31/03; [2003] VSC 482

SUPREME COURT OF VICTORIA

CHAMPION v RICHARDSON & ANOR

Kellam J

25 August, 12 December 2003 — (2003) 40 MVR 529)

PRACTICE AND PROCEDURE – PERMANENT STAY OF PROCEEDINGS – DRINK/DRIVING CHARGE – BLOOD SAMPLE TAKEN FROM DEFENDANT AT HOSPITAL – LATER ANALYSED TO SHOW BAC OF 0.354% – BLOOD SAMPLE HELD BY HOSPITAL LOST – DEFENDANT CHARGED WITH DRINK/ DRIVING OFFENCE – BLOOD SAMPLE HELD BY POLICE DESTROYED BEFORE HEARING OF CASE – APPLICATION BY DEFENDANT FOR PERMANENT STAY OF PROCEEDINGS – APPLICATION GRANTED – WHETHER MAGISTRATE IN ERROR: *ROAD SAFETY ACT* 1986, SS49(1)(b), (g), (5), 57(2), (4), (7), (7A); *ROAD SAFETY (GENERAL) REGULATIONS* 1999, R205.

R. who had been driving a motor vehicle when it was involved in an accident had a blood sample taken from her whilst she was in hospital. Upon analysis, the blood sample was found to have a BAC of 0.354%. Subsequently charges under s49(1)(g) and (b) of the *Road Safety Act* 1986 were laid. Before the hearing of the charges R. took steps to collect her sample of blood from the hospital but was informed that the sample had been either lost or discarded. When R. sought access to the blood sample held by police it was revealed that the sample had been destroyed by the Forensic Science Laboratory. When the matter came on for hearing, an application was made on R's behalf for a permanent stay of proceedings. The application was granted. Upon an originating motion seeking an order in the nature of *certiorari* or mandamus—

HELD: Application granted. Order of magistrate quashed. Remitted for hearing and determination according to law.

1. It is a long established principle that Australian courts have jurisdiction to stay proceedings which are an abuse of process. The jurisdiction is said to have the purpose of preventing "an abuse of process or the prosecution of a criminal proceeding ... which will result in a trial which is unfair". However, it is equally well settled that a permanent stay of criminal proceedings should be ordered only in rare and exceptional or extreme circumstances. The court exercising the discretion must engage in a process of balancing the right of an accused person to a fair trial with the legitimate public interest in the disposition of criminal charges, and in the conviction of those who are guilty and the need to maintain public confidence in the administration of justice. In judging fairness, the court must balance the expectation of the community that people charged with offences will be brought before the courts with the requirement that the trial of the charges will be fair. The onus is upon the person seeking the stay. It has been described as "a heavy onus".

2. The Magistrate erred in the exercise of her discretion by placing too much weight on the loss of the blood sample and the contribution it may have made to R's defence was a matter of conjecture or speculation. The Magistrate determined that there should be a permanent stay of the proceedings on the basis of the concession made by the prosecutor that the sample previously held by police and after analysis had been destroyed. No other evidentiary material, save for the untested affidavit of R. was before the Magistrate. In circumstances where the grant of a stay of proceedings is an exceptional and extreme step, the reliance upon the loss of the blood sample and any contribution it may have made to the defendant's defence was speculative in circumstances where there was no other evidence of any substance before the Magistrate, in particular, as to the taking of the sample, its safe keeping and its analysis.

3. It was premature for the Magistrate to rule that the absence of the blood sample meant that the prosecution of the defendant would be unfair and unjust, in the circumstances of the limited state of the evidence before her and particularly in circumstances where the evidence about the taking of the blood sample, its analysis and certification had not been tested in any way.

4. In an application for a permanent stay of proceedings it is imperative that the issue of the public interest in having cases brought to trial be considered and weighed in the balance as to whether or not a stay should be granted. The discretionary power to grant a permanent stay of criminal proceedings is a power confined by general principle. It is confined by matters which "may be taken into account and by the matters, if any, which must be taken into account in its exercise". One matter which must be taken into account is the balancing exercise which "generally speaking, is to hear and determine finally whether the accused has engaged in conduct which amounts to an

offence and on that account, is deserving of punishment" against the interest of the accused person in having a fair trial. The magistrate does not appear to have given any consideration to this issue.

KELLAM J:

Introduction

1. On 15 May 2002, Senior Constable John Champion, the plaintiff in this proceeding ("the informant") filed a charge and summons at the Frankston Magistrates' Court alleging that contrary to s49(1)(g) of the *Road Safety Act* 1986 ("the Act") the first named respondent, Brigitte Richardson ("the defendant") on 17 October 2001 had a blood sample taken from her within three hours of driving and which upon analysis was found to exceed .05% of blood alcohol concentration ("BAC"). Section 49(5) of the Act provides that it is a defence to a charge under s49(1)(g) of the Act for the person charged to prove that the result of the analysis of his or her blood sample was not a correct analysis. In addition, Brigitte Richardson was charged with driving a motor car whilst having a blood alcohol concentration of more than .05% contrary to s49(1)(b) of the Act. The BAC alleged to have been found upon analysis was .354%.

2. The proceeding came on for hearing before a Magistrate sitting at Frankston Court on 8 October 2002. At the commencement of the hearing, counsel who then appeared for the defendant, made an application for an order permanently staying the proceedings on the basis that a sample of blood which had been taken from the defendant on 17 October 2001, and subsequently held by police had been destroyed by them, after analysis, and prior to the hearing of the proceeding.

3. The Magistrate granted the application for a permanent stay of the prosecution of the proceedings.

The Relief Sought

4. On 6 December 2002, by originating motion, the informant commenced proceedings in the Supreme Court pursuant to Order 56, seeking an order in the nature of *certiorari* or mandamus seeking to bring up and quash the order of the Magistrate to permanently stay the proceedings.

5. The grounds upon which the informant relies in support of his contention that the Magistrate erred in the exercise of her discretion to grant a permanent stay of proceedings are that she did so by

> "(a) Placing too much weight on the loss of the blood sample and any contribution it may have made to the defendant's defence was a matter of conjecture or speculation (sic);
>
> (b) ruling if she did so, that the absence of the blood sample meant that the prosecution of the first defendant would be unfair and unjust;
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> (c) placing too much weight on the efforts made by the defendant to retrieve the blood sample;
>
> (d) not giving any or any sufficient weight to the public interest in having the proceedings determined by a hearing at court."

6. In accordance with usual practice the Magistrates' Court has been joined to the proceeding but has advised the Prothonotary by letter dated 27 February 2003 that it will abide the decision of this Court.

Background

7. The evidence before the Magistrate consisted of an affidavit of the defendant sworn on 12 August 2002. It is pertinent to observe that this affidavit was not sworn in support of the application for a permanent stay of the proceedings. It was sworn in support of an earlier application made in the Magistrates' Court seeking an order that the police provide a blood sample held by them to the defendant for the purposes of further analysis by an expert to be retained on her behalf. No oral evidence was given in the course of the hearing before the Magistrate. By the affidavit tendered before the Magistrate the defendant deposed, amongst other matters, to the following:

> • that upon discharge from the Alfred Hospital on 20 October 2001 she was not provided with a blood sample nor was she aware that she should have received a blood sample;
>
> • approximately one week after discharge from the Alfred Hospital she was telephoned by a nurse from

the emergency department of the Alfred Hospital and was advised that the hospital had possession of a blood sample and that it requested her to collect the sample;

• that on 23 November 2001 the sister of the defendant attended upon the Alfred Hospital to obtain the blood sample but it could not be located;

• that on 28 January 2002 the defendant spoke to the Triage nurse at the Alfred Hospital and requested the blood sample. The defendant was informed the sample would be kept stored for a lengthy period of time.

• on 17 July 2002 the defendant attended upon the Alfred Hospital and was informed that the sample was not in any of the storage facilities of the hospital and had been either lost or discarded;

• on 23 July 2002 the solicitor for the defendant wrote to the informant seeking access to the blood sample held by police.

8. An affidavit sworn by Senior Constable Darryl Hayes on 11 February 2003 was filed in the proceedings in this Court. Senior Constable Hayes was the prosecutor in the proceedings in the Magistrates' Court at the time that it was permanently stayed by the Magistrate. From his affidavit the following facts appear:

• Initially, the charge and summons against the defendant were set down for hearing at Frankston Court on 19 June 2002.

• By letter dated 23 May 2002 the solicitor for the defendant wrote to the informant and to the Magistrates' Court advising of the defendant's intention to plead guilty and seeking adjournment of the hearing of the matter until 1 July 2002.

• On 1 July 2002 the Court and the informant were advised that contrary to the earlier indication by letter, the defendant intended to contest the charges. The proceeding was further adjourned to 21 August 2002 for a contest mention.

• At the contest mention on 21 August 2002, counsel who then appeared for the defendant applied for an adjournment. He informed the Court that he intended to make application for a permanent stay of the proceedings and that he would be calling expert evidence in support of such application.

• On 8 October 2002 the informant was served with the affidavit of the defendant sworn 15 August 2002 and referred to above, together with a report from a psychologist, Mr Jeffrey Cummins, dated 2 October 2002.

• The application for a permanent stay came on for hearing before the Magistrate on 8 October 2002.

9. The transcript of the application for the stay of proceedings which was heard by the Magistrate reveals that it was conceded by the prosecutor that the sample of blood held by the police had been destroyed by the Forensic Science Laboratory on 29 July 2002.

The reasons of the Magistrate for granting the permanent stay of proceedings

10. The reasons for decision of the Magistrate granting the application for a permanent stay contain the following statement of facts and conclusions:

"On 17 October 2001 the defendant was involved in a motor vehicle accident which resulted in her being transferred to the Alfred Hospital. At that admission a sample of blood was taken from the defendant pursuant to s56 of the Act. The prosecution contend that this sample was the subject of analysis which revealed a blood alcohol reading of .354%. This reading is an extremely high reading and gives rise to a number of questions which the defendant seeks to raise as to the validity of the reading and the testing undertaken. The capacity to undertake a defence in circumstances where the source blood samples no longer exist, is raised on this application. ... The Act is clear that certificates issued by authorised and duly qualified officers are proof of the facts and matters stated therein in the absence of evidence to the contrary. Such evidence would usually be called by the defendant. (See s57(3)(4A)(4B)(5) and (6)). In particular leave may be granted by the court to the defendant to cross-examine in relation to the contents of any certificates in certain circumstances. One of the particular circumstances is that there is a reasonable possibility that the blood referred to in a certificate was not that of the accused (s57(7A)(b)(i) and (ii)). or/and that there is a reasonable possibility that the blood referred to in the certificate became contaminated and that as a consequence the reading was higher than it would have been. Whilst none of the evidence that was foreshadowed today established as fact any such conduct, however, it did provide a basis for such a suggestion as

to doubt, particularly having regard to the evidence said to be available from persons who might be able to say that the defendant was largely unaffected by alcohol at a time shortly before the accident. It is also clear that the matters which are in issue are matters which may have been conclusively determined one way or the other by the availability of the blood sample. The inability to check the blood sample at this time gives rise to a serious difficulty in the defendant pursuing a defence in this matter. That is, in the context where such an extremely high blood alcohol reading was recorded. This decision is also made in the context of a statutory scheme wherein a presumption exists that the defendant must overcome. The difficulty for this defendant is that save for circumstantial evidence, and casting doubt upon the continuity, the absence of the blood sample precludes any possibility of establishing on any scientific basis, evidence in support of her defence. The question is whether the continuation of the proceedings against the defendant in the circumstances would be unjust and unfair or oppressive. In this case, the fact of the blood sample being destroyed largely precludes or makes extremely onerous the obligations upon the defendant to establish such a defence. It is clear that the statutory presumptions which the prosecution alleges sustain the charges arise from the certification of the samples, and the processes and procedures which gave rise to that certification and the sample being extracted. Whilst these are matters about which the defendant is not precluded from cross-examining, they largely operate to the advantage of the prosecuting authority, particularly when positive proof of a defence is required. I have considered the decision of *Holmden v Bitar*. Whilst it is in some respects distinguishable from this case because there were no statutory presumptions operative and there had been no certification or analysis undertaken of the items in dispute, nevertheless I am satisfied that the approach is appropriate to be applied here. Finally, I make it clear that there were circumstances in this case, involving efforts made by the defendant to obtain samples and take reasonable steps which have inclined me towards the granting of the application for permanent stay. It is clear that the issue of the validity of the reading was under scrutiny by the defence prior to and at the contest mention of this matter. This is not a recently invented technical defence. Nor is it a deliberate or contrived attempt to take advantage of time lapse having become aware of the destruction or likely destruction of the forensic laboratory samples. The defendant is entitled to a stay of these proceedings."

The Relevant Legislation

11. Regulation 205 of the *Road Safety (General) Regulations* 1999 deals, relevantly, with procedures to be taken after the obtaining of a blood sample as follows:

"205. Procedures after taking blood samples

(1) A registered medical practitioner or an approved health professional who takes a blood sample must ensure that—

(a) the sample of blood is placed in 3 dry containers, each containing approximately the same amount of blood and

(b) each container is vacuum sealed or sealed with a septum seal; and

(c) each container in which the sample is placed bears a label stating—

(i) that the container holds a specific anti-coagulant and preservative such as potassium oxalate and sodium fluoride; and

(ii) the name of the chemist, laboratory or pharmaceutical organisation that prepared it; and

(d) each container has attached to it a label bearing the signature of the registered medical practitioner or approved health professional, the date and the time the sample was taken, and the name of the person from whom the sample was taken or, if the name of the person is not known, sufficient information to enable the sample to be identified with the person from whom it was taken.

(2) …

(3) If a blood sample is taken under section 56 of the Act and has, in accordance with this regulation, been placed in containers which have been sealed and labelled, the doctor must ensure that—

(a) one container is placed in a locked receptacle provided for the purpose at the place at which the sample was taken; and

(b) one container is placed and sealed in a container labelled 'screening' sample and

(c) one container is delivered to the person from whom the blood sample was taken or placed with that person's personal property at the place at which the sample was taken."

12. In the circumstances of this case it is clear that the blood sample was taken from the defendant after she was admitted to hospital and thus the sample was taken under s56 of the Act. It is apparent from her reasons for decision that the Magistrate concluded that Regulation 205(3)(c) had not been complied with by the hospital in that no blood sample had been delivered to the defendant or placed with her personal property.

13. It is relevant to refer to the legislation concerning the evidentiary requirements for proof of a BAC by certificate. Section 57 of the Act sets out the requirements in question.

14. Section 57(2) of the Act provides that if the question of whether or not a finding on the analysis of a blood sample is relevant, on a hearing of charges for offences such as those with which the defendant was charged

> " ... then, without affecting the admissibility of any evidence which might be given apart from the provisions of this section, evidence may be given of the taking, after that person drove or was in charge of a motor vehicle, of a sample of blood from that person by a registered medical practitioner or an approved health professional, of the analysis of that sample of blood by a properly qualified analyst within twelve months after it was taken, of the presence of alcohol ... and, if alcohol is present, of the concentration of alcohol expressed in grams per 100 millilitres of blood found by that analyst to be present in that sample of blood at the time of analysis ... "

15. Section 57(4) of the Act provides that:

> "A certificate containing the prescribed particulars purporting to be signed by an approved analyst as to the concentration of alcohol expressed in grams per 100 millilitres of blood found in any sample of blood analysed by the analyst is admissible in evidence in any proceeding referred to in sub-section (2) and, in the absence of evidence to the contrary, is proof of the facts and matters contained in it."

16. No doubt it is this section of the Act to which the Magistrate was referring when she stated in her reasons for decision that "the statutory presumptions which ... sustain the charges arise from the certification of the sample" operate largely "to the advantage of the prosecuting authority".

17. Section 57(7) of the Act provides:

> "An accused who has been served with a copy of a certificate given under this section may, with the leave of the court and not otherwise, require the person who has given the certificate or any other person employed, or engaged to provide services at, the place at which the sample of blood was taken to attend at all subsequent proceedings for cross-examination and that person must attend accordingly."

18. Section 57(7A) of the Act provides:

> "The court must not grant leave under sub-section (7) unless it is satisfied that appropriate notice has been given to the informant and that
> (b)(i) there is a reasonable possibility that the blood referred to in a certificate given by an analyst ... was not that of the accused; or
>
> (ii) there is a reasonable possibility that the blood referred to in a certificate given by a registered medical practitioner or an approved health professional had become contaminated in such a way that the blood alcohol concentration found on analysis was higher than it would have been had the blood not been contaminated in that way; or
>
> (iii) there is a reasonable possibility that the sample was not taken in accordance with the Code of Practice for Taking Blood Samples from Road Accident Victims; or
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> (iv) for some other reason the giving of evidence by the person who gave the certificate would materially assist the court to ascertain relevant facts."

19. Accordingly, the scheme of the Act in respect of a prosecution, whereby a blood sample has been taken, is that a certificate containing the prescribed particulars and purporting to be signed by an appropriate person is, in the absence of evidence to the contrary, proof of the facts and matters contained in it. The accused person has the right to cross-examine the person who gave the certificate, or others employed to provide services at the place at which the sample of blood is taken, only with the leave of the Court.

The Informant's Submissions

20. The submission of Mr Saunders of Counsel who appears on behalf of the informant is that a permanent stay of proceedings was not justified in the circumstances of this case. It is submitted by him that the fact that the police had destroyed their sample of the blood sample taken from the defendant is not a fundamental defect which goes to the root of the trial. It is submitted that a permanent stay should be granted only in an exceptional case and that the case before the Magistrate was not such a case. In this regard Mr Saunders relies upon *Jago v The District Court*

of New South Wales and Others[1] where Mason CJ said[2]:

> "To justify a permanent stay of criminal proceedings, there must be a fundamental defect which goes to the root of the trial of such a nature that nothing that a trial judge can do in the conduct of the trial can relieve against its unfair consequences: *Barton*[3] per Wilson J."

21. Furthermore, Mr Saunders submits that the Magistrate granted the permanent stay of the proceedings without giving any or any adequate consideration to, or exploring what other matters may have been capable of being considered, in order to overcome any prejudice suffered by the defendant by reason of the loss of the blood samples held by the hospital and the police. In this regard he relies upon the following statement of Mason CJ, Dawson, Toohey and McHugh JJ appearing in *Williams v Spautz*.[4]

> "If a permanent stay is sought to prevent the accused from being subjected to an unfair trial, it is only natural that the court should refrain from granting a stay unless it is satisfied that an unfair trial will ensue unless the prosecution is stayed. In other words, the court must be satisfied that there are no other means, such as directions to be given by the trial judge, of bringing about a fair trial."

22. In particular, Mr Saunders submits that the question of whether or not the defendant could be accorded a fair trial was entirely speculative at the time that the Magistrate ruled that there should be a permanent stay of the proceeding.

23. He submits that a reading of .354% blood alcohol concentration in a female is a matter which might of itself raise a doubt as to the level and accuracy of the reading. Mr Saunders concedes that by reason of the provision of s57(7) of the *Road Safety Act* 1986 the defendant would not have been able to require the person who analysed the blood sample of the defendant and who provided the certificate of analysis of the blood at a level of .354% to attend court and be cross-examined without the leave of the court. However, he submits that at the minimum, consideration should have been given by the Magistrate to the question of whether leave under s57(7) should have been granted. Mr Saunders submits that had such consideration been given it is highly likely that the Magistrate would have granted such leave under s57(7A) of the Act. It is submitted that the Magistrate acted prematurely in granting a permanent stay in circumstances where there were ways in which any unfairness caused by loss of the sample could possibly be overcome.

24. Furthermore, Mr Saunders submits that in any event the disappearance of the two samples held by the hospital in the period shortly before the hearing of the proceedings, took place in circumstances where there was substantial delay on the part of the defendant to take steps to obtain her sample from the Alfred Hospital and obtain analysis of it. The delay, he submits, is such that it cannot be said that the circumstances before the Magistrate were so exceptional as to justify the imposition of a permanent stay.

The Submissions of the Defendant

25. Mr Reynolds of Counsel who appears for the defendant submits that the exercise by the Magistrate of her discretion was both correct and open to her. He submits that where an exercise of discretion is the subject of review, the power of any appellate court is limited by "a strong presumption in favour of the correctness of the decision appealed from and that decision should therefore be affirmed unless the Court ... is satisfied that it is clearly wrong".[5] Whilst that is so, the discretion to stay a criminal proceeding permanently is a narrow discretion. It does not have the breadth of a discretion, for instance, to award costs. It is a discretion which is exercisable only in exceptional circumstances and in circumstances where there is no other alternative, to avoid an unfair trial. It is a power to be exercised "sparingly and with utmost caution".[6]

26. Mr Reynolds submits that the inability of the defendant, to be able to have the blood sample which was taken from her, analysed on her behalf, has resulted in her being unable to call the best evidence in rebuttal of the statutory presumptions against her and that this went to the "fundamental root of the trial".

27. Mr Reynolds relies upon two South Australian decisions in support of his proposition that the destruction before trial, by prosecuting authorities, of evidence that is in their possession and which may possibly provide exculpatory evidence to assist in the defence of the charges, is a proper

basis for the exercise of the discretionary power to order a permanent stay of the proceedings.

28. In *Holmden v Bitar*[7] the defendant was charged with importing tins of meat pate into Australia in contravention of *Quarantine* and *Customs Acts*. Three days after the allegedly offending articles were seized by the authorities, they were destroyed. The Magistrate dismissed the proceeding on the basis that it was an abuse of process. He considered that in circumstances where the relevant legislation gave the prosecution the advantage of averments which in "the absence of proof to the contrary, be deemed to be proved", the destruction of the exhibits denied the defendant's right to a fair trial.

29. Cox J, on appeal, said[8]:

> "What was very unusual here was the combination of the averment provision and the destruction of the actual evidence. Obviously the former would not have been enough without the latter, and in many cases a court would be able to find a less dramatic but equally effective way of dealing with the mere destruction of an important piece of evidence – by reaching the same conclusion by another route, perhaps, or by finding that the prosecution had not proved its case beyond reasonable doubt. However, such a course was not open to the learned magistrate here. Because of s86D, if the case proceeded to judgment in the ordinary way the respondent (it would seem) had to be found guilty. Such an adjudication would necessarily have been made without the benefit of any analytical evidence that the respondent might have been able to call had the tins that were seized from her not been destroyed by the prosecution before trial."

30. It is appropriate to observe that factual circumstances of the case of *Holmden v Bitar* differ materially from the case now under consideration in that there had been no analysis whatsoever of the contents of the tins of pate in that case.

31. Mr Reynolds relies further upon another South Australian case, *Commonwealth Service Delivery Agency v Bourke*[9] where the issue arose in the context of charges of numerous counts of knowingly obtaining a benefit under the *Social Security Act* 1991 (C'th) being laid against a defendant. The detection of the alleged offences arose from a comparison between the defendant's taxation records and his Department of Social Service fortnightly records. However, before he was charged with the offences, the fortnightly forms which the defendant had lodged with the department, were destroyed pursuant to the *Archives Act* 1983 (C'th). The defendant applied for a permanent stay of all counts on the basis that destruction of records deprived him of a fair trial and that the proceedings constituted an abuse of process of the Court. The Magistrate agreed and made an order permanently staying the proceedings. The prosecution appealed.

32. Upon appeal, Wicks J held that the case was "one of those rare and exceptional cases where a permanent stay of proceedings was appropriate".[10] He did so on the basis that the fortnightly forms were the only evidence which had the potential to support the defendant's defence that he had filled the forms out correctly to the best of his abilities. It should be observed that Mr Reynolds does not submit that the loss of the blood sample is the only evidence which may be advanced in favour of the defence of the prosecution in the case before me. Rather, he submits that the "best evidence" has been lost.

33. Nevertheless, Mr Reynolds submits that the Magistrate was entitled to order a stay of proceedings and to do so on such facts as were agreed between the parties. He submits that it was appropriate for the Magistrate to do so prior to the calling of any evidence by the prosecution. He relies upon the decision of Nathan J in *Edebone v Allen*.[11] In that case one of the grounds of appeal from the Magistrate was that the application for a permanent stay of proceedings which was made at the close of the Crown case, was made at the wrong time. The appellant argued that the application should have been made prior to the commencement of the Crown case. Nathan J said[12]:

> "In my view the usual course to be adopted with applications to permanently stay proceedings is for them to be heard prior to the calling of prosecution evidence. In most cases the merits of the application will be based upon facts anterior to, and independent of, the evidence supporting the Crown case. The nature of such application is essentially preliminary. That is, the proceedings be stayed because to go further would amount to an abuse of the court's processes. However, I cannot find common law authority for a proposition that an application for a permanent stay must be made prior to the Crown case commencing, nor can I find authority for the contrary proposition. In so

> far as authorities have considered the issue, it has been assumed that the applications of this kind are made and disposed of as a preliminary step: see *Jago v District Court of New South Wales* [1989] HCA 46; (1989) 168 CLR 23; 87 ALR 577; (1989) 63 ALJR 640; 41 A Crim R 307 and all the cases therein referred to, and also *Longman v R* [1989] HCA 60; (1989) 168 CLR 79; 89 ALR 161; 43 A Crim R 463; 64 ALJR 73."

34. In my view, there is no rule requiring an application for a permanent stay of criminal proceedings to take place prior to the commencement of the Crown case. No doubt that is the usual course, for the reasons stated by Nathan J in *Edebone*. However, it appears to me that the application can be made at any time when it becomes apparent that there exist circumstances that may justify such an application. That said, however, it is clear that there must be established a sound evidentiary basis for the application. Mr Reynolds submits that there were here, agreed facts which were sufficient for the Magistrate to act upon.

35. However, in relation to the matter of "agreed facts", it is apparent from a reading of the transcript of the proceeding before the Magistrate, that very little was agreed between the parties. Whilst it is true that the police prosecutor conceded that the sample of blood held by the police was destroyed on 29 July 2002, there is no suggestion arising from the transcript that the application made on behalf of the applicant was made on the basis of any agreed facts. Indeed, it is apparent from the transcript that it was the intention of counsel, who then appeared for the defendant, to seek to call a number of witnesses upon the application.[13] Rather, it seems that it was the Magistrate who concluded that no evidence should be called when she said[14]:

> "That is I don't consider that for the purposes of this application it is necessary to call that evidence and I say so because I am proceeding on the basis of those matters have (sic) been put as the various options that are available in consideration of explanations and cross-examination or whatever scenario might arise. The real issue as far as I can see is the issue of whether or not - there is a circumstance which prevents the defendant from running a defence, fully testing the prosecution's case in circumstances that would warrant a permanent stay, having regard to the whole milieux, including that which is contained in the defendant's affidavit material."

36. It is clear from the transcript that the prosecutor submitted to the Magistrate that evidence should be called, insofar as the defendant submitted that she had difficulty in challenging the "continuity evidence" in circumstances where she was unable to re-analyse the police sample of blood. The prosecutor said[15]:

> " ... If continuity is an issue then that is a matter that should be dealt with at a fully contested hearing because it is then raised as to whether it (sic), in fact, blood has been taken from the defendant and that comes down to a question that has to be clearly asked of the doctor. Then subsequent in relation to continuity, et cetera, of it being some type of contamination. And finally, Your Worship, in relation to the analysis of that sample, whether there has, in fact, been some mistake during the analysis of that and that comes down to the analyst who has conducted that, Your Worship, and all of those issues would need both the doctor and the analyst present for those issues to be put directly to them, Your Worship. It is not a matter that can be raised in their absence and put as a probability or a possibility without, in my respectful submission, them being given the opportunity to answer those questions and on that basis, Your Worship, and finally, I believe a permanent stay could not be granted unless the court is fully appraised of all of those issues and those issues have been addressed in a fully contested hearing. If at the conclusion, Your Worship, any magistrate hearing the matters believes it would be oppressive or unfair to proceed on the basis of hearing at all, then a permanent stay could be granted, Your Worship ..."

37. It appears that the Magistrate at one point in the course of the hearing considered that evidence about the taking of the blood sample at the Alfred Hospital was appropriate to be called and may have been relevant to the matters under consideration. The defendant had subpoenaed a representative of the Alfred Hospital to attend the hearing of the application for a permanent stay. The Magistrate arranged for the court clerk to call that witness to attend before her in the court. There was no response to the calling of the witness and no further steps were taken to ascertain the whereabouts of the witness.[16] The Magistrate then stood down to consider her decision and then handed it down without hearing any evidence.

Conclusion

38. It is a long established principle that Australian courts have jurisdiction to stay proceedings which are an abuse of process. The jurisdiction is said to have the purpose of preventing "an

abuse of process or the prosecution of a criminal proceeding ... which will result in a trial which is unfair".[17] However, it is equally well settled that a permanent stay of criminal proceedings should be ordered only in rare and exceptional or extreme circumstances.

39. The court exercising the discretion must engage in a process of balancing the right of an accused person to a fair trial with the legitimate public interest in the disposition of criminal charges, and in the conviction of those who are guilty and the need to maintain public confidence in the administration of justice.[18] In judging fairness, the court must balance the expectation of the community that people charged with offences will be brought before the courts with the requirement that the trial of the charges will be fair. The onus is upon the person seeking the stay. It has been described as "a heavy onus".[19]

40. I accept that the apparent failure of the hospital to provide a blood sample as required by Reg 205 and the later destruction of the sample of blood held by the police has in the circumstances of this case the potential to cause the defendant prejudice in the conduct of her defence. However, I do not accept that in all the circumstances, the loss of the opportunity to conduct a further analysis of the sample, on the material before the Magistrate, can be said to be fundamental, going to the root of the trial, and of such a nature that there was nothing that the Magistrate could do to alleviate the unfairness.

41. First, as is clear, although evidence of a further analysis of the blood sample held by police, is apparently no longer available to the defendant, she has not been deprived of all evidence which may be called in her favour. In relation to the charge brought against the defendant under s49(1)(g) of the Act it is provided specifically by s59(5) of the Act that it is a defence for the person charged to prove that the result of the analysis of blood taken from that person was "not a correct result". It is true of course that this sub-section casts the onus of proving such a defence upon the defendant.[20] However, the defendant is entitled in relation to both charges brought against her to seek leave pursuant to s57(7) of the Act to require the person who has given the certificate to attend for cross-examination. She is entitled (as was obviously intended and foreshadowed by her counsel) to call evidence before the Magistrate so as to demonstrate that there is a "reasonable possibility" that the blood that was analysed was not her blood (s57(7A)(i)), or that the sample was contaminated (s57(7A)(ii)).

42. Whilst it is true, as Nathan J observed in *Edebone v Allen* that the usual course to be adopted with applications for permanent stay proceedings is for them to be heard prior to the calling of the prosecution case, that does not mean that the grant of such an application should be made in the absence of appropriate evidence. In the circumstances of this application before the Magistrate, the only evidence of any relevance which was before her was the concession made by the prosecutor that the police had destroyed their sample of blood on a date shortly prior to the hearing of the matter, and the affidavit of the defendant, much of which contained hearsay in relation to the matters of possession of the sample by the Alfred Hospital, and which affidavit was prepared by the applicant for a purpose entirely different from the application to stay proceedings. The prosecution was given no opportunity to challenge the version of the defendant in relation to issues of delay, and her reasons for not obtaining her sample from the Alfred Hospital soon after she was advised by the Alfred Hospital that the sample was held by them. There was no evidence before the court as to the procedures undertaken by the Alfred Hospital in relation to the taking of the blood sample and the keeping of samples, nor was there any evidence in relation to continuity matters. There was no evidence as to the analysis of the blood sample by the police. There was no evidence as to the circumstances of the destruction of the sample by police. In my view, evidence in relation to these, and other matters was relevant to the application before the Magistrate.

43. In my view, the question of whether a permanent stay should be granted in the balance of the community interest could not be considered until these matters were articulated before the Magistrate. There is, of course, a possibility that after these matters had been considered the Magistrate might have concluded that the failure of the police to keep the sample in question was such that it went to the root of the trial and justified a stay. It is also possible that the Magistrate might well have concluded that the loss of the opportunity to further analyse the sample could be taken into account in favour of the defendant, in ways other than ordering a permanent stay of the proceedings. In this regard, it should be noted that notwithstanding the statutory provisions, that a certificate in the absence of evidence to the contrary is proof of the facts and matters

contained in it, that the prosecution nevertheless maintains the burden of establishing the guilt of an accused person beyond reasonable doubt.

44. I turn now to the particular grounds upon which the application made by the informant is based.

45. The first ground is that the Magistrate erred in the exercise of her discretion by placing too much weight on the loss of the blood sample and the contribution it may have made to the defendant's defence was a matter of conjecture or speculation. In my view, this ground is made out. The Magistrate determined that there should be a permanent stay of the proceedings on the basis of the concession made by the prosecutor that the sample previously held by police and after analysis, had been destroyed. No other evidentiary material, save for the untested affidavit of the defendant, was before the Magistrate. In circumstances where the grant of a stay of proceedings is an exceptional and extreme step, the reliance upon the loss of the blood sample and any contribution it may have made to the defendant's defence was speculative in circumstances where there was no other evidence of any substance before the Magistrate, in particular, as to the taking of the sample, its safe keeping, and its analysis. As Gaudron J said in *Jago*:[21]

> "The limited scope of the power to grant a permanent stay necessarily directs an enquiry whether there are other means by which the defect attending the proceedings can be eliminated or remedied. ... a court should have regard to the existence of all of its various powers, and should only grant a permanent stay if satisfied that no other means is available to remedy that feature which if unremedied would render the proceedings so seriously defective, whether by reason of unfairness, injustice or otherwise as to demand the grant of a permanent stay."

46. There is no evidence that the Magistrate directed any enquiry as to whether there were other means by which any unfairness created by the loss of the blood sample might be eliminated. Instead she relied upon the fact of the loss of the blood sample and appears to have decided conclusively that such loss rendered the continuation of the proceeding such that there was no alternative but that it be stayed.

47. I am satisfied that reliance upon the evidence of the loss of the blood sample without giving consideration to the other evidence which was open to be called and without any enquiry into any other means, including the calling of evidence which might ameliorate against such loss, was an error in the exercise of her discretion.

48. I turn to the second ground of relief which is that the Magistrate erred in the exercise of her discretion by "ruling if she did so, that the absence of the blood sample meant that the prosecution of the first defendant would be unfair and unjust". The Magistrate states in her reasons for decision:

> "In this case the fact that a blood sample being destroyed largely precludes or makes extremely onerous the obligations upon the defendant to establish such a defence. It is clear that the statutory presumptions which the prosecution alleges sustaining the charges arise from the certification of the samples and the processes and procedures which gave rise to that certification and the sample being extracted. Whilst these are matters about which the defendant is not precluded from cross-examining, they largely operate to the advantage of the prosecuting authority, particularly when positive proof of an offence is required."

49. I conclude from that statement that although she did not say so, the Magistrate did rule that the absence of the blood sample meant that the prosecution of the defendant would be unfair and unjust. In my view, it was premature for the Magistrate to so rule, in the circumstances of the limited state of the evidence before her and particularly in circumstances where the evidence about the taking of the blood sample, its analysis and certification had not been tested in any way.

50. The third ground upon which relief is sought is that the Magistrate placed too much weight on the "efforts made by the defendant" to retrieve the blood sample. Obviously the reasons for the delay by the defendant in seeking to obtain the sample held by police for analysis were matters relevant to the exercise of discretion by the Magistrate. However, in circumstances where the defendant's explanation was provided by an affidavit which had been produced for reasons other than the application before the court, and whereby at least some of the affidavit material relating

to discussions had with the Alfred Hospital was of a hearsay nature, and in circumstances where those matters were matters to be placed in the balance with the other evidence which should have been before the court on the application, it appears to me that there is a basis for complaint on the part of the informant. However, that said, I do not consider that the reliance by the Magistrate on such admissible evidence as there was, that the defendant had endeavoured to retrieve the blood sample, necessarily demonstrates an error in the exercise of her discretion in relation to this matter, and if this was the only ground upon which the informant relied, I would not consider that the exercise of her discretion miscarried. This is, in my view, merely a matter of weight.

51. Finally however, the informant relies upon the ground that the Magistrate did not give any or sufficient weight to the public interest in having the proceedings determined by a hearing at court. The reasons for decision of the Magistrate contain no suggestion that the consideration of the public interest in the continued conduct of the proceeding before the court was regarded as relevant by her. Mr Reynolds concedes that the Magistrate did not refer to the matter of the competing public interest in her reasons for decision. He submits, however, that even if she had given that particular factor, "the public interest, in bringing those charged with offences to trial, the full weight – even if she had given that factor full weight, she would have exercised her discretion to order a permanent stay in the same way". In my view, in the circumstances of an application for a permanent stay of proceedings it is imperative that the issue of the public interest in having cases brought to trial be considered and weighed in the balance as to whether or not a stay should be granted. The discretionary power to grant a permanent stay of criminal proceedings is a power confined by general principle. It is confined by matters which "may be taken into account and by the matters, if any, which must be taken into account in its exercise".[22] One matter which must be taken into account is the balancing exercise discussed in *Jago*[23] which "generally speaking, is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and on that account, is deserving of punishment"[24] against the interest of the accused person in having a fair trial. The reasons for decision of the Magistrate do not demonstrate that any consideration was given by her to this issue. Thus, a matter which must be taken into account in the exercise of the discretion to permanently stay proceedings, does not appear to have been considered in any way.

52. For the above reasons I conclude that the Magistrate erred in the exercise of her discretion by ordering a permanent stay of proceedings in the circumstances of the evidence then before her, and I order that the decision of the Magistrate of 8 October 2002 permanently staying the proceedings brought against the defendant be quashed and that the proceedings be remitted to the Magistrate for determination according to law.

53. I will reserve the question of costs for submission by counsel.

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[1] [1989] HCA 46; (1989) 168 CLR 23; 87 ALR 577; (1989) 63 ALJR 640; 41 A Crim R 307.
[2] At 34.
[3] [1980] HCA 48; (1980) 147 CLR 75 at 111; (1980) 32 ALR 449; 55 ALJR 31.
[4] [1992] HCA 34; (1992) 174 CLR 509 at 519; 107 ALR 635; (1992) 66 ALJR 585; 61 A Crim R 431.
[5] *Australian Coal and Shale Employees Federation v The Commonwealth* [1953] HCA 25; (1953) 94 CLR 621 per Kitto J at 627.
[6] *Jago v District Court of New South Wales* [1989] HCA 46; [1989] 168 CLR 23 per Gaudron J at 76; (1989) 63 ALJR 640; 41 A Crim R 307.
[7] (1987) 47 SASR 509; (1987) 75 ALR 522; (1987) 27 A Crim R 255.
[8] At 517.
[9] [1999] SASC 154; (1999) 75 SASR 299.
[10] At 304.
[11] [1991] VicRp 100; (1991) 2 VR 659 at 661.
[12] At 661.
[13] At p10 of transcript of proceeding before the Magistrate.
[14] At p25 of transcript.
[15] At p27 of the transcript.
[16] At p30 of the transcript.
[17] *Barton v R* [1980] HCA 48; (1980) 147 CLR 75 at 95-96; (1980) 32 ALR 449; 55 ALJR 31.
[18] *Walton v Gardiner* [1993] HCA 77; (1993) 112 ALR 289; (1993) 67 ALJR 485; (1993) 112 A Crim R 289; (1993) 177 CLR 378.
[19] *R v Littler* [2001] NSWCCA 173 per Hodgson J at para 6; (2001) 120 A Crim R 512.
[20] See *Furze v Nixon* [2000] VSCA 149; (2000) 2 VR 503 at 513; (2000) 113 A Crim R 556; (2000) 32 MVR 547 where the Court of Appeal held that the analogous provision in s48(4) of the Act placed the burden of

proof upon the defendant.
[21] At 77 - 78.
[22] *Jago* at 76.
[23] Per Mason CJ at 33, Deane J at 61, Toohey J at 72.
[24] *Jago*, per Brennan J at 47.

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