IMM v The Queen [2013] NTSC 9

PARTIES:	IMM
	v
	THE QUEEN
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING ORIGINAL JURISDICTION
FILE NO:	21206228
DELIVERED:	27 February 2013
HEARING DATES:	11 February 2013
RULING ON APPLICATION FOR STAY OF PROCEEDINGS:	BLOKLAND J

CATCHWORDS:

Criminal law – procedure – stay of proceedings – abuse of process – whether inadequate and confusing disclosure – whether deprived of committal proceedings on some counts – deficient disclosure not intentional or reckless – chance of dismissal at committal proceedings remote – protected witness.

Criminal law – procedure – deficient disclosure – *Basha* inquiry – further cross examination of complainant – preferred alternative to a stay of proceedings.

Criminal law – procedure – alteration of charges following committal – whether prejudicial – whether prejudice can be cured.

Criminal Code (NT) s 127, s 132, s 299
Justices Act (NT) s 105L,

R v Basha (1989) 39 A Crim R 337; 87 ALR 577; applied

Jago v District Court of New South Wales (1989) 168 CLR 23; (1989) 87 ALR 577; discussed

Barron v Attorney-General (NSW) (1987) 10 NSWLR 215; *Director of Public Prosecutions (DPP) (Cth) v Bayly (No 1)* (1994) 63 SASR 97; *R v Joyce* (2002) 173 FLR 322; *R v Siugzdinis* (1984) 81 FLR 360; *Subramaniam v R* (2004) 211 ALR 1; referred to

Barton v R (1980) 147 CLR 75; 32 ALR 449; *GO v The Queen* (1990) 73 NTR 1; *May v O'Sullivan* (1955) 92 CLR 654; *R v Hanson* (1993) 89 NTR 1; *R v Ngalkin* (1984) 12 A Crim R 29; *R v Swaffield* (1998) 192 CLR 159; 151 ALR 98; *R v Ulman-Naruniec* (2003) 143 A Crim R 531; *The Queen v Boungaru* (1980) 147 CLR 75; *Walton v Gardiner* (1993) 177 CLR 378; 112 ALR 289; cited

Andrew Choo, 'Abuse of Process and Judicial Stays of Criminal Proceedings', 2nd ed, Oxford.

REPRESENTATION:

Counsel:

Applicant:	Ms Armitage
Respondent:	Mr Nathan

Solicitors:

Applicant:	Bennett Lawyers
Respondent:	Office of the Director of Public Prosecutions

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

IMM v The Queen [2013] NTSC 9
No. 21206228

BETWEEN:

IMM
Applicant

AND:

THE QUEEN
Respondent

CORAM: BLOKLAND J

RULING ON APPLICATION FOR A STAY OF PROCEEDINGS ON INDICTMENT

(Delivered 27 February 2013)

Introduction

[1] This is a ruling on an application to stay four counts on an indictment signed on 22 June 2012. In the case of the first three counts, the application is for a conditional stay pending the conduct of committal proceedings.

[2] Broadly, the stay is sought on the grounds of inadequate and confusing disclosure said to amount to an abuse of process. Counts one and two on the indictment were not the subject of committal proceedings, although committal proceedings were conducted. In relation to the fourth count the accused opposes an application to amend the date alleged and seeks a permanent stay of that count.

[3] After considering detailed submissions from both parties, for the reasons that follow, I decline to stay any of the counts on the indictment. In doing so, I agree that the procedural background and disclosure leading up to trial was deficient. As a consequence, representatives of the accused were to some degree mislead in terms of the particulars, (both as a matter of form and of substance) with respect to each count. I do not conclude this confusing series of disclosures was intentional or reckless on the part of the prosecution or its agents; more care should, however, have been taken earlier in the process in relation to the provision of correct particulars.

[4] Decisions by the prosecution should have been taken at an earlier time than appears to have been the case in relation to whether the allegations which now form the basis of counts one and two were to be reduced to charges. I recognise also that cases of this kind often reveal difficulties in relation to ascertaining dates, places and other particulars of the alleged impugned conduct. Without some remedial action being taken, it is possible this could impact on the overall fairness of the trial. This case however, is not in the exceptional category of cases that would attract an order for a stay.

[5] In my view the deficiencies identified will be minimized or overcome by this court utilizing its powers to order a pre-trial examination or a "*Basha*"[1] inquiry of certain witnesses, the editing of pre-recorded evidence given by the complainant and by ordering further pre-recorded evidence. If

[1] From *R v Basha* (1989) 39 A Crim R 337.

necessary, forthright directions on any remaining deficiencies may need to be given to the jury.

[6] As is recognised in the authorities, trial judges are under a duty to utilize all other powers to control procedure to secure a fair trial before resorting to a stay of proceedings. That responsibility is not discharged by abdicating the duty to try a case.[2] The remedy of a stay is to be exercised sparingly and "only in most exceptional circumstances".[3] In determining the sufficiency of any defect in the proceedings to warrant a stay the court must balance the right of the accused to a fair trial with the right of the community to expect persons charged with criminal offences to be tried.[4]

[7] The categories or circumstances that may lead to consideration of the remedy to stay proceedings are not closed.[5] In *Subramaniam v R*[6] the Full Court of the High Court summarised the law in Australia:

> "It may now be accepted however that the categories of factual situations which may call for consideration of the possibility of abuse of process in criminal proceedings are not closed.[7] As Mason CJ, Deane and Dawson JJ said in *Walton v Gardiner*,[8] the inherent power of a superior court to stay proceedings on the ground of "abuse of process extends to all those categories of cases in which the process and procedures of the court, which exist to administer

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2 *Jago v The District Court (NSW)* (1989) 168 CLR 23 per Brennan J at 49.
3 *Jago v The District Court (NSW)* (1989) 168 CLR 23 per Mason CJ at 31.
4 *Jago* (above) at 54; *R v Ulman-Naruniec* (2003) 143 A Crim R 531 at 537.
5 A review of the grounds available in common law jurisdictions is comprehensively set out in Choo, 'Abuse of Process and Judicial Stays of Criminal Proceedings' 2nd ed Oxford.
6 (2004) 211 ALR 1 at [26] – [27].
7 *Walton v Gardiner* (1993) 177 CLR 378 at 393; 112 ALR 289 at 298 per Mason CJ, Deane and Dawson JJ; see also *Jago v District Court (NSW)* (1989) 168 CLR 23 at 31; 87 ALR 577 at 581-2 per Mason CJ, CLR 74; ALR 613-14 per Deane J, CLR 77; ALR 615-16 per Gaudron J; *Barton v R* (1980) 147 CLR 75 at 95-6; 32 ALR 449 at 458-60 per Gibbs ACJ and Mason J.
8 (1993) 177 CLR 378 at 393; 112 ALR 289 at 289.

> justice with fairness and impartiality, may be converted into instruments of injustice or unfairness".
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> Fairness or unfairness has been said to defy "analytical definition" and to "involve an undesirably, but unavoidably, large content of essential intuitive judgment".[9] Deane J in *Jago*[10] posed some examples of unfairness: default or impropriety on the part of the prosecution in pre-trial procedures, or the concealment of evidence from an accused person that may have assisted his or her defence. Others may include conviction on evidence truly not probative; compulsion upon an accused to incriminate himself or herself; the exaction of involuntary confessions or admissions;[11] failure to hold committal proceedings;[12] and, unreasonable delay."

[8] Although the application in relation to counts one, two and three is for a stay conditional on the conduct of committal proceedings, the preferable remedy, in my view is that those witnesses who may be called to shed light on the matters in contention be required to give evidence at a pre-trial examination in this court. In my opinion the problems with disclosure can be dealt with expeditiously in this Court rather than by effectively re-commencing the proceedings. Given the charges involve allegations brought by a young person, alleged to be under the age of 16 years at the relevant time, together with the delay since the date of the alleged offending, justice dictates the proceedings should continue in this court without a return to a committal.

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9 *Jago v District Court (NSW)* (1989) 168 CLR 23 at 57; (1989) 87 ALR 577 at 601 per Deane J.
10 (1989) 168 CLR 23 at 57; 87 ALR 577 at 601.
11 *R v Swaffield* (1998) 192 CLR 159; 151 ALR 98.
12 *Barton v R* (1980) 147 CLR 75 at 100-1; 32 ALR 449 at 462-4 per Gibbs ACJ and Mason J; cf Stephen J at CLR 104; ALR 455-6.

Counts on the which the accused was committed for trial

[9] The accused was committed for trial on three separate charges following a preliminary examination conducted on the papers.[13] Count one on information charged: *that between 1 January 2008 and 31 December 2009 he did at Darwin indecently deal with SA (the complainant) a child under the age of 16 years, contrary to s 132(2)(a) of the Criminal Code*. Based on the brief of evidence provided and the précis of facts,[14] the accused's representatives understood this charge related to an allegation of indecent dealing, (penis next to outside the vagina) on a day when the accused was said to have collected the complainant from school early following disciplinary issues.

[10] Having read the particular précis I agree it was reasonable for defence counsel at the committal to proceed and make decisions on the basis that those indeed were the particulars of the first charge on information. What did not emerge until the hearing of this application, was that the prosecutor was working from a different, possibly revised précis at the time of the committal.[15]

[11] Although a précis of facts does not always assume such significance, here it was relied on to provide substantial particulars for a series of alleged events that would form the basis of the charges.

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13 The preliminary examination date was 30 May 2012. No witnesses were called.
14 Exhibit 2 in these proceedings.
15 Exhibit 3 in these proceedings.

[12] The Crown understanding of the particulars of this first charge on information at the time of the committal was the accused touching the complainant's leg while she was performing a massage on him. At committal, reference was made to pages 69-79 of the Child Forensic Interview. As counsel for the accused has pointed out, the reference to the Child Forensic Interview did not clarify the matter as the incident is described as occurring "5 months ago", making it closer to charges alleged in 2010 or 2011, rather than the date contained in the charge. Although committed for trial on this charge the accused was not indicted on this particular charge after an assessment by the prosecutor.

[13] The second charge on information was that "*between 1 June 2010 and 30 December 2010 at Darwin, had sexual intercourse with a child (SA), and that child was under the age of 16 years, namely 12 years of age. Contrary to s 127(1)(b) of the Criminal Code*".

[14] In relation to this count, the defence understanding of the précis indicated the dates were 2008-2009; the place where the offending took place was in Karama and involved cunnilingus. Once again, given the information in the possession of the accused at that time, it was reasonable to understand the charge in that way. The Crown's précis and understanding of the basis of that charge was one of simulated sexual intercourse after the accused had picked the complainant up from school.

[15] The third charge the accused was committed for trial on was "*that between 1 June 2010 and 30 November 2010 at Darwin, committed an act of gross indecency against a child under 16 years, namely 12 years old contrary to s 127(1)(b) Criminal Code*".

[16] As a result of the précis supplied, the accused's representatives understood that this count referred to a massage described in the précis whereas the Crown said the charge related to an act of cunnilingus occurring at "Milikapiti". The Crown concedes there was an error in relation to the place where the offending was said to have occurred.

[17] The Crown did not seek that the accused be committed on any further charges at the conclusion of the committal.

The Indictment

[18] The indictment dated 22 June 2012 contains four counts.

[19] Count one alleges an aggravated indecent dealing of a child under 16 years on or about 12 June 2002 at Darwin. Count two alleges an aggravated indecent dealing between 1 January 2004 and 13 June 2004 at Darwin. Neither of these counts on the indictment formed charges at the committal. They were introduced by the Crown after the committal. The Crown did not seek to have the accused committed on these counts.

[20] On behalf of the accused it is submitted the additional counts were not justified by a change in the evidence and that this has resulted in unfairness

and prejudice to the accused as he has been denied access to the protection of committal proceedings. The defence understanding of the factual basis of these counts, (which do not correspond with the charges on information), was that the allegations were "uncharged acts" of possible evidential relevance only. The significance and consequences of the allegations have changed as the accused now faces conviction for two further serious counts. It was submitted that without justification the accused has been denied the opportunity to cross examine the witnesses, mount a defence and obtain a possible dismissal of each count at committal.

[21] It was pointed out that the brief of evidence tendered at committal disclosed conflicting versions between witnesses and if the incidents had been the subject of charges, the defence would have sought leave to call and cross examine the witnesses on their points of difference. It is submitted the accused may have chosen to lead evidence contrary to the prosecution case; and that decisions were made about the conduct of the committal on the basis that the alleged incidents would be no more than uncharged acts. Additionally the accused has been served with a further statement by a witness (KW) on 29 October 2012 which changed her earlier evidence contained in a statement of 19 January 2012. The further statement was served after the complainant had given evidence that was pre-recorded in this court. It is submitted decisions about the conduct of the committal and the trial, including the complainant at the pre-recorded evidence at trial

were made based on the evidence disclosed by the Crown prior to the committal.

[22] In the précis that the prosecutor was using at the committal, the incidents that have formed the basis of the additional counts were noted as charges yet to be laid. The incidents forming the basis of counts one and two are referred in the Child Forensic Interview which was disclosed to the defence prior to the committal. I accept the content of the Child Forensic Interview is confusing. That is not unusual in cases of this kind.

[23] Section 299 of the *Criminal Code* permits the Crown to alter charges on indictment following committal. The Court must however take into account the actual prejudice faced by an accused if deprived of a real opportunity at committal had they been aware of the new charges.[16] I acknowledge the authorities concluding absence of committal proceedings may of itself be evidence of abuse of process.[17] In *Barron v Attorney-General (NSW)* [18] the New South Wales Court of Appeal considered the advantages to an accused provided by committal proceedings, namely knowledge of the evidence of Crown witnesses; opportunity to cross examine them; opportunity of calling or giving rebuttal evidence and a chance of the matter being dismissed.

[24] In these proceedings there has been further disclosure of evidence since committal. Since filing the current indictment the complainant's evidence

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16 *The Queen and Boungaru* (1993) 113 FLR 211*; R v Hanson* (1993) 89 NTR 1. A clear case of abuse of this power was discussed in *Siugzdinis* (1984) 81 FLR 360.

17 *Barton v The Queen* (1980) 147 CLR 75. The circumstances of *R v Ngalkin* (1984) 12 A Crim R 29 were extreme.

18 (1987) 10 NSWLR 215.

has been pre-recorded. The accused had some awareness of the evidence forming the basis of counts one and two. This evidence would have been significant even though it was initially thought to represent uncharged acts. Although an accused has a right to call rebuttal evidence at committal, this occurs rarely. It is unknown what the evidence or the strength of any proposed evidence would be. I do not consider the possibility of calling rebuttal evidence at a future committal as a significant factor in this case. As the test for sufficiency of the evidence to commit for trial in the Northern Territory is low, and the Crown case must be taken at its highest,[19] there is limited force in the argument that rebuttal evidence could realistically result in dismissal when there is evidence of the complainant to support the charges. The chances of dismissal at committal would appear remote when the facts that form the basis of the charges are contained in the Child Forensic Interview.

[25] A further matter which distinguishes this case from earlier abuse of process cases based on defective committal proceedings in the Northern Territory is that alleged victims of sexual offences are "protected witnesses".[20] This prohibits the complainant's attendance and cross examination at committal. Even though the court has the power to grant a temporary stay, the accused would not be permitted to cross examine the complainant at committal and would only be permitted by leave of the court to cross examine other witnesses. It is not known whether such leave would be given.

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19 *May v O'Sullivan* (1955) 92 CLR 654.
20 Section 105L *Justices Act.*

[26] Acknowledging the importance of committal proceedings, the legislative arrangements currently in place in the Northern Territory lead me to the conclusion that the preferable remedy is that all relevant witnesses be made available for a *Basha* inquiry. This was the approach preferred by Olsson J when dealing with the consequences of the refusal by a South Australian Magistrate to adjourn a committal. In *Bayly (No 1)*[21] his Honour indicated the preferred mechanism to remedy prejudice was by way of conducting a *Basha* inquiry rather than remitting for committal. With respect I agree generally with his Honour's approach.

[27] Count three on the indictment alleges that between 1 January 2009 and 31 December 2009 at Darwin the accused committed the crime of aggravated indecent dealing of a child. The allegations associated with this count are alleged to have occurred at a time when the complainant was in year six at Wagaman Primary School. The complainant gives some details of this in the Child Forensic Interview, however, as is not uncommon in cases of this kind the relevant date was not ascertained.

[28] The importance and relevance of school records to particularise the date of the incident was emphasised on behalf of the accused. This issue was raised with the Crown before the committal hearing commenced. The records were also requested on behalf of the accused prior to evidence being given by the complainant in the pre-recorded evidence in this court. Counsel for the Crown advised the court on the morning of 5 September 2012 that requests

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21 (1994) 63 SASR 97.

for the relevant school records were made by the Crown on a number of occasions both before and after committal. Information provided to police from education authorities, up until the morning of 5 September 2012 was that the records were unable to be located and that they had been destroyed due to a virus that had infected the old computer system. The relevant records were however produced and served later on 5 September 2013.

[29] It was explained that the records were retrieved after further investigation by education officers. Hard copies were eventually retrieved and provided. After the records had been provided to the accused an application was made by the accused's counsel to adjourn the proceedings to consider the information before cross examining the complainant. The pre-recording was adjourned. When the matter resumed on 24 October 2012, new counsel who had been briefed on behalf of the accused cross examined the complainant about this incident with reference to the material in the records.

[30] In my view, given counsel was able to cross examine the complainant about the material in the school records sufficient to show how the material may bear not only on the date of the incident but also on the complainant's credibility, prejudice sufficient to warrant a stay of proceedings in relation to count three has not been shown.

[31] It would have been far preferable for this material to have been available prior to committal. It was not available, despite some efforts being made to secure it. Now that it is available, it provides the date that the evidence

shows the incident is said to have occurred. While that does not preclude the Crown from charging a broader period, it is preferable that the date be identified in the indictment if the material supporting the date of the incident is to be relied on.

[32] In as much as the inability to argue alibi has been raised, the accused is not prohibited from relying on alibi in relation to this count. The accused is not deprived from doing so regardless of how the indictment is framed.

[33] Count four on the indictment alleges that between 1 June 2010 and 30 November 2010 at Milikapiti the accused had sexual intercourse, namely cunnilingus with the complainant who was a child under the age of 16 years. The accused was not committed for trial on any offence alleged to have occurred at "Milikapiti", nor for any offence of cunnilingus on the date specified in the indictment. The charge at committal was clearly defective in that the place and dates where the offence was said to be committed were wrong. The Crown submits this was sufficiently particularised by reference to the only described incident of cunnilingus committed at Milikapiti in the complainant's Child Forensic Interview of 3 September 2011.[22] Further, the place alleged was made clear when the indictment was filed and served.

[34] The Crown advised the accused's solicitor the day before the taking of the pre-recorded evidence of the complainant that the dates for count four would be provided prior to her commencing her evidence on 5 September 2012. As

[22] At pages 58 to 65.

there was no change to the dates it is submitted the accused was therefore entitled to assume that the dates had been settled. The accused was arraigned on 5 September 2012 and pleaded not guilty to the charge as it was then particularised. The complainant was cross examined at the pre-recording of her evidence according to the defence case that the accused was not in Milikapiti on the date alleged in the indictment and therefore could not have committed the offence at that location on any of the dates. Cross examination on the other counts was in some respects predicated on the defence case as it related to count four, thus potentially raising doubt as to the complainant's reliability on the other counts.

[35] As the pre-recorded evidence was adjourned to 22 October 2012, there was further cross examination of the complainant. On 23 October 2012 the Crown indicated its intention to amend the count four on the indictment to dates late in 2003 or early in 2004. That amendment was opposed.

[36] The accused submits he was unfairly denied the opportunity of raising a defence of alibi at committal and was prejudiced as he was denied the possibility of dismissal of this count. For reasons similar to those given in relation to count three, it is unlikely that a charge arising from the incident alleged as the basis of count four would have been dismissed at committal.

[37] It is submitted that given the history of count four, to permit an amendment after the defence has put its case in cross examination to the complainant would result in unfair prejudice. It is submitted the prejudice caused by

such a late amendment is so pervasive in the context of this case that the prejudice could not be remedied by further cross examination or editing of the complainant's evidence.

[38] Section 312 of the *Criminal Code* allows the court to amend an indictment either before or at any stage of the trial if there appears to be a variance between the indictment and the evidence and there is no injustice to the accused. It is a very broad power and not limited to the simple amendment of an existing charge but can extend to the substitution of charges.[23] The power may be exercised very late in the proceedings as occurred in *R v Joyce*.[24]

[39] In relation to the provision of the dates the subject of count four the Crown has explained that conferencing of the complainant did not disclose any further date; earlier it was explained there had been a lack of ability to conference the complainant. As noted, the Crown first indicated an intention to apply for an amendment of the charge on 23 October 2012.

[40] Counsel for the Crown has told the court that it was not until that morning that the complainant raised in conference she could now recall that the incident at Milikapiti occurred during Christmas holidays in which her brother had a fishing photo placed into the local newspaper. The conference was stopped at that point and other enquiries were made with the complainant's mother and grandmother. They informed counsel for the

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23 *GO v The Queen* (1990) 73 NTR 1 at 5; *R v Joyce* (2002) 173 FLR 322 at 333.
24 (2002) 173 FLR 322..

Crown that the newsletter in question could be located. As a result of further conferences counsel was told that the photo was taken during the 2003 – 2004 Christmas school holidays. Shortly after 11:00am on that day the Crown informed the defence about this information and that an application would be made to amend the dates. On behalf of the accused it was submitted the Crown spoke to the witnesses before 11:00am and that there were no proofing notes from those conferences. The same afternoon the Crown provided the defence with three documents headed "proofing notes". On behalf of the defence it was pointed out that the times were not disclosed; they were not signed or adopted by any of the witnesses and did not disclose how the newspaper article and photo came into their possession or how they gained knowledge about it.

[41] The complainant was cross examined on 24 October 2012 at around 11:15am. Counsel for the accused submits this was on the understanding that the only relevant conversations were before 11:00am that day. It was then clarified that there was a second proofing of each witness sometime later than 11:00am. Counsel for the accused cross examined the complainant about the change of particulars relevant to this count. Complaint is made that there has been no disclosure as to what was said by any individual witness during proofing before 11:00am on 23 October 2012. Further, that the failure to disclose the conditions under which the conversations took place leaves open, in the accused's submission, the possibility of contamination between witnesses. The Crown submits the

material disclosed in the three sets of proofing notes contains all relevant material provided by the witnesses and that there is no basis to suggest there is any further evidence. In my view this is an area that is more appropriately explored in cross examination in a *Basha* inquiry than by a permanent stay of proceedings or by denying the Crown the opportunity to amend the indictment in accordance with the most recent evidence. It seems fruitful areas of cross examination may have been exposed, but the appropriate course is to proceed with cross examination, not permanently stay the proceedings.

[42] For these reasons I dismiss the application for a permanent stay on this count.

[43] The defects in the pre-trial disclosure, in terms of being unable to cross examine certain witnesses in the light of changed particulars can be met by production of those witnesses for cross examination in a *Basha* inquiry. In my view sound reasons exist for further cross examination of the complainant on defined subjects. As the Crown now has a specific date for count three on the indictment, the indictment should be amended to reflect that. I am going to permit the amendment of the date for count four, however issues relevant to the amendment may be explored with the witnesses in the pre-trial process as indicated.

[44] The matter will be re-listed to complete pre-trial issues.

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