily constitute a miscarriage of justice".*

143. The High Court was not satisfied that the circumstances were such as to prevent a fair trial, at [38]:

> *"The apprehended defect in the appellant's trial, namely unfair consequences of prejudice or prejudgment arising out of extensive adverse pre-trial publicity, was capable of being relieved against by the trial judge, in the conduct of the trial, by thorough and appropriate directions to the jury".*

144. The High Court left open the question of whether pre-trial publicity could ever warrant a permanent stay if the circumstances were "extreme" or "singular", at 38:

> *"..it is not necessary for the purposes of this case to undertake any broad inquiry into the full extent of the court's inherent power to grant a permanent stay of criminal proceedings in order to prevent unfairness to an accused".*

145. In the opinion of the author in Australia the circumstances would have to be so extreme and singular that to obtain a permanent stay on the sole basis of media publicity would be all but impossible.

146. A combination of publicity and other prejudicial factors may however lead to circumstances so unfair that a stay may be warranted.

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70 Paragraph 6.

147. Such other circumstances could include repeated statements by persons of special and unique authority to the effect that the accused is guilty or otherwise a dangerous offender.

148. In *R v Ferguson; ex parte A-G (Qld)*[71] the Queensland Court of Appeal were concerned with an appeal by the Crown against a decision of a trial judge to permanently stay the prosecution of notorious sex offender Mr. Dennis Ferguson.

149. The Court noted the finding of the trial judge that the pre-trial publicity included, at [4-5]:

> *"..expressions of opinion - usually to the effect that the accused should not be at large in the community, or would constitute a real risk to children if allowed at large in the community. Such opinions have been reportedly expressed by: (i) Ministers of the Crown; (ii) Federal politicians; (iii) State politicians; (iv) City Councillors, and by others who might perhaps be described in the language of Mr Justice Brennan in Glendon [sic], page 611, as: 'Persons who affect to convey the moral conscience of the community and to possess information, insights and expertise in exceptional measure."*

150. In *Ferguson* the appeal court set aside the permanent stay on the basis that the trial judge had failed to turn his mind to an adjournment for the blaze of publicity to subside and to various provisions of the jury legislation that could have been utilised to potentially inquire into the unfairness to the accused from the media coverage.[72]

151. It may well be that such improper statements by persons of 'special and unique authority' may be able to be relied upon as a species of executive misconduct capable of leading to a stay upon the 'bringing the administration of justice into disrepute' limb of the power.

COUNSEL REVEALS GUILT OF CLIENT IN OPEN COURT

152. In *Tuckiar v R*[73] the High Court quashed the conviction for murder of an Aboriginal man and prevented any further trial (through the entering of a verdict of acquittal rather than a permanent stay) because counsel for the accused had post-verdict told the judge in open court that his client had confessed to the murder. The reasoning may well be applicable to the stay power as acknowledged by the High Court in *Dupas v R* and *R v Glennon* as discussed above.

153. Gavan Duffy CJ, Dixon, Evatt and McTiernan JJ stated, at [347]:

71 [2008] QCA 227

72 Mr. Ferguson was later acquitted at a judge alone trial.

73 (1934) 52 CLR 335

"In the present case, what occurred is productive of much difficulty. We have reached the conclusion, as we have already stated, that the verdict found against the prisoner must be set aside. Ordinarily the question would next arise whether a new trial should be had. But upon this question we are confronted with the following statements made by the learned trial Judge in his report—"After the verdict, counsel—for reasons that may have been good—made a public statement of this fact which has been published in the local press and otherwise broadcasted throughout the whole area from which jurymen are drawn. If a new trial were granted and another jury were asked to chose between Parriner's story, Harry's story, and some third story which might possibly be put before them it would be practically impossible for them to put out of their minds the fact of this confession by the accused to his own counsel, which would certainly be known to most, if not all, of them. ... Counsel for the defence ... after verdict made, entirely of his own motion, a public statement which would make a new trial almost certainly a futility." In face of this opinion, the correctness of which we cannot doubt, we think the prisoner cannot justly be subjected to another trial at Darwin, and no other venue is practicable".

DEPRIVATION OF COMMITTAL PROCEEDINGS

154. Lack of committal proceedings is a well-established ground for a permanent stay of proceedings on an ex-officio indictment.

155. It would seem unlikely in Australia in the current day, where paper committals are the norm and *Basha*[74] inquiries regularly granted, that a stay application would succeed on this ground alone.

156. Deprivation of committal proceedings may however be a relevant consideration in conjunction with other asserted grounds of unfairness, oppression or circumstances with the effect of diminishing public confidence.

157. In *R v Bartalesi* [75] Handley JA stated at 647:

"..Proceedings commenced in those courts by ex officio indictment may be stayed for abuse of process where the absence of prior committal proceedings will occasion unfair prejudice to the accused: see Barton v The Queen (1980) 147 CLR 75 and Barron v Attorney-General for New South Wales (1987) 10 NSWLR 215. The provisions of Pt 9A will be irrelevant on any such application. However, as already stated, this was not the basis of the stay applications in these cases".

[74] Basha v R (1989) 39 A Crim R 337 authority for the proposition that a trial judge can allow a witness to be cross examined in the absence of the jury to ensure a fair trial.
[75] [1997] 41 NSWLR 641

158. In *Director of Public Prosecutions (NSW) v PM*[76] Latham J (Whealey J agreeing) stated at [82]:

> *"..It is clear that the Director of Public Prosecutions (the DPP) has the power to present an indictment regardless of the fact that there may have been some defect in the committal proceedings and the finding of an ex officio indictment in those circumstances will not produce an abuse of process, unless it would result in unfairness to the accused at trial : s 8(1) Criminal Procedure Act ; s 7, Director of Public Prosecutions Act 1986 and see generally* R v Sepulveda *[2003] NSWCCA 131;* R v Janceski*;* Grassby v R *(1989) 168 CLR 1;* Barton v R *(1980) 147 CLR 75. Moreover, the court cannot go behind the issue of an ex officio indictment : Barton v R*" .

159. In *Barton v The Queen*[77], in affirming the power of a trial court to stay a prosecution where an accused has been deprived of committal proceedings, Gibbs and Mason JJ stated at [99-100]:

> *"..Lord Devlin in The Criminal Prosecution in England was able to describe committal proceedings as "an essential safeguard against wanton or misconceived prosecutions" (p.92) (emphasis added). This comment reflects the nature of committal proceedings and the protection which they give to the accused, viz. the need for the Crown witnesses to give their evidence on oath, the opportunity to cross-examine, to present a case and the possibility that the magistrate will not commit. Mr. Shand submits that the same purpose can be achieved by the supply of particulars and the delivery of copies of proofs of evidence. This is the course which is followed when the Crown decides to call at the trial a witness whose depositions were not before the magistrate. But it is one thing to supplement the evidence given before a magistrate by furnishing a copy of a proof; it is another thing to deprive the accused of the benefit of any committal proceedings at all. In such a case the accused is denied (1) knowledge of what the Crown witnesses say on oath; (2) the opportunity of cross-examining them; (3) the opportunity of calling evidence in rebuttal; and (4) the possibility that the magistrate will hold that there is no prima facie case or that the evidence is insufficient to put him on trial or that there is no strong or probably presumption of guilt. (at p99)*
>
> *41. The deprivation of these advantages is, as the judges observed in Fazzari and as Fox J. noted in Kent (1970) 17 FLR 65 , a serious departure from the ordinary course of criminal justice".*

76 [2006] NSWCCA 297

77 (1980) 147 CLR 75

160. Their Honours stated further at [101]:

> *"..It is for the courts, not the Attorney-General, to decide in the last resort whether the justice of the case requires that a trial should proceed in the absence of committal proceedings. It is not for the courts to abdicate that function to the Attorney-General, let alone to Crown Prosecutors whom he may appoint. We need to recall that the commencement of prosecutions is in very many cases left to Crown Prosecutors. It is quite impossible for an Attorney-General to deal personally with the question except in a minority of cases and then in accordance with advice tendered to him by officers who are acquainted with the materials. If the courts were to abdicate the function, there is the distinct possibility that the ex officio indictment, so recently awakened from its long slumber, would become an active instrument, even in cases in which it has not been employed in the past, notwithstanding the vigorous criticism which has been directed to it and the assertions of commentators that it was appropriate for use only in a very limited category of cases".*

INDIGENT ACCUSED WITH NO LEGAL REPRESENTATION

161. In *Dietrich v The Queen*[78] the High Court confirmed the power of a trial judge to stay a prosecution in circumstances where an indigent accused facing serious charges was left without legal representation.

162. Any such arguments in Fiji would no doubt be effected by article 14(2)(d) of the Constitution regarding legal representation rights and the fair trial right in article 15.

163. In *McInnis v. The Queen*[79], Murphy J, in dissent, had stated:

> *"If a person on a serious charge, who desires legal assistance but is unable to afford it, is refused legal aid, a judge should not force him to undergo trial without counsel. If necessary, the trial should be postponed until legal assistance is provided, and in an extreme case, the accused, if not already on bail, should be granted bail".*

164. Mr. Dietrich had been convicted of heroin importation after being tried without legal representation in Victoria.

165. Mason CJ and McHugh J stated at [40]:

> *"In view of the differences in the reasoning of the members of the Court constituting the majority in the present case, it is desirable that, at the*

78 (1992) 177 CLR 292

79 [1979] HCA 65; (1980) 143 CLR 575

risk of some repetition, we identify what the majority considers to be the approach which should be adopted by a trial judge who is faced with an application for an adjournment or a stay by an indigent accused charged with a serious offence who, through no fault on his or her part, is unable to obtain legal representation. In that situation, in the absence of exceptional circumstances, the trial in such a case should be adjourned, postponed or stayed until legal representation is available. If, in those circumstances, an application that the trial be delayed is refused and, by reason of the lack of representation of the accused, the resulting trial is not a fair one, any conviction of the accused must be quashed by an appellate court for the reason that there has been a miscarriage of justice in that the accused has been convicted without a fair trial".

FAILURE OF DISCLOSURE

166. One possible response to a serious failure of disclosure is an application for a permanent (or temporary) stay of the proceedings.

167. In *Regina v Richard Lipton*[80] the Court of Criminal Appeal upheld a decision of Judge Finnane of the District Court of New South Wales to temporarily stay a sentence matter until relevant material that would potentially assist to mitigate sentence was disclosed to the offender.

168. This order was made in circumstances where police had refused to disclose the relevant material to the Director of Public Prosecutions.

169. Judge Finnane stated as follows, (see para [48] of *Lipton)* :

> *"Of course, it is for the Director to form an opinion as to whether there should be a disclosure. The notice of motion does not ask for the production of any documents, but asks merely that the Director get documents that obviously exist and form an opinion as to whether they should be disclosed. It is a very unusual application since it is made in circumstances where the offender has pleaded guilty to a serious offence. Nevertheless, there appears to be in existence material that may bear upon a very relevant question as to whether the offender was led into committing an offence or offences by Melanie Brown, either acting on her own behalf or acting as an agent for the Police. The only sanction I can impose, if the Director declines to seek any documents from the Police to enable him to form his view on these issues, is to grant a stay of proceedings and to consider granting bail."*

170. Justice McColl (with whom R.S Hulme and Hislop JJ agreed) stated of the decision to temporarily stay the matter at [120]:

80 [2011] NSWCCA 247

"Finally, I would observe that the primary judge did not grant a permanent stay of the proceedings, merely one conditioned on the DPP obtaining the material referred to in the Police Disclosure Certificate, forming the views referred to in his order and communicating that advice to the respondent. It was a matter for the respondent then to determine how to proceed. It was appropriate for his Honour to grant a conditional stay in those circumstances to ensure fairness to the respondent, to maintain public confidence in the administration of justice and to avoid a potential miscarriage of justice".

171. If a temporary stay conditional upon compliance is not complied with the inevitable effect will be a permanent stay of proceedings.

172. There is United Kingdom authority for the proposition that a failure of disclosure can lead to a permanent stay.[81] The ultimate question will of course be whether the failure means that the trial cannot be fair and thus would be an abuse of process. (Or possibly, whether the failure of disclosure brings the administration of justice into disrepute such that the proceedings are an abuse of process).

ACCUSED UNFIT TO BE TRIED

173. The criminal law demands a certain level of "fitness" for an accused person to be prosecuted at trial. The concept of fitness centres on the capacity of an accused to understand and participate in criminal proceedings. The fitness doctrine is designed to avoid a basic unfairness or inhumanity in prosecuting someone incapable of understanding the process and also perhaps to avoid the dangers of miscarriage of justice that arise when a person is tried without being able to meaningfully participate.

174. In Australia the most commonly applied 'test' as to whether a person is fit is that propounded in *R v Presser*[82] where Smith J stated that a person to be considered fit must be able:

"... to understand what it is that he is charged with. He needs to be able to plead to the charge and to exercise his right of challenge. He needs to understand generally the nature of the proceeding, namely, that it is an inquiry as to whether he did what he is charged with. He needs to be able to follow the course of the proceedings so as to understand what is going on in court in a general sense, though he need not, of course, understand the purpose of all the various court formalities. He needs to be able to understand ... the substantial effect of any evidence that may be given against him; and he needs to be able to make his defence or answer to the charge. Where he has counsel he needs to be able to do this through his counsel by giving any necessary instructions and by letting his counsel know what his version

81 *R v Patel* [2001] EWCA Crim 2505, [2002] Crim LR 304 (CA) at para 57

82 [1958] VicRp 9; [1958] VR 45 at 48

of the facts is and, if necessary, telling the court what it is ... [H]e must, ... have sufficient capacity to be able to decide what defence he will rely upon and to make his defence and his version of the facts known to the court and to his counsel, if any."

175. Many Australian jurisdictions have created so called 'special hearings' to allow some determination of factual matters in respect of those unfit to be tried. Under such schemes certain non-punitive measures, including deprivation of liberty, are available if certain factual matters are substantiated as to the behaviour alleged to constitute a criminal offence.

176. Historically in Australia and elsewhere there were legislative regimes that allowed for the indefinite detention of those found unfit to be tried for an indictable offence. These have generally been replaced with regimes providing for 'special hearings' and release by the order of a specialist tribunal.

177. In some modern circumstances in Australia however there is no procedure to deal with unfit offenders. This is the case in summary proceedings in New South Wales for example. In other cases the statutory scheme only deals with certain types of factors that impact on an accused's person's capacity to participate in the trial process.

178. There is authority for the proposition that to maintain a prosecution in circumstances where an accused is unfit to be tried, or otherwise incapable of properly participating, is an abuse of process and should be stayed.[83]

179. In Fiji section 108 of the *Criminal Procedure Decree* would seem to provide a code for dealing with such instances in criminal matters in both the Magistrates Court and High Court and as such abuse of process considerations may not be applicable.

OPPRESSION

RE LITIGATION OF MATTERS RESOLVED IN EARLIER PROCEEDINGS

180. An accused has available a plea in bar (of *autrefois acquit* and *autrefois convict)* to an indictment that seeks to prosecute for matters previously the subject of an acquittal or conviction. These common law principles are generally however restricted to offences constituted by the same elements, (even if one offence contains additional elements).[84] This is the protection from 'double jeopardy' in its narrow sense.

[83] *Mantell v Molyneux* [2006] NSWSC 955 (18 September 2006). *T and V v United Kingdom* (2000) 31 EHRR 861.

84 *Pearce v R* [1998] HCA 57; 194 CLR 610

181. Double jeopardy is however codified and entrenched in the Constitution of the Republic of Fiji, article 14 providing:

> *(1) A person shall not be tried for— (a) any act or omission that was not an offence under either domestic or international law at the time it was committed or omitted; or (b) an offence in respect of an act or omission for which that person has previously been either acquitted or convicted.*[85]

182. The doctrine of abuse of process however gives additional double jeopardy protection to accused persons when a prosecution can be characterised as an abuse of process on account of it being an attempt to re-litigate matters dealt with in earlier proceedings. (Some of this protection may be superfluous in the Fiji constitutional context).

183. In *R v Carroll*[86] the High Court was concerned with an appeal against a conviction for perjury. The conviction rested on the finding that the accused had lied in his murder trial years earlier when he denied being the killer and obtained an acquittal.

184. Gleeson CJ and Hayne J stated at 21-22:

> *"A criminal trial is an accusatorial process in which the power of the State is deployed against an individual accused of crime. Many of the rules that have been developed for the conduct of criminal trials therefore reflect two obvious propositions: that the power and resources of the State as prosecutor are much greater than those of the individual accused and that the consequences of conviction are very serious. Blackstone's precept "that it is better that ten guilty persons escape, than that one innocent suffer"[16] may find its roots in these considerations.*
>
> *Many aspects of the rules which are lumped together under the title "double jeopardy" find their origins not so much in the considerations we have just mentioned as in the recognition of two other no less obvious facts. Without safeguards, the power to prosecute could readily be used by the executive as an instrument of oppression. Further, finality is an important aspect of any system of justice. As the New Zealand Law Commission said in a recent report dealing with the possibility of statutory relaxation of the rule against double jeopardy in the case of acquittals procured by perjury or perversion of the course of justice[17], the need to secure a conclusion of disputes concerning status is widely recognised, and the status conferred by acquittal is important"*

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[85] This protection appears perhaps broader (in its reference to 'act or omission') than the equivalent article contained in the 1997 Constitution which stated an accused had the right, "not to be tried again for an offence of which he or she has previously been convicted or acquitted".

86 (2002) 213 CLR 635

185. In *Rogers v The Queen*[87] the High Court dealt with an appeal where an accused had been convicted on the basis of admissions made to police. In a previous trial of different charges those same admissions had been excluded and the appellant acquitted.

186. Mason CJ characterised this re-litigation of matters dealt with in earlier proceedings (where strict double jeopardy was not applicable) as oppressive and calculated to erode public confidence in the administration of justice, at 256-7:

> *"..The tendering of the confessions by the prosecution was vexatious, oppressive and unfair to the appellant in that it exposed him to re-litigation of the issue of the voluntariness of the confessional statements in the records of interview. This issue had already been conclusively decided in the appellant's favour because the confessions sought to be tendered - although relating to different crimes - were made at the same time and in exactly the same circumstances as the confessions that were the subject of the voir dire. Re-litigation in subsequent criminal proceedings of an issue already finally decided in earlier criminal proceedings is not only inconsistent with the principle that a judicial determination is binding, final and conclusive (subject to fraud and fresh evidence), but is also calculated to erode public confidence in the administration of justice by generating conflicting decisions on the same issue."*

187. Deane and Gaudron JJ in the same matter held that the challenge to the judge's 1989 ruling invited "*the scandal of conflicting decisions*"[88] which had the effect of jeopardising public confidence in the administration of justice.

PROSECUTION IN BREACH OF AMNESTY FROM PROSECUTION

188. Authority exists for the proposition that a prosecution in breach of an applicable amnesty from prosecution will be an abuse of process if the conditions of the amnesty are complied with (and the court is of the view proceedings would be an abuse of process).[89]

189. In the author's experience in Solomon Islands some prosecutions brought in breach of the *Amnesty Act 2000* were permanently stayed while others were dealt with under statutory plea in bar provisions.

AVOIDANCE OR MANIPULATION OF STATUTORY TIME LIMITS

190. It will be an abuse of process to commence criminal proceedings under a provision of the criminal law that is not subject to an expired statute of

87 (1994) 181 CLR 251

88 At 280

89 *AG of Trinidad and Tobago et al v Philip et al* (1994) 45 WIR 456 PC.

limitations, when the same conduct is protected from prosecution (in respect of a different criminal offence) by an expired statute of limitation. Such prosecutions undermine legislative intention and are oppressive in a similar way to prosecutions that raise double jeopardy considerations.

191. *In Vakalalabure v The State*[90] the appellant was unlawfully sworn in as a member of a purported government and subsequently charged with taking an unlawful oath. The act was treasonous in nature and the appellant relied on the fact that the offence of treason was subject to an expired two year statute of limitations to argue the prosecution was an abuse of process.

192. The Supreme Court of Fiji (Fatiaki CJ, Handley and Scott JJ) reviewed the authorities and stated [21]:

> *"These decisions are applicable where the conduct could be prosecuted under different sections of the same Act but the time limit for a prosecution under one section has expired. They establish the following propositions relevant to this case:*
> *(1) The effect of such an Act is that the same conduct cannot be prosecuted under another section to avoid the time bar.*
> *(2) A prosecution can be brought under a different section for independent conduct which was not merely part of the conduct which constituted the time barred offence.*
> *(3) The appropriate charge depends on the predominant facts of the case.*
> *(4) In those cases the indecent assaults, or acts of indecency charged, were the acts of unlawful sexual intercourse, or attempted unlawful sexual intercourse, and the former could not be proved without proving the latter."*

193. The Court dismissed the appeal, holding that the elements of the oath offence and treason were entirely different and the facts supporting the oath offence effectively severable from the treasonous activities at [49]:

> *"On the whole of the material the Court can safely find that the petitioner was not charged, tried, or convicted of any offence other than that charged in the information. More importantly he was not tried or convicted of treason in proceedings commenced after the time bar for that offence had expired".*

194. In *Chaudhry v State*[91], discussed below, 4 charges under the Penal Code of making a false statement were permanently stayed on the basis that the conduct, which was based on the filing of a false tax return, was statute barred under the Income Tax Act. Goundar J endorsed the statement of principle in *Vakalalabure v The State* discussed above.

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[90] CAV0003 of 2004S
[91] [2012] FJHC 1229

CONTROVERTING EARLIER VERDICTS

195. There is no doubt that a permanent stay can be granted on the basis that a prosecution is an attempt to controvert (undermine or call into question) an earlier acquittal[92] even though double jeopardy in a strict sense is not invoked.

196. This line of authority talks about the accused being entitled to the "full benefit" of a previous acquittal.

197. In *R v CB*[93], the Crown sought to prove the accused had been involved in detaining the complainant in a hotel room. Minutes earlier the accused was alleged to have been involved in an affray at a caravan in which the complainant was assaulted and then chased to the hotel room. The affray charge was dealt with in the Childrens Court and the young person acquitted on the basis that identity was not proved beyond a reasonable doubt.

198. At the subsequent trial the take and detain charge was stayed as an abuse of process because it represented an attempt to controvert the decision of the Childrens Court. The prosecution case necessarily sought to prove that the young person had in fact been involved in the affray and the pursuit of the complainant to the hotel room. Those being matters of which the Childrens Court had not been satisfied.

199. The judge accepted that the prosecution sought to deny the accused the 'full benefit' of his acquittal in the Childrens Court.

200. Judge Walmsley stated:

> *"[The accused] argued that if the Crown is allowed to call evidence that the three people at the caravan were Mr John Bamblett, Mr Carr and the accused, then [the] client would be put in double jeopardy: that would be unfair. That is because there is a threat in the new case that he would be denied the full benefit of his acquittal. An essential part of the new case is that he was one of the three men who emerged from the caravan before the three men went to the motel. Though the elements in the detain case are different from those of which the accused was acquitted, if the Crown succeeds in proving the detain case it will follow the accused will be proved to have been one of the three men who emerged from the caravan. That decision would then throw serious doubt on the correctness of the Children's Court acquittals". Why is that important? The reason is that there is a close relationship between the doctrine of autrefois acquit and the incontrovertibility principle that [the accused] relies on. If a person has been acquitted of a criminal offence he or she cannot be tried again for*

92 *R v Carroll* (2002) 213 CLR 635; *Connelly v Director of Public Prosecutions* [1964] AC 1254 at 1364. *Gilham v Regina* [2007] NSWCCA 323

93 [2010] NSWDC (21 June 2010)

the same or any other offence for which he or she could properly have been convicted at the previous trial. The source of this principle is sometimes said to be in the maxim that no person should be twice troubled for the same offence".

201. A subsequent prosecution can represent an attempt to controvert an earlier acquittal notwithstanding that the elements of the latter offence are different to the elements of the earlier acquitted offences.

202. In *Island Maritime Ltd v Filipowski*[94], Gummow and Hayne JJ (Kirby and Callinan JJ agreed with this analysis), at [57]:

"Thus, what is revealed by the contrasting outcomes postulated by reference to the example given earlier, according to whether the first offence is tried by jury or tried summarily, is that to treat the plea of autrefois acquit as yielding no more than a form of issue estoppel does not give effect to all of the values embraced by the notion of double jeopardy. In particular, to treat an acquittal on one charge as barring a subsequent prosecution concerning the same events as founded that first charge only where all the elements of the first offence are included in the elements of the second offence not only would fail to accept that the earlier decision was correct, but also would require the individual to relitigate matters that the public interest requires be treated as finally determined.

203. This is not to say that evidence led at a previous trial (which ended in an acquittal) will always be inadmissible in a future trial against the same accused.

204. *Washer v State of Western Australia*[95], was an appeal concerned with the admission of evidence the subject of a previous acquittal for conspiracy to supply drugs. The High Court dismissed the appeal on the basis that the evidence led could properly have been used by the jury to reach conclusions that would not have amounted to a controversion of the acquittal.

205. Gleeson CJ, Heydon and Crennan JJ (with whom Hayne J agreed) stated at [39]:

"In this case, the prosecution did not ask the jury to accept that the conversations between the appellant and Whitsed and Bowles showed the appellant making or pursuing an agreement with Whitsed and Bowles that the three of them would supply drugs to other people. It asked the jury to accept that the appellant, at the time of the proposed importation from Queensland, was a drug dealer, and from that to infer, among other things, that he intended to sell or supply to others his share of the amount imported. It was neither explicit nor implicit in the

94 (2006) 226 CLR 328

95 (2007) 234 CLR 492

acquittal at the earlier trial that the appellant was not a drug dealer. For the purposes of the law, the acquittal established that the appellant was not a party to a conspiracy with Whitsed and Bowles to supply drugs to others; nothing more, and nothing less".

206. The law in Australia is different to that applicable in the United Kingdom and New Zealand where, in 'similar fact' cases, evidence has been permitted to be led that had the effect of controverting an earlier acquittal.[96]

WHEN FILING OF NOLLE PROSEQUI AN ABUSE OF PROCESS

207. In *R v YI*[97] the Director of Public Prosecutions attempted to file a *nolle prosequi* in order to avoid the trial judge finalising the matter.

208. Crispin J stated:

> *73. As Macrossan CJ and Thomas J pointed out in R v Jell, ex parte Attorney-General (1991) 1 Qd R 48 it is possible to identify some instances of an abuse of process justifying the Courts in refusing to permit the entry of a nolle prosequi. The instances which their Honours noted were:*
>
> *(i) where the jury, by request for redirection, may have so signalled their likely verdict that an "unscrupulous prosecutor" might seek to avoid it by entering a nolle prosequi even at that late stage;*
>
> *(ii) where the case has gone badly for the prosecution and it is conceivable that it might turn out better in a subsequent trial;*
>
> *(iii) where the prosecutor has taken a risk by proceeding without a witness who was then not available and whose evidence it was hoped would be covered by some other witness who did not come up to proof, so that the prosecutor feels that the accused will unfairly escape conviction; and*
>
> *(iv) where the Crown case does not disclose the commission of the offence alleged in the indictment.*

209. Crispin J ruled at [87]:

> *"In my opinion, the entry of a nolle prosequi in these circumstances clearly constituted an abuse of process. The accused, like any other person facing criminal charges in this country, was entitled to verdicts of acquittal if the Crown failed to prove her guilt to the requisite standard at her trial. Notwithstanding that entitlement, it remained open*

96 *R v Z* [2000] 2 AC 483

97 [2004] ACTSC 115 (27 October 2004

to the Director to enter a nolle prosequi if of the view that the charges should not be maintained. However, it was not appropriate for this procedure to be used as a means of aborting the trial because it had gone badly for the prosecution and it hoped to do better in a subsequent trial, even if those hopes were dependent upon a vague hope of ultimately obtaining favourable rulings on appeal".

210. Similar considerations will apply if proceedings are recommenced following a filing of a *nolle prosequi* in such circumstances, even if the filing is not challenged at the time.

RECOMMENCEMENT OF PROCEEDINGS FOLLOWING FILING OF NOLLE PROSEQUI/WITHDRAWAL OF CHARGES

211. In some circumstances it will be oppressive and an abuse of process to re-litigate matters after a *nolle prosequi* has been filed or matters otherwise discharged. This will be so, in the appropriate case, even though the proceedings have not been finally determined on the merits and strict double jeopardy does not apply.

212. In *Vuetaki v State*[98] the accused were discharged after the prosecutor failed to attend court. The charges were re-filed on the same day however the accused was not brought before the court to re-commence the proceedings for some six months.

213. Goundar J took into account the circumstances of the discharge in finding that the renewed proceedings were not an abuse of process, holding [31-32]:

"The applicant was discharged by the Magistrates' Court when the prosecutor failed to appear in court. There is nothing in the record to suggest that the learned Magistrate made any enquiries about the whereabouts of the prosecutor before discharging the applicant. The trial was part heard. The decision to discharge the applicant was hastily made without any regard whatsoever why the prosecutor was not in court. Ms Puamau advised this Court from the bar table that she was late because she was making enquiries about a surety of the applicant upon the request of the Magistrates' Court.

Given that the Magistrate did not exercise his discretion judicially in discharging the applicant in the absence of the prosecutor and that a discharge is not a bar to subsequent proceeding, I am not satisfied that the re-filing of the charge was a misuse of any procedure or was done for improper purpose. There was no abuse of process".

[98] [2009] FJHC 173; HAR001.2009 (21 August 2009)

214. In *R v Swingler*[99] the Victorian Court of Appeal considered a case where the appellant had been proceeded against on sexual assault charges which had been the subject of a nolle prosequi after the Crown had acceded to a representation from the accused. The charges were later recommenced when additional complainants came forward.

215. The Court (Winneke P, Callaway JA and Crockett AJA) refused the stay application but held:

> *"We do not say that there can never be a case where the exercise of the power to make presentment on a charge in respect of which a nolle prosequi has previously been entered will amount to an oppressive exercise of prosecutorial power and thus an abuse of the court's process. The categories of "abuse cases", as has often been said, are never closed. We are not, however, satisfied that this is such a case. An application of this nature is an application in which the court is asked to exercise its discretion. The criteria which govern the exercise of such a discretion have been most recently stated by the High Court in Walton v Gardiner per Mason CJ, Deane and Dawson JJ at 395-396 in the following terms: 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".*

PROSECUTION RELYING ON SAME ALLEGATIONS FOLLOWING GRANTING OF A PERMANENT STAY

216. In *Walton v Gardiner*[100] the High Court upheld a decision of the New South Wales Court of Appeal which held that disciplinary proceedings before a state medical tribunal were an abuse of process because they sought to litigate matters already the subject of a permanent stay in previous proceedings.

217. The stay in the previous medical tribunal proceedings was granted on the basis of the delay between the facts becoming known and the institution of the proceedings. Though the charges in the later proceedings were different they arose out of the "same pattern of professional conduct" as that impugned in the earlier proceedings.

PROSECUTIONS DOOMED TO FAIL

99 [1996] 1 VR 257

100 (1992) 177 CLR 378

218. It has long been established that utterly hopeless prosecutions (or other types of process) can amount to an abuse of process.

219. In *Walton v Gardiner*, Mason CJ, Deane and Dawson JJ stated at [23]:

> *"The inherent jurisdiction of a superior court to stay its proceedings on grounds of abuse of process extends to all those categories of cases in which the processes and procedures of the court, which exist to administer justice with fairness and impartiality, may be converted into instruments of injustice or unfairness. Thus, it has long been established that, regardless of the propriety of the purpose of the person responsible for their institution and maintenance, proceedings will constitute an abuse of process if they can be clearly seen to be foredoomed to fail ((22) See, e.g., Metropolitan Bank v. Pooley (1885) 10 App Cas 210, at pp 220-221; General Steel Industries Inc. v. Commissioner for Railways (N.S.W.) [1964] HCA 69; (1964) 112 CLR 125, at pp 128-130.)".*

220. The difficult question of course is at what point does a prosecution or other process become 'doomed to fail' as opposed to merely weak.

UNDERMINING PUBLIC CONFIDENCE IN THE ADMINISTRATION OF JUSTICE

221. The cases dealing with the 'bringing the administration of justice into disrepute' limb of the stay power are generally concerned with executive misconduct, rather than concerns relating to the fairness of any trial.

222. Many are concerned with circumstances where the prosecution's capacity to try a person rests on a breach of the rule of law.

223. The theory underpinning much of the case law is that the court will become seemingly complicit in wrongdoing if it allows such cases to proceed. Such complicity can undermine public confidence in the administration of justice. This is turn can compromise the very capacity of the courts to function.

224. These cases represent concerns of high public policy and perhaps more than the other categories of abuse sit in tension with the fundamental value of accountability.

225. In these cases an accused is immunised from prosecution, not because the trial will be unfair or the prosecution otherwise oppressive, but because the court's declare that to be involved in the prosecution at all will taint the judicial process.

ACCUSED BROUGHT WITHIN THE JURISDICTION IN CIRCUMVENTION OF APPLICABLE EXTRADITION ARRANGEMENTS OR OTHERWISE UNLAWFULLY

226. The prosecution of a person unlawfully rendered into the jurisdiction by the executive, or with their complicity, in breach of applicable extradition arrangements, will be an abuse of process as it tends to taint the court with the unlawful conduct which has made the trial possible.

227. In *Levinge v. Director of Custodial Services*[101], McHugh, J.A. stated [564-5]

> *"Where there is in existence an extradition treaty which is knowingly circumvented by the prosecuting authorities, a court has jurisdiction to stay criminal proceedings on the ground that they are an abuse of process. It seems to me, as it seemed to the New Zealand Court of Appeal, that the courts cannot turn a blind eye to a deliberate disregard of statutory requirements concerning extradition. In many areas of the civil law, the courts refused to entertain causes of action on the ground that the plaintiff has been guilty of unlawful or illegal conduct or has contravened a rule of public policy. I see no reason why in an appropriate case a court does not also have jurisdiction to prevent the bringing or continuance of a criminal prosecution which offends 'those canons of decency and fairness which express the notions of justice of English speaking peoples even towards those charged with the most heinous offenses":*

228. In *Moti v The Queen*[102] the High Court of Australia considered the case of former Solomon Islands Attorney-General Mr. Julian Moti QC. Mr. Moti was illegally deported to Australia with the active and knowing assistance of Australian police and diplomats. A court order was extant at the time restraining deportation and the applicable legislation gave all deportees seven days to appeal before which the deportation power was properly enlivened. The appellant however had been arrested at his house and immediately forced onto a place to Brisbane the same day.

229. French CJ, Gummow, Hayne, Crennan, Kiefal and Bell JJ stated at [63-65]:

> *"It is enough to observe three matters. First, Australian officials (both in Honiara and in Canberra) knew that the senior representative of Australia in Honiara at the time (the Acting High Commissioner) was of opinion that the appellant's deportation was not lawful. Second, the Acting High Commissioner's opinion was obviously right. Third, despite the expression of this opinion, and its obviously being right, Australian officials facilitated the unlawful deportation of the appellant by*

101 (1987) 9 N.S.W.L.R. 546

102 [2011] HCA 50

supplying a travel document relating to him (and travel documents for those who would accompany him) at a time when it was known that the documents would be used to effect the unlawful deportation. That is, Australian officials supplied the relevant documents in time to be used, with knowledge that they would be used, to deport the appellant before the time for deporting him had arrived.

……

The critical observation is that what was done by Australian officials not only facilitated the appellant's deportation, it facilitated his deportation by removal on 27 December 2007 when Australian officials in Honiara believed that this was not lawful and had told Australian officials in Canberra so. It follows that the maintenance of proceedings against the appellant on the indictment preferred against him on 3 November 2008 was an abuse of process of the court and should have been permanently stayed by the primary judge".

230. Abuse of process in the same context has been recognised as a valid challenge to jurisdiction before the International Criminal Court.[103]

BREACH OF THE PRINCIPLE OF 'SPECIALITY' IN PROCEEDINGS FOLLOWING EXTRADITION

231. It is a common feature of the law of international extradition that a person extradited can only be prosecuted for matters which were the subject of the extradition request, unless the requested country expressly consents. In Australia this protection is contained within section 42 of the *Extradition Act* 1988 (Cth).

232. There is authority that a prosecution resting on a breach of speciality will be an abuse of process.

233. In *R v Phong*[104] the appellant had been extradited from Hong Kong for the offences of being 'knowingly concerned' in the importation of a prohibited import and counselling or procuring the importation of a prohibited import.

234. The Extradition treaty between Australia and Hong Kong allowed different offences to be proceeded with, as long as the extraditee had been given 40 days to leave the country before the matters were commenced.

235. Mr. Phong was eventually indicted and convicted for an offence of actual importation (rather than knowingly concerned or counselling and procuring) and had never been given 40 days to leave the country.

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[103] *Lubanga* (ICC-01/04-01-06, Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19(2)(a) of the Statute, 3 October 2006. Pp 9-10.

[104] [2005] VSCA 149, (2005) 12 VR 17

236. Mr Phong appealed his conviction and sentence and succeeded after a Crown concession that the conviction could not stand in light of the breach of speciality. Mr. Phong remained in custody, was reindicted on the charge of being knowingly concerned in the importation and found guilty. The judge at the second trial refused an application for a permanent stay made on the basis that the second trial rested on the original breach of speciality.

237. The Court of Appeal dismissed the appeal being of the view that the original Crown concession was wrong and that the first prosecution did not in fact breach the speciality principle. This finding was based on a limb of section 42 which allows prosecution for the offences for which a person was extradited, and "*any other offence (being an offence for which the penalty is the same or is a shorter maximum period of imprisonment or other deprivation of liberty) of which the person could be convicted on proof of the conduct constituting any such offence*". The judgment however affirms the fundamental principle that a prosecution resting on a breach of speciality is an abuse of process.

ENTRAPMENT

238. Entrapment describes a situation where a person commits a criminal offence after being lured into doing so by another, generally acting as a state official or agent.

239. In the United Kingdom[105] and Fiji[106] one remedy for entrapment rising to an abuse of process is a permanent stay of proceedings.

240. Bruce J stated in *Takiveikata v State*:

> *"It will readily be seen that the factor common to all these cases, indeed the central consideration underlying the entire principle, is that the various situations in question all involved the defendant standing trial when, but for an abuse of executive power, he would never have been before the Court at all. In the wrongful extradition cases the defendant ought properly not to have been within the jurisdiction; only a violation of the rule of law had brought him here. Similarly, in the entrapment cases, the defendant only committed the offence because the enforcement officer wrongly incited him to do so. True, in both situations, a fair trial could take place. But, given that there should have been no trial at all, the imperative consideration became the vindication of the rule of law".*

241. The position in Australia is somewhat different and entrapment is generally dealt with through the exclusion of evidence.

105 *Panday v Virgil* [2008] 1 AC 1386 1397 R v Latif; R v Shahzad [1996] 1 WLR 104

106 *Takiveikata v State* [2008] FJHC 315; HAM039.2008 (12 November 2008)

242. In *Ridgeway v R*[107] the High Court considered a case where the Australia Federal Police had orchestrated a large importation of heroin in order to be able to prosecute the appellant for Customs Act offences.

243. The majority held that a permanent stay, on the grounds of entrapment itself, was not appropriate.

244. The majority did however order a permanent stay, on the basis that the entire evidence relating to the importation should be excluded pursuant to the public policy discretion and the Crown case was therefore doomed to fail.

245. Mason CJ, Deane and Dawson JJ, stated of the discretion to exclude the evidence, at [31]:

> *"The basis in principle of the discretion lies in the inherent or implied powers of our courts to protect the integrity of their processes. In cases where it is exercised to exclude evidence on public policy grounds, it is because, in all the circumstances of the particular case, applicable considerations of "high public policy" (30) relating to the administration of criminal justice outweigh the legitimate public interest in the conviction of the guilty".*

246. This statement highlights the common conceptual basis of abuse of process doctrine and the public policy discretion to exclude evidence.

247. Mason CJ, Deane and Dawson JJ explained their disinclination to stay the matter on the basis of the executive complicity in the importation in this way at [40]:

> *"Once it is concluded that our law knows no substantive defence of entrapment, it seems to us to follow that the otherwise regular institution of proceedings against a person who is guilty of a criminal offence for the genuine purpose of obtaining conviction and punishment is not an abuse of process by reason merely of the circumstance that the commission of the offence was procured by illegal conduct on the part of the police or any other person. To the contrary, to institute and maintain proceedings in a competent criminal court for that purpose is to use the process of that court for the very purpose for which it was established. If the commission of the crime was procured by illegal conduct on the part of another person, one would prima facie expect that criminal proceedings would also be instituted against that person. If that other person is a police or other government officer, a failure to institute such criminal proceedings might be a relevant consideration favouring the exercise of the discretion to exclude evidence of the illegally procured crime or of an element thereof. Such a failure would not, however, of itself convert the*

107 (1995) 184 CLR 19

use of a criminal court's process for the trial and conviction of the person who committed the charged offence into an abuse of that process".

248. Brennan J similarly ruled the evidence ought have been excluded pursuant to the public policy discretion and rejected entrapment as a basis for a permanent stay, at [48]:

"*If there be jurisdiction to stay the prosecution of an offender, it must be on some ground other than entrapment. It would be anomalous to deny a defence of entrapment yet admit a jurisdiction to grant a permanent stay of a prosecution on the ground of entrapment. Such a jurisdiction would create a discretionary power to try a case or to decline to try a case according to whether the court "desires to let the defendant go free". It follows that I would respectfully decline to accept the approach taken in at least some Australian courts that prosecution of an offender entrapped into the commission of an offence is an abuse of process enlivening a judicial discretion to stay the prosecution."*

249. Brennan J also made the following call for the consideration of legislative intervention (a call which was heeded and led to the introduction of 'controlled operations' legislation in Australia), at [53-54]:

"This result is manifestly unsatisfactory from the viewpoint of law enforcement. As a technique of law enforcement, the so-called "controlled" importation of prohibited imports may be an acceptable technique for the detection and breaking up of drug rings but, if that be so, the law enforcement agencies must address their concerns to the Parliament. So long as the unqualified terms of s.233B(1)(b) reveal the Parliament's intention to prohibit all persons, including the law enforcement agencies, from importing heroin, it is not for the courts to encourage the Executive branch of government to sanction a deliberate course of contravention. The Executive branch of government cannot dispense its officers from the binding effect of the laws prescribed by the Parliament (106). If law enforcement agencies apply for an amendment of the laws to permit the employment of detection methods such as those used in this case, it will be for the Parliament to consider whether controls should be legislatively prescribed. The Parliament might impose conditions upon the employment of those methods. The Parliament might place responsibility for authorizing the importation of prohibited imports for detection purposes upon specified officers who will be liable if they fail to exercise supervision over the operations of the law enforcement agencies. It is manifest that there will be anomalies, if not corruption, in the conduct of such operations in the absence of adequate supervision.

But provisions of that kind cannot be prescribed by courts; they are appropriate matters for consideration by the Parliament".

250. Toohey J recognised a power to stay a prosecution based on entrapment but ruled that the test was not met on the facts in the case, and also ordered exclusion of the evidence, at [62-63]:

> *"A stay can be warranted only on the footing that the charge against the appellant was the result of actions by police officers, involving breaches of the Act, and that to proceed against the appellant in those circumstances was to bring the administration of justice into disrepute. It was the importation of the heroin which involved police officers in themselves committing breaches of the Act. Had the appellant been charged under a State law with being in possession of heroin, the circumstances in which the heroin came to be in Australia would not have been crucial to the charge. It would perhaps be ironical if the present proceedings should be stayed when, subject to questions of double jeopardy, a prosecution under the laws of South Australia would almost certainly not be stayed. But that is not an argument of much weight. The question is not one of fairness or unfairness to the appellant but rather the implications for the process of the court in allowing the proceedings to continue.*
>
> *While the conduct of the police officers cannot be condoned and left them open to being charged with breaches of the Act, I do not think that to proceed with the charge against the appellant was to make an improper use of the process of the District Court".*

251. Gaudron J approached the issue on the basis that abuse of process was the applicable remedy for the entrapment, and ordered a permanent stay on that basis, stating of the entrapment scenario generally, at [77-78]:

> '*Equally, prosecution authorities will ordinarily have acted, as they also say they did in this case, solely or mainly for the purpose of ensuring the prosecution of those who perpetrate crime. But those considerations are beside the point when the inevitable consequence of the proceedings is to weaken public confidence in the administration of justice. Proceedings of that kind are, on that account, an abuse of process. And that is so no matter the purpose or motive with which they are brought and no matter that a fair trial is possible".*

252. McHugh J in dissent dismissed the appeal, while recognising the availability of a permanent stay as a remedy, His Honour elucidated four criteria by which to judge the appropriateness of a stay and found none satisfied by the facts, at [92]:

> *"I do not think that it is possible to formulate a rule that will cover all cases that arise when an accused person seeks to stay a prosecution*

on the ground that the offence was induced by or was the result of the conduct of law enforcement authorities. The ultimate question must always be whether the administration of justice will be brought into disrepute because the processes of the court are being used to prosecute an offence that was artificially created by the misconduct of law enforcement authorities. That question should be determined after considering four matters:

(1) Whether conduct of the law enforcement authorities induced the offence.

(2) Whether, in proffering the inducement, the authorities had reasonable grounds for suspecting that the accused was likely to commit the particular offence or one that was similar to that offence or were acting in the course of a bona fide investigation of offences of a kind similar to that with which the accused has been charged.

(3) Whether, prior to the inducement, the accused had the intention of committing the offence or a similar offence if an opportunity arose.

(4) Whether the offence was induced as the result of persistent importunity, threats, deceit, offers of rewards or other inducements that would not ordinarily be associated with the commission of the offence or a similar offence".

253. The majority decision (that a stay could not be justified on the basis of entrapment but exclusion on the grounds of high public policy could) sits somewhat uneasily with later developments in Australia in cases such as *Moti v The Queen*.

254. The question could be asked, why would it bring the administration of justice into disrepute any less to countenance a prosecution brought about by illegal importation of drugs by police than to countenance one brought about by executive complicity in illegal kidnapping in a foreign jurisdiction? Both acts are undertaken to facilitate a prosecution and both involve serious criminality (or relevant complicity with it) by the executive undertaken to ensure prosecution can occur.

255. Given the various opinions expressed in Ridgeway and the developments since (particularly the *Moti* case) it may be that if an entrapment case comes before the High Court in the future the decision as to the application of abuse of process doctrine may be different.

BREACH OF PROMISE/LEGITIMATE EXPECTATION

256. Departure by the executive from representations or undertakings made is a well-established basis for a permanent stay of proceedings of any indictment, primarily on the ground that a legitimate expectation that a person will not be prosecuted, or not prosecuted for a particular charge, is worthy of protection and that involving the court in the breach of undertaking has a tendency to bring the administration of justice into disrepute.

257. This principle has been extensively recognised in the United Kingdom[108] and in Fiji and Australia.

258. Its first recognition in Australia seems to have been in the South Australian Supreme Court in *The Queen v Milnes and Green*[109].

259. The undertaking does not have to amount to an express promise, undertaking or offer of immunity. It can be implied and arise where a person 'is given to understand' that they are not to be prosecuted.[110]

260. The representations are more important and departure from them more serious, when the undertakings are made to a Court.[111]

261. In *State v Peceli Vuniwa*[112] Shameem J, stated the principles in this way:

> *"In summary the principles in relation to this limb of the inherent jurisdiction to stay proceedings for abuse of the process can be summarized by asking the following questions:*
> *1. Did the prosecution make an undertaking to the accused and/or his counsel that a charge would not be instituted or proceeded with?*
> *2. Did the accused accept that undertaking?*
> *3. What was the lapse of time between the undertaking and the revocation?*
> *4. Was there in fact a revocation?*
> *5. Was the accused prejudiced by the change in the prosecution's position?*
> *6. Has the accused shown, on a balance of probabilities that the prosecution is an abuse of the court's process because it is a breach of an undertaking?*
> *7. Is the abuse so unfair and wrong that the prosecution should not be allowed to proceed?"*

262. Goundar J accepted this statement of principle in *Chaudhry v State*[113] where a stay of proceedings on this basis was unsuccessfully sought.

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108 *Chu Piu-Wing v Attorney General* [1984] HKLR 411, *R v Croydon JJ, Ex Parte Dean* [1993] QB 769 *Bloomfield* (1997) 1 Cr. App. R. 135 *R v Townsend* & Ors [1997] 2 Cr. App. R. 540 *R v Latif and Shahzad* [1996] 1 1 ALL E.R 353, *R v Inland Revenue Commissioners, Ex Parte Mead and Another* [1993] 1 ALL E.R 772.

109 [1983] 33 SASR 211

110 *R v Croydon JJ, Ex Parte Dean* (at pg 8 unreported version)

111 *Bloomfield* per Staughton L.J. at pg 143

112 HAC 31 of 2005

113 [2012] FJHC 1229

263. The former Prime Minister was considered to have been cleared by an executive ordered inquiry of allegations of financial offences arising from keeping monies in a foreign bank account. The monies had been donated by supporters in India following the events of 2000 and subsequently maintained in a bank account in Australia. Despite the findings of the inquiry he was however subsequently prosecuted for the offences.

264. A stay was sought on the basis that the, "*Prime Minister and the Attorney General publicly endorsed the findings of an independent inquiry and cleared him of any culpability in respect of the donated funds*".

265. Goundar J rejected the submission by the accused that the Prime Minister's statement, "*this matter is now no longer an issue as far as I and the Government are concerned constitutes a representation that he is absolved from any prosecution in the future in relation to the donated funds*" finding that, "*the Prime Minister never suggested in his correspondences to the applicant or to the public at large that he would enforce the findings of the inquiry on the Reserve Bank or the DPP. To do so would have been interfering with the independence of these institutions and contrary to good governance*".

266. In *Nolan v Curby*[114] the Supreme Court of New South Wales was concerned with a situation where an accused was induced to make statements on the basis of representations to the effect that he would not be charged. Clarke, Powell and Cole JJA stated:

> *"..The appellant's case was that he had provided information and documents to police associated with the Building Industry Task Force because he was told that he had no choice but to answer questions put and to hand over the documents requested; because he was told that this was preparatory to his giving evidence to the Royal Commission and possibly later criminal proceedings against other persons; because he was told that nothing he said adverse to his own interests could be used against him because of the provisions of the Royal Commissions Act and because unidentified police officers promised him that he would not be charged with any offence. The appellant submitted that he was induced by those statements, which were false, to co-operate when otherwise he would not have done so.*
>
> *His evidence (which the Court is bound to assume is correct for present purposes) raises a serious question about the conduct of the officers involved but that does not mean that the proceedings, which were commenced the day after Dowd J's judgment, should be stayed pending the hearing of the*

114 No. 40757 of 1995 (NSW Court of Criminal Appeal) (20 December 1995)

summons. The critical question is whether there is a serious question as to whether this is one of those exceptional cases in which, notwithstanding the reluctance of the civil courts to interfere in the criminal process, a stay should be granted.

In support of the application the appellant's counsel referred to three authorities. The first of the three cases to which the court was referred (and to which his Honour was not referred) was R v Croydon Justices, ex parte Deane [1993] 3 AER 129, a decision of two justices of the Queens Bench Division. There the court was concerned with a case in which a person, who was an accessory after the fact, alleged that he had given assistance to the prosecuting authorities because the police wished to use him as a prosecution witness and had told him that he would not be prosecuted for offences associated with the murder of a named person.

Staughton LJ, who gave the judgment, concluded that the 'prosecution of a person who had received a promise, undertaking or representation from the police that he will not be prosecuted is capable of being an abuse of process'. In reaching that conclusion his Lordship considered a number of cases including R v Milnes and Green [1983] 33 SASR 211, R v Georgiadis (supra), R v Betesh [1976] 30 CCC (3d) 233 and Chu Piu-wing v A-G (1984) HKLR 411.

A similar question was considered in R v Trainor (1991) 56A Crim R 102 by the Court of Criminal Appeal in Queensland. There the prosecutor and the appellant's solicitor reached an agreement that in consideration that the appellant would not seek an order for costs against the prosecutor the prosecution would be discontinued. Dowsett J considered that the mutual intention must have been that all proceedings in respect of the incident in question be then and there terminated and went on to say: "Nothing is more likely to bring the judicial process into disrepute than to permit either the Crown or the police force to resile from such an agreement I consider that the subsequent proceedings constituted an abuse of process."

These cases, to adopt the words of Cox J in R v Vuckov and Romeo (Supreme Court of South Australia, 7 April 1986, unreported): " ... show on the whole a cautious but steady development in recent years of the use of a stay of proceedings on the criminal side as a remedy against prosecutorial oppression in a variety of situations. They are not all concerned with the manner of a man's trial, but extend to the question whether he should be tried at all. There can be no set

categories of cases that call for the exercise of this drastic but necessary power.".

267. In *Rona v District Court of South Australia*[115] the South Australian Supreme Court was concerned with a situation where the Crown departed from assurances at a 'case status conference' that the charges would remain the same.

268. King CJ (with whom, Mohr J agreed) said at 21:

> *"..I think that the attempt by the DPP to depart from the unequivocal assurances given at the status conference that the information on which the accused would go to trial was the false pretences information, by proceeding on the information for fraudulent conversion, was in the circumstances an abuse of the process of the Court which gave rise to a power in the Court to stay proceedings on that information"*

269. *In R v Mohi*[116] the Supreme Court of South Australia was concerned with a case where the applicant had been given assurances that he would be treated as a prosecution witness and not charged. Following upon which he was charged.

270. Martin J stayed the prosecution and stated, at [30]:

> *"..Counsel for the applicant relied heavily upon the decision of Staughton LJ, with whom Buckley J agreed, in R v Croydon Justices, Ex parte Dean [1993] QBD 769. In many respects, the facts are similar to those relating to the applicant. The appellant was aged 17. During the course of a murder investigation the applicant and others were arrested on suspicion of murder. In two separate interviews the appellant made statements which were untrue, but admitted taking part in the destruction of evidence. His statements amounted to potentially important evidence against one of the other persons arrested for the murder. The appellant was released from arrest and made a witness statement. He said that he was willing to assist the police. The custody record at the police station contained remarks that the appellant had been eliminated as a suspect and had provided a statement to act as a prosecution witness. Notwithstanding that the appellant had admitted the offence with which he was eventually charged, no charge was laid and he was released. Five days later he undertook three further periods of interview, prior to which he was told that he was not under arrest and was free to leave at any time. During the course of the interview he admitted that he had not been entirely truthful with the police. At the conclusion of the interview the police explained to the appellant that he was a prosecution witness and had their protection. During the*

115 (1995) 77 A Crim R 16

116 (2000) 78 SASR 55

following day, with the assistance of his solicitor, the appellant prepared a statement which formed the basis of a further witness statement that he made to the police. He also attended at the scene of the crime to assist in the inquiries.
[31] Approximately four weeks after the police had first spoken to the appellant, an officer of the Crown Prosecution Service decided that he should be charged with the same offence to which he had admitted in the first interview. Notwithstanding that decision, a week later the appellant made two further statements. He was not cautioned or offered legal advice, nor was he told that he was to be charged. The officer who arranged for the additional statements to be taken said he was awaiting instructions in writing from the Crown Prosecution Service to charge the appellant and had forgotten that fact when he sent the officers to obtain the additional statements.
[32] The appellant was formally charged a little over five weeks after he had given his first statement in which he admitted the offence. Throughout that period he had been treated as a witness. The Court accepted that the police had told the appellant that he was to be used as a prosecution witness and that he would not be prosecuted for offences associated with the murder.
[33] Against that background Staughton LJ, with whom Buckley J agreed, identified the following principle (p778):

"In my judgment the prosecution of a person who has received a promise, undertaking or representation from the police that he will not be prosecuted is capable of being an abuse of process. Mr Collins [counsel for the prosecution] was eventually disposed to concede as much, provided (i) that the promisor had power to decide, and (ii) that the case was one of bad faith or something akin to that. I do not accept either of those requirements as essential."
[34] His Lordship concluded (p779):

"In my judgment, particularly having regard to the fact that the applicant was only 17 at the time, although not, as he has since admitted, a stranger to crime, it was clearly an abuse of process for him to be prosecuted subsequently. The impression created was not dispelled for over five weeks, during which period he gave repeated assistance to the police. This case can, I think, be regarded as quite exceptional. The justices were bound to treat it as one of abuse of process."
[35] The Court in Croydon placed considerable reliance upon the decision of the Hong Kong Court of Appeal in Chu Piu-wing v Attorney-General [1984] HKLR 411. The Court of Appeal set aside a subpoena to a witness as an abuse of process because officers of the Independent Commission Against Corruption had previously enlisted the witness's assistance on the basis of an undertaking by the officers that the witness would not be required to give evidence. The Court observed (p417 and p418):

"We think that there is a clear public interest to be observed in holding officials of the State to promises made by them in full understanding of what is entailed by the bargain."
[36] The Court also remarked that the public interest is well served by the cooperation of accomplices with investigating authorities and that this aspect of the public interest is likely to be prejudiced if investigating authorities break faith by failing to abide by promises made to such persons.
[37] The bargain in Chu Piu-wing was found in a specific undertaking given by officers of the Independent Commission Against Corruption in return for the witness's cooperation. Detective Laity denied that any specific undertaking was given to the applicant. Rather than an undertaking, in response to concerns expressed by the applicant, the officers reassured him that he would not be charged and would only be used as a witness. In some circumstances the difference between an "undertaking" and "reassurance" might be significant, but in the practical world of criminal investigation such distinctions are not contemplated by those whose cooperation is enlisted by means of such "reassurances".

271. Justice Martin stated further at [46-48]:

"In my opinion, it is no answer to the cumulative force of these facts to say that those concerned with the prosecution of Williams and Herbsach within the Office of the Director had not finally decided whether the applicant was to be a witness or an accused. If of any significance, the fact that consideration was first given to this issue in April 1999, but was not resolved in the mind of those making the decision until February 2000, supports the case for the applicant. From the perspective of the accused and the community, the reassurances given by the investigating officers that the applicant would not be charged were confirmed and adopted by the conduct of the Director through his officers. That adoption came in a number of forms and over a lengthy period. No change in circumstances occurred which could amount to good reason for a change in the ostensible position previously taken by the Director.

The community expects that the police will use all legitimate investigatory techniques in the investigation of serious crime. Those techniques include the use of accomplices and lesser offenders as sources of information and as witnesses. The successful prosecution of persons who commit serious crimes is often dependent upon the cooperation of such persons. To that end it is in the interests of justice that such persons be encouraged to cooperate with investigating and prosecuting authorities. <u>The administration of justice will be brought into disrepute if, without good reason, the investigating and prosecuting authorities are permitted to decline to comply with the undertakings or assurances given to such persons</u>

that they will not be charged and to pursue prosecutions against those to whom such undertakings or assurances have been given".

I stress that these remarks are made in the context of the particular circumstances relating to the applicant. I also stress that the mere fact that an investigating officer has treated a person as a witness and given an undertaking that the person would not be prosecuted will not, in ordinary circumstances, in itself justify the exercise of a discretion to stay a prosecution against such a person. For example, if the Director had decided in April 1999 that the applicant should be charged, while the conduct of the police in their dealings with the applicant may have resulted in the exclusion from evidence of the two statements, in my opinion that conduct would not have justified the exceptional course of staying the prosecution. In such circumstances the Director would not, by the conduct of his officers, have ostensibly adopted the assurances given by the investigating officers. I regard the apparent adoption by the Director, over a lengthy period, of the assurances given by investigating police, and the reliance by the Director upon the applicant's statements before the committing Magistrate in the matter of Williams and Hersbach, as particularly important features. The absence of good reason for a change in position by the Director is also of particular significance. ~49 For these reasons, I ordered a permanent stay of the prosecution of the applicant.

272. In *Bloomfield*[117] the Court of Appeal of England was concerned with a situation where (as summarised in the headnote) :

"..The defendant was charged with possession of a Class A controlled drug. At a plea and directions hearing at the Crown Court prosecuting counsel indicated to defence counsel that the Crown wished to offer no evidence because it was accepted that the defendant had been the victim of a set-up. Owing to the presence in court of certain people it would have been embarrassing to the police and prosecution if no evidence were offered that day so counsel spoke to the trial judge in his room. An order was then made in open court to adjourn the case and relist it "for mention". The Crown Prosecution Service subsequently arranged a conference with new prosecuting counsel and thereafter informed the defence solicitors that the Crown intended to continue the prosecution. An application at the trial to stay the proceedings as an abuse of process having failed, the defendant pleaded guilty and was sentenced to three months' imprisonment. On appeal against conviction on the question (1) whether it was an abuse of process for the Crown to revoke a previous decision, communicated to the defendant and the court, to offer no evidence and, if it could be an abuse of process, whether (2) it made any difference if prosecuting

117 *Bloomfield* (1997) 1 Cr. App. R. 135

counsel had made that decision and communicated it to the defendant and the court without authority".

273. The decision was summarised in the headnote as follows:

> *"..allowing the appeal,(1)that whether or not there was prejudice to the defendant, it would bring the administration of justice into disrepute to allow the Crown to revoke its original decision without any reason being given as to what was wrong with it, particularly as it was made coram judice in the presence of the judge; and(2)that neither the court nor the defendant could be expected to enquire whether prosecuting counsel had authority to conduct a case in court in any particular way and they were therefore entitled to assume in ordinary circumstances that counsel did have such authority. Croydon Justices, ex p. Dean (1994) 98 Cr. App. R. 76, D.C., applied "*

274. In *Craig Anthony Trainor*[118] the Court of Criminal Appeal Queensland considered a situation where an accused agreed to waive costs on the basis an information before a Magistrate was discontinued. The information was then re-laid and he was convicted after hearing. The Court held it was an abuse of process for him to be prosecuted and the conviction was set aside.

275. *R v Georgiadis*[119] was a case where the Crown sought to indict an accused in circumstances where he had received a formal undertaking from the Crown to the effect that he would not be prosecuted and had received immunity.

276. Ormiston J ruled that the accused had in effect been promised immunity and adjourned the case for the Director of Public Prosecutions to consider the position. The judgment cites a number of authorities for the proposition that a prosecution brought in breach of a clear grant of immunity would be an abuse of process.

277. A large number of United Kingdom cases demonstrate that permanent stays have been granted following police and other authorities reneging on an undertaking to deal with a matter by way of caution or other diversionary mechanism.[120]

POLICE MISCONDUCT AT THE INVESTIGATORY STAGE

278. With the exception of the extradition/deportation cases and the breach of promise cases the author has not found a body of Australian case law demonstrating that a permanent stay will be granted on the basis of police misconduct during a criminal investigation.

118 (1991) 56A Crim R 102

119 [1984] VR 1030

120 See Wells, Colin. Abuse of Process. Second Edition. Pgs 19-27 and 186-204

279. This perhaps demonstrates that the 'bringing the administration of justice into dispute' limb of abuse of process doctrine is further developed in the United Kingdom and in Fiji than Australia.

280. There is no doubt however that the general principles are sufficiently broad to allow such arguments to be made.

281. In *R v Grant*[121] the English Court of Appeal was concerned with a murder case where police had eavesdropped on conferences between solicitor and client following the client's arrest. The breach of privilege yielded nothing of use and did not compromise the fairness of the trial.

282. The Court of Appeal quashed the conviction and stated at 52:

> *"..Acts done by police, in the course of an investigation which leads in die course to the institution of criminal proceedings, with a view to eavesdropping upon communications of suspected persons which are subject to legal professional privilege are categorically unlawful and at the very least capable of infecting the proceedings as abusive of the court's process. So much seems to us to be plain and obvious and no authority is needed to make it good. The only question that requires examination is whether such proceedings ought to be charectarised as an abuse of the process, and the prosecution stopped, if the defendant or defendants have suffered no prejudice in consequence of the relevant unlawful acts".*

283. The answer to the question posed was a categorical yes, the court holding that the breach of privilege was (at 54):

> *"..so great an affront to the integrity of the justice system, and therefore the rule of law, that the associated prosecution is rendered abusive and ought not be countenanced by the court".*

284. In *Takiveikata v State*[122] Bruce J permanently stayed an indictment against a Mr. Khan, charged with conspiracy to murder the Prime Minister, Minister for Finance and Attorney-General, on the basis of a combination of executive misconduct involving the unlawful detention of Mr. Khan and the denial of access to confidential legal advice.

285. Bruce J was significantly influenced by the fact that at [218-219]:

> *"Fiji places value on personal liberty. This is evident from provisions such as section 23 of the Constitution and the provisions of the Criminal Procedure Code to which I have referred. Fiji also places a high and, indeed, constitutional value on the right to confidential legal advice. Personal liberty is a basic human right. While it is invidious to*

121 [2005] EWCA Crim 1089

122 [2008] FJHC 315; HAM039.2008 (12 November 2008)

rank human rights, personal liberty must on any view be in the upper ranks of human rights.

The right to confidential legal advice is, on any view, fundamental to the maintenance of the rule of law and must rank in the same level as rights to access to justice and the courts. A society whose laws have any level of complexity (such as Fiji and the balance of the common law jurisdictions in the world) demand that ordinary members of society have confidential access to legal advice. Lord Hoffman in the passage I have quoted from R v Special Commissioner & Another, ex parte Morgan Grenfell & Co Ltd (above) described the right to confidential legal advice as a basic human right.

286. Bruce J undertook a balancing exercise but was of the view the breaches warranted a stay of proceedings at [220-221]:

"Against that, is the clear imperative that those facing criminal charges should be tried. Every authority that I have taken into account in considering these issues makes it plain that a stay of proceedings is to be an exceptional remedy. Generally, it is, as I have observed, almost the opposite of what justice according to law is all about.

In the end, as a member of the judiciary, taking responsibility for upholding the rule of law, I am reluctantly driven to the conclusion that I cannot countenance behaviour by the executive that substantially threatens either basic human rights or the rule of law".

ILLEGAL RECORDING OF ACCUSED BY PRIVATE PERSONS

287. In *State v Pal*[123] the Fiji Court of Appeal upheld a permanent stay ordered by the trial judge on the basis that private persons had secretly recorded the accused engaging in conduct said to be incriminatory. This recording was said to have been in breach of his constitutional rights. The prosecution sought to adduce the videos to prove the offences. The trial judge rejected a claim of entrapment, but found the recordings had been done in 'bad faith'. Rather than excluding the videos from evidence the trial judge stayed the prosecution. Upon a Crown appeal the court (Pathik, Mataitoga and Scutt JJA) held:

"We consider that what occurred in this case was unconscionable and a gross abuse of process. The state should not be a party to such an abuse, and nor should the courts allow such conduct to found a prosecution or be a part of the criminal justice system".

BREACH OF INTERNATIONAL LAW

[123] [2008] FJCA 117; [2009] 1 LRC 164 (8 February 2008)

288. Executive conduct that seriously breaches international law in a way that has sufficient nexus with a subsequent prosecution can give rise to an abuse of process. This can be seen as closely linked to the abuse of process that exists in the 'unlawful extradition' cases.

289. In *R v Carrington*[124] a drug trafficking prosecution was permanently stayed after it emerged that executive officials has mislead Maltese authorities in order to gain permission to board a vessel on the high seas, without such consent the boarding would have been in clear breach of international law.

MATTERS HELD NOT TO AMOUNT TO AN ABUSE OF PROCESS

290. The case law is replete with failed applications for a stay of proceedings based on abuse of process. Often this is because the questions involved are one of degree. Some failed applications raise relevant considerations, such as delay or executive misconduct, but they are held to fall somewhere short of arising to an abuse of process. Little is gained by way of an understanding of principle by recounting these instances or analyzing why they failed.

291. In some cases however the refusal to stay a proceeding on abuse of process does give rise to a discernable principle capable of being generally applied.

WITNESS PAYMENTS

292. In *Moti v The Queen*[125] (the High Court appeal which is discussed above) the judge at first instance stayed the prosecution on the basis that the Australian Federal Police had paid well over $100,000 to the complainant and her family in response to continual threats to 'withdraw' from the prosecution. The first instance judge held the payments to be an affront to the public conscience and stayed the indictment.

293. Mullins J stated at [87-90]:

> *"I am satisfied that the purpose that the financial support has been given to the complainant's family members in Vanuatu is to ensure that those witnesses and the complainant remain willing to give evidence against the applicant. The level of the financial support is of great concern and the expectation it has created on the part of the complainant's family in Vanuatu that the support remains ongoing whilst the prosecution continues. What would the complainant's*

[124] February 1999. (See discussion in Wells, Colin. Abuse of Process. 2nd Edition (2010) pg. 164).
[125] *R v Moti* [2009] QSC 407

parents and brother have done to support themselves since February 2008, if the AFP had not provided full financial support of them and their dependants? It raises questions about the integrity of the administration of the Australian justice system, when witnesses who live in a foreign country, where it is alleged an Australian citizen committed acts of child sex abuse, expect to be fully supported by the Australian Government, until they give evidence at the trial in Australia of the Australian citizen. The conduct of the AFP in taking over the financial support of these witnesses who live in Vanuatu is an affront to the public conscience. It squarely raises whether the court can countenance the means used to achieve the end of keeping the prosecution of the charges against the applicant on foot.

The assumption by the AFP of the responsibility of providing total living support for the complainant's parents, her brother and their dependants in Vanuatu brings the administration of the justice system into disrepute.

Although it is only in exceptional circumstances that abuse of process justifies staying an indictment, I have concluded that the balancing of the various policy considerations favours the applicant over the prosecution. In the circumstances, the appropriate sanction for that abuse of process is to stay the indictment. The seriousness of the abuse of process would not be acknowledged appropriately by any other order".

294. This order was quashed by the Court of Appeal of Queensland but later reinstated by the High Court on different grounds.

295. The High Court stated as follows in relation to the witness payments ground, at [15]

"In these circumstances, the Court of Appeal was right to conclude [31] that the payments "were not designed to, and did not, procure evidence from the prosecution witnesses". Further, contrary to the appellant's submissions in this Court, the payments were not shown to be unlawful. It was not demonstrated that any of the payments were made in breach of any provision of the Financial Management and Accountability Act 1997 (Cth) or the Financial Management and Accountability Regulations (Cth). More particularly, it was not shown that the payments (whether considered separately or together) could not have been seen as an "efficient, effective and ethical" use of Commonwealth funds[32]. Nor was it demonstrated that the payments could not be seen as "not inconsistent with the policies of the Commonwealth"[33]. Describing the payments (as the appellant did) as payments made in response to "demands" or "threats" by the complainant does not lead to any different conclusion. It was not open to the primary judge to conclude that the payments were "an affront to the public conscience"[34] justifying a stay of the appellant's

prosecution. And to the extent that the appellant argued he could not have a fair trial due to the payments, that argument should be rejected. As Mason CJ and Toohey J said in R v Glennon[35], in what this Court in Dupas[36] called "an authoritative statement of principle":

> *"a permanent stay will only be ordered in an extreme case[37] and there must be a fundamental defect 'of such a nature that nothing that a trial judge can do in the conduct of the trial can relieve against its unfair consequences'[38]."*

If the payments were said to bear upon the evidence witnesses gave at trial, that issue could be explored fully in evidence and could be the subject of suitable instructions to the jury that would prevent unfairness to the appellant[39]".

296. Despite its rejection by the High Court in the facts of the case the witness payments issue in the *Moti* case is an interesting example of a trial judge not being confined by the existing categories of abuse of process and having recourse to fundamental underlying values in determining the important question of whether executive conduct has a tendency to undermine public confidence in the administration of justice.

297. The case is an example of judicial oversight of a fundamentally executive function (support to witnesses) in circumstances where (in the view of the trial judge at least) the executive conduct had a tendency to bring the administration of justice by the courts into disrepute.

298. That said, the fundamental question left judicially unanswered by the *Moti* litigation is why the Australian Federal Police (and to a significant degree also the Commonwealth Director of Public Prosecutions) engaged in, or acquiesced in, the behavior they did, including conniving in international kidnapping and acceding to demands for large sums of money by a complainant.

OPERATION OF SPECIAL MEASURES AT TRIAL PURSUANT TO LEGISLATION

299. Parliament regularly creates laws that impact upon the way that criminal trials proceed and in some cases deny rights to accused persons they have previously held.

300. Generally speaking it has been held that the effect of a validly enacted act of parliament will not be capable of being relied upon in support of a claim of an abuse of process. This seems to reflect the hierarchy between common law and legislation and the court's deference to the choices of parliament.

301. In Fiji, where the validity of legislation is held to a higher standard, that of compliance with constitutionally enshrined rights, the cases discussed below may have been decided differently, or at least different reasoning

undertaken. (It may be for example that some such legislative initiatives might be struck down as unconstitutional).

302. In *Regina v P.J.E*[126] the appellant sought a stay on the basis that legislative provisions would prevent him adducing evidence that tended to disclose the complainant had previous sexual history the appellant contended was relevant to his defence. The trial judge granted a permanent stay and the Crown appealed the order. The Court of Criminal Appeal set aside the stay of proceedings, holding [28]:

> *"The question of principle which arises in the present case is whether the jurisdiction to stay an indictment extends to include a perception of unfairness arising from the operation, in accordance with its terms, of a validly enacted statute of the Parliament. In my view, it does not. To hold otherwise would, in effect, be to elevate the Court's judgment above that of the Parliament".*

303. In *R v MSK and MAK*[127] the appellants challenged the lawfulness of convictions following a sexual assault trial where they, as self-represented accused, were unable to personally cross examine the complainant because of the effect of a section of the criminal procedure law designed to protect complainants from such cross-examination. The appellants chose not to avail themselves of a court appointed intermediary who could have conducted cross examination on their behalf. They had earlier declined state funded legal representation generally.

304. The main challenge in the appeal was to the constitutionality of the special measures contained within legislation that prohibited cross-examination. The court did however consider earlier case law holding that such special measures could not be relied upon to sustain an abuse of process claim and endorsed Sperling J's reasoning in *Regina v PJE*.

APPLYING FOR A TEMPORARY OR PERMANENT STAY OF CRIMINAL PROCEEDINGS

VENUE

305. Generally the remedy for an abuse of process is sought before the court that the prosecution is brought before, or in the court to which an appeal (or judicial review) from that court is heard.

306. The Supreme Court of Fiji in *Ledua v State*[128] has warned that stay applications should generally be made to the trial judge in accordance with

[126] No. 060216/95 Criminal Law and Procedure [1995] NSWSC 117 (31 October 1995)
[127] [2004] NSWCCA 308 (6 September 2004)
[128] [2008] FJSC 31; CAV0004.2007 (17 October 2008)

long standing pre-trial processes and applications in alternate venues risk being considered an abuse of process (Mason, Handley, Sackville JJ) at [42]:

> *"Section 41 of the Constitution confers jurisdiction on the High Court to grant "redress" in relation to actual or threatened contraventions of Chapter 4 of the Constitution. The High Court (Constitutional Redress) Rules 1998 prescribe procedures for such applications. Nevertheless, s. 41(4) of the Constitution arms the High Court with a discretion not to grant relief under that section "if it considers that an adequate alternative remedy is available to the person concerned". The decision of Shameem J in Singh v The Director of Public Prosecutions [2003] FJHC 221 that was upheld on appeal (see [2004] FJCA 37) states the applicable principles, following a line of Privy Council cases. An application for constitutional redress is a collateral proceeding that fragments the criminal process. Disputed questions of fact are to be resolved in accordance with well established common law procedures. It will generally be an abuse of process deserving summary dismissal to launch a free-standing application in the High Court civil jurisdiction in relation to an application for an adjournment and/or stay that could and therefore should be made as part of the pre-trial processes of a criminal prosecution. These principles apply to criminal proceedings in any court".*

307. It should be noted that the Constitution in section 44(4) contains a similarly worded provision to the provision considered by the court in *Ledua*.

308. There is however authority in the United Kingdom for the proposition that where a stay of proceedings is sought on the basis that executive conduct is such as to undermine public confidence in the administration of justice that a summary court should not hear the matter. It has been said in those circumstances the matter should be adjourned to allow a declaration to be sought before the higher court.

309. Lord Griffiths in *Regina v Horseferry Road Magistrates Court, Ex parte Bennett*[129] stated:

> *"I would accordingly affirm the power of the magistrates, whether sitting as committing justices or exercising their summary jurisdiction, to exercise control over their proceedings through an abuse of process jurisdiction. However, in the case of magistrates this power should be strictly confined to matters directly affecting the fairness of the trial of the particular accused with whom they are dealing, such as delay or unfair manipulation of court procedures. Although it may be convenient to label the wider supervisory jurisdiction with which we are concerned in this appeal under the head of abuse of process, it is in fact a horse of a very different colour from the narrower issues that arise when considering domestic criminal trial procedures. I adhere to the view I*

[129] [1994] 1 A.C. 42

expressed in Reg. v. Guildford Magistrates' Court, Ex parte Healy [1983] 1 W.L.R. 108 that this wider responsibility for upholding the rule of law must be that of the High Court and that if a serious question arises as to the deliberate abuse of extradition procedures a magistrate should allow an adjournment so that an application can be made to the Divisional Court which I regard as the proper forum in which such a decision should be taken.

ONUS

310. It is often said that the onus of satisfying the Court that an abuse of process exists lies with the party alleging it.[130]

311. In *R v S*[131] however the Court of Appeal cautioned that this was potentially misleading given the decision as to whether to stay proceedings was a discretionary one, involving questions of judgment, distinct from a typical fact finding exercise.[132]

312. The totality of all the factors involved in a case should be considered in determining the question of whether there is an abuse of process.[133]

STANDARD

313. As discussed above the standard is generally posited to be on the balance of probabilities.

314. The power has long been described as discretionary, but it is mandatory, in that it must be exercised where grounds for it are proved.

315. As Gaudron and Gummow JJ stated in *Carroll v R*:

"..The power to stay is said to be discretionary. In this context, the word "discretionary" indicates that, although there are some clear categories, the circumstances in which proceedings will constitute an abuse of process cannot be exhaustively defined and, in some cases, minds may differ as to whether they do constitute an abuse. It does not indicate that there is a discretion to refuse a stay if proceedings are an abuse of process or to grant one if they are not".

130 *Williams v Spautz* (1992) 174 CLR 509 at 529. *Takiveikata v State* [2008] FJHC 315

131 Court of Appeal Criminal Division: Rose LJ, Stanley Burnton and Hedley JJ: 6 March 2006.

132 See discussion in Wells, Colin. Abuse of Process. 2nd Edition. Pg 137-8.

133 *R v Gagliardi & Filippidis* 26 A Crim R 391 at 407

316. Proof of factual matters is upon the party seeking the remedy and to the civil standard.[134] This is not to suggest that there may not be cases where proof to a lesser standard of some matter might not be relevant to the discretion.[135]

EVIDENCE

RELEVANT EVIDENCE TO PROVE THE FACTS NECCESSARY

317. The evidence required in a stay application will necessarily vary depending on the grounds for the alleged abuse of process and what it is the applicant needs to prove to make out the claim of an abuse of process.

318. In NSW the rules of evidence will generally apply.

FROM THE SOLICITOR

319. Generally, the notice of motion seeking the stay will need to be supported by an affidavit by the instructing solicitor.

320. This may be the sole evidence in support or other written or oral evidence may need to be adduced.

321. In the successful matter of *R v CB* (where the basis of the application was that the prosecution was an attempt to controvert an acquittal obtained in earlier proceedings), the affidavit of the instructing solicitor evidenced merely:

- The grounds for the application
- The transcript of the Childrens Court hearing

322. Additionally a crown outline was tendered to assist the court in understanding the relationship between the matters the subject of the prior acquittal and the trial matter.

323. In *R v Moti* discussed above the evidence was substantial and was adduced over a period of weeks, and included oral evidence from numerous governmental officials, lawyers and others from Solomon Islands and the tendering of a large quantity of government documents

FROM THE APPLICANT

[134] *Takiveikata v State* [2008] FJHC 315

[135] Choo for example suggests in respect of delay issue that a “substantial risk” of a fair trial being compromised should suffice for a stay of proceedings. See Choo, Andrew L-T. Abuse of Process and Judicial Stays of Criminal Proceedings. Second Edition. Pg 91

324. In *Littler v R*[136] Hodgson JA expressed the view that an applicant for a permanent stay should provide sworn evidence, at [513]:

> *"In my opinion, an applicant for such an extraordinary remedy bears a heavy onus, and, if not unfit for trial, should normally be prepared to state on oath what he or she says would be the particular difficulties he or she would face in dealing with a trial of the charges brought".*

325. Hodgson J based this on a view that anything less would be an injustice to the complainant/s, at [513]:

> *"For myself, I would feel a sense of injustice to complainants such as these if a person charged with such offences could apply for and obtain a permanent stay, on the grounds such as those relied on in this case, without going so far as to state on oath what he says are his difficulties in dealing with the allegations".*

326. These comments were made in the context of a sexual assault allegations said to have occurred more than 30 years before police complaint.

327. There is no basis in law for applying this opinion generally to stay applications and indeed in many categories of abuse of process evidence from the accused might well be irrelevant.

328. His Honour's comments are perhaps best interpreted as a reflecting the heavy burden that an accused could be said to carry in persuading a court to preemptively terminate criminal proceedings on the basis of delay prejudice.

329. Hodgson J further opined, at [513]:

> *"..an applicant would not have to submit to cross-examination on the affidavit in the application, unless he or she elected to do so. If the affidavit were not permitted to be read without cross-examination, in my opinion it could be tendered as an exhibit, both as hearsay admissible in an interlocutory application, and also as direct evidence of what the applicant is prepared to say on oath and could, if he or she chose, say on oath at any subsequent trial. Of course, the applicant could choose to be cross-examined, and depending on what happened, this could add to or detract from the effect of the affidavit".*

330. In *R v Moti* discussed above the evidence was substantial and included oral evidence from numerous governmental officials, lawyers and others from Solomon Islands and the tendering of a large quantity of government documents. There was however no evidence from the applicant either orally or by way of an affidavit tendered at the hearing.

136 (2001) 120 A Crim R 512

DISCLOSURE

331. There is no reason to suppose that the Crown's obligation of disclosure does not apply in stay proceedings and it may well be that the evidence to support the application will need to come from the prosecution themselves.

332. An interesting example of this is the recent case of *R v Moti* discussed above.

333. As part of the proceedings at first instance before the Queensland Supreme Court the applicant served numerous subpoenas on Australian Government agencies and made an application for a disclosure order pursuant to section 590AB of the Queensland Criminal Code.

334. Daubney J set aside the subpoenas but granted the order for disclosure, ruling against the Crown submission that the disclosure obligation did not apply to the permanent stay application. Daubney J stated at 37:

> "*Mr Agius QC who, with Mr Chowdhury, appeared for the Director of Public Prosecution submitted that the pre-trial application by the accused was not a "relevant proceeding" within the meaning of the definition of that term as used in section 590AJ. It was argued that, because of that, the DPP can not be required to make the requested disclosure. While that argument has initial attraction, it does not, upon further consideration, have strength. Section 590AA is specifically designed for the making of pre-trial applications so that, among other things, time might be saved at the trial on indictment of an accused and, thus, provide for more efficient trials in general. As I noted above, section 590AA(2)(ba) specifically refers to the disclosure of a thing under chapter division 3 and the application by the accused comes within that section. Although a trial on indictment does not commence until the accused is called upon, I do not regard the definition of "relevant proceeding" as meaning that an application under chapter division 3 can only be brought once the trial has commenced".*

335. While the decision turned on the construction of the Queensland Criminal Code there is no reason to think it would not be adopted in the interpretation of the relevant disclosure provisions of the Director of Public Prosecutions Act and the Criminal Procedure Act.

COURT RULES

New South Wales

336. In the Local Court Rule 8.3 of the Local Court Rules would appear to apply to stay applications. There is no requirement in the Rules for the filing of a supporting affidavit but this course of action would be strongly advisable.

337. In the District Court Rule 10 of the District Court Rules applies to applications for a stay of an indictment. It requires the application be made:

> *"be made by filing notice of motion supported, unless the Court otherwise orders, by an affidavit or affidavits as to the facts and grounds upon which the application is made".*

338. In the Supreme Court a stay application should be done by notice of motion and supporting affidavit.

339. For Supreme Court and District Court matters it is important to be aware of Clause 8 of the Criminal Procedure Regulation

> *8 Application to stay indictment*
>
> *(1) This clause applies to:*
> *(a) any application to the Supreme Court or District Court for an order staying or quashing an indictment, and*
> *(b) any demurrer to an indictment.*
>
> *(2) Unless the court otherwise orders, an application or demurrer to which this clause applies must not be listed for hearing unless it has been filed within the prescribed time after a copy of the draft indictment was given to the accused person or the accused person's Australian legal practitioner under clause 7 (3) or (6).*
>
> *(3) For the purposes of this clause, the prescribed time is:*
> *(a) 1 month, in the case of an accused person who is in custody for the offence to which the indictment relates, or*
> *(b) 3 months, in any other case.*

APPEALING A REFUSAL

New South Wales

340. In New South Wales a refusal of a permanent stay in the District Court or Supreme Court can be appealed pursuant to section 5F of the *Criminal Appeal Act* 1912 (NSW).[137]

341. In Local Court proceedings there is an interlocutory appeal available pursuant to section 53(3)(b) of the *Crimes (Appeal and Review) Act* 2001 (NSW) with leave and on a question of law alone.

342. Alternatively judicial review pursuant to section 69 of the *Supreme Court Act* 1970 (NSW) could be considered but in light of the reluctance of the Supreme Court to allow the fragmentation of criminal litigation it may however be difficult to obtain leave for such relief.

137 *R v King* [2003] NSWCCA 399; 59 NSWLR 472

343. Otherwise abuse of process is a valid ground in an appeal against conviction, whether to the District Court of the Supreme Court, pursuant to the relevant provisions of the *Crimes (Appeal and Review) Act 2001* or the *Criminal Appeal Act 1912*.

344. The question of whether a stay should have been granted is reviewable in accordance with the principles enunciated in *House v The King.*[138]

Fiji

345. The principles in *House v The King* have been held in Fiji to be applicable in the review of discretionary decisions.[139]

346. The *Criminal Procedure Decree 2009* in section 246 allows appeals from the Magistrates Court to the High Court. Section 246(7) however would seem generally to preclude appeals prior to a determination of guilt. There may however be a question however of how this limitation interacts with article 100(5) of the Constitution.

347. In any event article 100(6) grants the High Court broad supervisory jurisdiction over the summary jurisdiction and power to make, "*such orders, issue such writs and given such directions as it considers appropriate to ensure that justice is duly administered by the Magistrates Court and other subordinate courts*".

348. The *Court of Appeal Act* allows appeals from criminal matters on indictment to the Court of Appeal. (This appellate jurisdiction is protected by article 99 of the Constitution). Section 99(3) also grants a power to, "*hear and determine appeals from all judgments of the High Court, and has such other jurisdiction as is conferred by written law*".

349. An erroneous failure to stay a prosecution should constitute an error enlivening jurisdiction for either appellate court.

350. Judicial review proceedings can also be utilized with the caveat that the availability of unused statutory remedies may lead to discretionary refusal.

351. Constitutional redress may be appropriate, with the High Court having original jurisdiction under article 100(4) of the Constitution, subject to the caveats discussed above with regard to the use of other remedies and the power of the High Court to refuse jurisdiction based on that availability.

138 [1936] HCA 40; (1936) 55 CLR 499.

139 *Siwan v State*[2008] FJHC 189; HAA 050.2008L (29 August 2008)

SUBSEQUENT APPLICATIONS UPON A CHANGE OF CIRCUMSTANCES

352. An application for a permanent stay, being in essence a discretionary decision making undertaking, can be the subject of renewed application, before the court of first instance, should new evidence or considerations arise.

353. In *Chaudhry v The State*[140] a second application for a permanent stay was made on the stated basis of new evidence having become available. Madigan J in refusing the application held:

> *[34] While Counsel for the Applicant is correct in that, as is the case for bail, multiple applications for stay can be made in respect of the same proceedings, that can only be if there is new matter or there are new circumstances to be brought before the Court and relied upon in the application.*
>
> *[35] However, as Counsel for the State points out, multiple "repeated collateral challenges and unmeritorious stay applications" should be deprecated. They refer to the Hong Kong Court of Appeal case of Yeung Chun Pong [2008] 3 HKLRD 1, affirmed by the Court of Final Appeal in (2009) 12 HKCFAR 867 where the Court observed:*
>
> > *63. "'There is clear public interest in ensuring that charges, once before a Court, must be tried. There is built into the system a host of safeguards to secure an accused a fair, and an appropriately speedy, determination. If those safeguards are not afforded in a particular instance, there is provided by the Legislature a prescribed appeal mechanism. That mechanism does not envisage interlocutory appeals or collateral challenges. That is for very good reason, namely, that in practice most trials would be constantly interrupted to the effective decision-making and the disruption of the system as a whole. .....*
> >
> > *..... The outcome is that unwarranted applications to stay proceedings combined with collateral challenges themselves run the risk of abusing the Court's processes".*
>
> *[36] This Court approves of and endorses those dicta.*

The author welcomes comments and feedback on this paper.

[140] *Chaudhry v State* [2013] FJHC 241; HAM45.2013 (15 May 2013)

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