24/91

SUPREME COURT OF VICTORIA

EDEBONE v ALLEN

Nathan J

15 January, 11 February 1991 — [1991] VicRp 100; [1991] 2 VR 659

CRIMINAL LAW – STAY OF PROCEEDINGS – ABUSE OF PROCESS – DELAY OF EIGHT YEARS IN LAYING INFORMATIONS – WHETHER UNFAIRNESS TO ACCUSED – WHETHER ABUSE OF COURT'S PROCESS – WHEN APPLICATION FOR STAY SHOULD BE MADE.

1. Applications to stay proceedings permanently should be treated sparingly and with the utmost caution and will of themselves necessarily involve exceptional or unusual circumstances or extreme cases. Relevant considerations include the length of and reasons for a delay in laying/bringing charges, whether the accused has contributed to the delay, any likely prejudice to the accused and finally, the public interest. The grant of a permanent stay on the basis of delay alone will be very rare.

***Jago v District Court of NSW and Ors* [1989] HCA 46; (1989) 168 CLR 23; (1989) 63 ALJR 640; 87 ALR 577; 41 A Crim R 307 [Noted 64 ALJ 138; [1990] CrimLR 552; 106 LQR 379], followed.**

2. Accordingly, a magistrate fell into error in granting a permanent stay where a delay of 8 years occurred between the commission of the alleged offences and the laying of informations.

3. Whilst there may be cases where the continuation of a hearing already commenced may amount to an abuse of process, the general rule of practice is that applications to stay proceedings permanently should be dealt with as a preliminary step prior to the commencement of evidence for the prosecution.

NATHAN J: **[1]** Paul Edebone, is a policeman and the applicant Anthony Allen, the respondent, is the defendant to ten Informations laid by him and this is an appeal from the exercise of a magistrate's discretion to permanently stay the hearing of three of them. Edebone alleged Allen sexually molested five different boys on four separate occasions. Informations were laid pursuant to the *Crimes Act* 1958, s44. Five further Informations alleging common assault upon the boys were also laid. Two of the boys, Cox and Swift, were aged 8 and 10 when they were allegedly sexually assaulted at Shepparton in November 1982. Cornish, the third boy in respect of whom an appeal is before me, was aged 11 or 12 when he was allegedly molested at Campbellfield in May 1984. The other two boys, Treloar and Harrison, were alleged to have been indecently assaulted in November 1988 and June 1989 respectively. The Informations in respect of those offences were heard and dismissed by the learned magistrate.

Rehearsal of the events before the magistrate is necessary. The ten Informations were called on for hearing. The five Informations relating to common assault were then withdrawn. Four were apparently out of time and the fifth was treated as if it was. Thus the magistrate was left with five Informations relating to the alleged paedophilic assaults. Counsel for Allen applied to have the matters heard separately. That application was dismissed. The prosecution then called its evidence relating to Swift and Cox. That evidence concerned events at a Cub/Scout Camp at Shepparton in 1982. At that Camp the respondent was a leader. The molestation **[2]** allegedly occurred at night. Swift's father gave evidence of becoming aware of the incident when collecting his child and having informed the scouting authorities of it. He and later his wife made a joint decision not to proceed with any further complaint at that time, and did so in what they then perceived to be in the best interests of their child. A scout supervisor also gave evidence of being told of the alleged indecent assaults, and then of referring the matter to the parents for them to decide whether the incident should be reported to police. Both Swift and Cox both now aged 17 gave evidence and were cross-examined.

Counsel for Allen then made an application for a permanent stay of the prosecutions. The magistrate accepted this submission and granted the stay. It is useful to rehearse from the affidavit material his reasons for doing so. The magistrate stated the parents knew of the incidents in 1982 and had chosen not to involve the police. That the incidents only came to light because of further

police investigation. He said that memory could not be expected to be 100 per cent accurate eight years after the incident. The magistrate said that although there may not be a specific identifiable prejudice to Allen, such as the loss of a witness, he considered the passage of time would result in memory loss and that in itself would lead to an unfair trial. The magistrate did not make any reference to the matters of public interest put to him by way of submission, but did say "the man in the street would not be too concerned to see that the charges be prosecuted". The magistrate said "to use the prosecutor's terms perhaps what is buried is better off left dead and buried".

[3] The prosecutor then adduced evidence about the Information relating to Cornish. Mrs Cornish swore she was a sole parent when her son, Jason, attended an after-school program at which Allen was a leader. Allen became very friendly with her son and he stayed at Allen's caravan nearly every weekend. In 1984 she said she could recall her son coming home at about 2.00 a.m. one morning, and he told her he had had a fight with Allen. She said it was not until a number of years later that her son told her Allen had indecently assaulted him in the caravan. Cornish himself gave evidence of being molested in the caravan. The witnesses were cross-examined. Counsel for Allen made a similar application for a permanent stay which was granted. The magistrate ruled there was not much difference between the incidents involving Cox and Swift, that the Cornish incident had been dug up by police and it would be better left off buried. The prosecution then presented its evidence relating to Treloar and Harrison. These Informations were not proved and dismissed.

The grounds of the appeals are twofold and can be summarized as follows. The magistrate exercised his discretion incorrectly and in breach of legal principles in granting a permanent stay of the prosecutions, and secondly he erred in law in relying upon the evidence of the prosecution witnesses before determining the defendant's application for the stay. In effect this ground asserts that the despatch of an application for the stay of proceedings should be made and disposed of prior to the hearing of the case, in much the same way as **[4]** a *voir dire* is conducted to determine the admissibility of evidence. I shall deal with the latter ground first.

It is critical to distinguish between an application to permanently stay proceedings and a submission that the defendant has no case to answer, put upon the conclusion of the Crown case. The former means the defendant remains charged with the offences and must reveal them if required by the law or face prosecution if the stay is lifted. The "no case" submission, if successful, entitles the defendant to an acquittal. In this case, and with respect to the learned Magistrate disposing of a heavy list in a busy court with as much despatch and compassion as can be brought to the task, some confusion and overlap seems to have occurred.

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 applications 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. Insofar as authorities have considered the issue, it has been assumed that 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 **[5]** 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.

In this case the facts disclose the magistrate considered the application at the conclusion of the Crown case. Far from the proceedings being stayed, they had proceeded a great distance. The magistrate seems to have granted the application upon the evidence adduced to support conviction, but said, in the circumstances, it would be appropriate to let sleeping dogs slumber. A submission, in those terms, would have been more appropriately put when the Informations were first called on for hearing, and after the refusal of the application to hear the matters separately. In Victoria, it is undoubted a magistrate is empowered to permanently stay the hearing of Informations. See *Barton v R* [1980] HCA 48; (1980) 147 CLR 75; (1980) 32 ALR 449; 55 ALJR 31, a case dealing with the power of the court to govern its own procedures so as to prevent its processes from being abused, *Higgins v Tobin & Winn* unreported, delivered 5th November 1987

and *R v Gyoerffy* unreported, delivered 27th February 1989 and the authorities recited therein. The position here is to be contrasted with committal proceedings which are ministerial as opposed to adjudicative processes and also the situation in New South Wales *Grassby v R* [1989] HCA 45; (1989) 168 CLR 1; 87 ALR 618; (1989) 63 ALJR 630; (1989) 41 A Crim R 183.

Despite the general rule of practice that applications for permanent stays be made prior to the Crown case commencing, there may be exceptional circumstances where the process of the trial reveals that it would abuse the court's processes if the matter were to continue. There is no rule of the common law which dictates that applications of this **[6]** kind must be made at a particular time or prior to the Crown producing evidence. It follows that the appeal on this ground must be dismissed.

My conclusion on the other ground, namely the exercise of discretion, is to the contrary, and partly because the learned magistrate erred in considering, as an amalgam, a permanent stay application and a no case submission. Even if he did not, his discretion erred and to that I now turn. I commence by isolating the reasons relied upon in granting the permanent stay. In the cases of Swift and Cox, there were four:

1. Delay, namely eight years.

2. The parents of the children knew of but desisted from formal complaint in the perceived interests of their children.

3. The unreliability of witnesses, particularly the complainants after the effluxion of time.

4. That it was better to leave these complaints "dead and buried".

The last ground appears to be the most substantial, in that it supports a notion that it would abuse the court's process to resuscitate complaints where those most immediately concerned at first instance, namely the parents, had decided not to do anything. In my view, the magistrate was incorrect in all of these conclusions.

The law, binding upon the learned magistrate and myself, is set out in *Jago's Case*. A judge was held to have correctly refused an application for a permanent stay where a **[7]** company director was alleged to have fraudulently converted cheques between 1976 and 1979. He was charged in October 1981 and committed for trial in July 1982. The case came on for hearing in February of 1987, that is six years after being charged and eleven years after the alleged first offence. I will not reiterate the world-wide authorities referred to by Mason CJ in dealing with the concept of delay providing reason of itself, for a court to conclude its processes would be abused, sufficient to cite his conclusion, (p30):

> "In essence then, the power to prevent an abuse of process in this context is derived from the public interest, first that trials and the processes preceding them be conducted fairly and, secondly, that, so far as possible, persons charged with criminal offences are both tried and tried without reasonable delay. In this sense, fairness to the accused is not the sole criterion when a court decides whether a criminal trial should proceed ..."

And p31:

> "In the context of undue delay, the interests of the accused in obtaining fairness are similar to, if not the same as, those which the rights to a speedy trial contained in the United States Constitution is designed to protect."

Brennan J, again after an extensive examination of world-wide authorities, concluded, (p44):

> "1 would hold that no right to a speedy trial is recognized by the common law ... that is not to say that the courts of this country do not regard speed in the disposition of criminal cases as desirable. To the contrary, it is a truism that justice delayed is justice denied. ... The furthest which a court can go is to regulate its procedures to avoid unnecessary delay, to do what can be done to achieve fairness in a trial and to prevent the abuse of its process."

Deane J, in accepting criteria identified by Kirby P in *Herron v McGregor* (1986) 6 NSWLR 246; 28 A Crim R 79, the **[8]** nascence of which can be traced to the Supreme Court of the United States, viz. *Barker v Wingo* 407 US 514; 33 L Ed 2d 101; 92 SCt 2182; 92 SCt 218; 3 L Ed 2d 101 and *United States v Von Neumann* 474 US 242; 88 L Ed 2d 587; 106 SCt 610, said of the process of justifiably granting a permanent stay, that the following are to be taken into account:

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

He went on to say:

> "They (the criteria) should not, however, be treated as a Code or permitted to divert attention from the fact that what will ordinarily be involved in answering that question is the formation of a value judgment in the context of the nature and seriousness of the alleged offence and having regard to all other relevant considerations. ... Consideration of the fifth (public interest) will require that account be taken of the fact that the primary responsibility for determining whether criminal proceedings should be maintained lies with the executive and not with the courts."

On this latter point Gaudron J was more specific. At p77:

> "One particular feature relevant to criminal proceedings is that the question whether an indictment should be presented is and always has been seen as involving the exercise of an independent discretion inhering in prosecution authorities, which discretion is not reviewable by the courts.

She also said (p76):

> **[9]** "Thus, it may be said that the power to grant a permanent stay of criminal proceedings is not to be exercised on the basis of an opinion that an indictment should not have been presented. See *DPP v Humphrys* [1977] AC 1; [1976] 2 All ER 497; (1976) 63 Cr App R 95; [1976] 2 WLR 857."

(and also)

> "Thus, the power is one that is readily seen as exercisable (whether in civil or criminal proceedings) only in exceptional cases or, as was said by this court in refusing special leave to appeal in *Attorney-General (NSW) v Watson* 'sparingly and with the utmost caution'."

Concerning the issue of general discretion and the factors to be weighed, Toohey J at 72 said:

> "There is more than one interest involved in the trial of the appellant. The Crown has an interest in bringing him to trial; he, of course, has an interest in obtaining a fair trial; running in parallel is the public interest that charges of serious offences be disposed of but they be disposed of at a hearing which is fair and not oppressive to the person charged".

The power to grant a permanent stay undoubtedly exists as an instrument which the court exercises to prevent injustice or the abuse of its processes. See *Metropolitan Bank v Pooley* (1885) 10 AC 210, *Lawrance v Norreys* (1890) 15 AC 210; [1890] All ER 858, *Jackson v Sterling Industries Ltd* [1987] HCA 23; (1987) 162 CLR 612 at 639; 71 ALR 457; [1987] Australian High Court and Federal Court Practice 96; 61 ALJR 332; [1987] ATPR 40-792 and *Hamilton v Oades* [1989] HCA 21; (1989) 166 CLR 486 at 502-504; 85 ALR 1; (1989) 63 ALJR 352; 15 ACLR 123; 7 ACLC 381. I apply the principles of *Jago* and examine the exercise of the magistrate's discretion in the light of that authority which commences with the proposition that such applications should be treated cautiously, and will of hemselves necessarily involve exceptional or unusual circumstances. The power is, as was said, to be exercised sparingly.

[10] I return to the first ground, and in my view it was not possible for the magistrate to have exercised his discretion on the basis of delay alone to have justified the granting of a stay. In this case the reasons for the delay in laying the Informations were made known to the magistrate. They were that the alleged victims themselves decided to suppress the institution of proceedings. It was not until the police investigating the alleged offences relating to Treloar and Harrison, that they became aware of the former alleged offences. There was no lapse of time between becoming aware of these offences and the institution of proceedings. In any event, the delay of eight years with offences of this kind is, unfortunately, common. Information relating to paedophilic offences cannot be expected to be forthcoming. Often it is the repetition of such offences which lead to their detection. No fixed time limits for the institution of alleged paedophilic offences can be imported into the Act. No limitation period is there set out. As with every other serious criminal offence, and except in the circumstances where injustice will ensue, the horizon of the law is not limited. The long arm of the law cannot be amputated by the passing of time.

It is correct to say the nature of the offence must be taken into account as well as the reasons for the delay. For these reasons I concur with Ormiston J in *Boehm v DPP* [1990] VicRp 42; [1990] VR 475. In that case so-called "white collar" offences were involved. A consideration there to be taken account is the fact that documentary material is routinely shredded after a few years. **[11]** The sheer incompetence of prosecuting authorities in bringing the matter on for trial may be relevant. See *R v Gyoerffy* (*ibid*). None of these considerations are here present, for the factual reasons I have already stated.

I come now to the second reason considered by the magistrate, that is the parents' original decision not to inform the police. Two principles collide. The first is sustaining the notion that parents can best decide the interests of their children. The second is that it is not for the victim or parents to decide whether the criminal law will be invoked. Certainly the wishes of parents will be weighty and considered, but I find as a matter of law they should not be determinative. In any event, it is always open to a person whom it is said has been the victim of a criminal offence to resile from the decision not to inform about it. This appears to have been the case here as the parents were called as Crown witnesses and not in response to subpoenas (none are on the court file).

Further, and again in any event, the correctness of a decision in respect of the child's welfare may well vary with passing events. That which is perfectly proper on Thursday may be at odds with reasonableness by Friday. Therefore, insofar as the magistrate took into account the original decision of the parents, or their subsequent decision to resile from it, it was an irrelevant consideration. As *Jago's Case* establishes, it is for the executive, not the judiciary, to decide whether proceedings will be instituted and prosecuted. The judiciary's function is limited to protecting its own processes by staying proceedings, if the court's own obligation to deliver justice would be hopelessly compromised. **[12]** This principle also accords with common sense. If the decision to prosecute were at the option of an alleged victim, then that person could become the subject of undue pressure, intimidation or threat, in order to thwart justice. In my view, it affronts the law, to stay proceedings on the basis that the parents of an alleged victim initially decided to do nothing.

I come now to the fourth ground relied upon by the magistrate. That is, the unreliability of witnesses, particularly of infants in sexual cases. This area of the law has suffered the attentions of social workers, some reports being tendered in apparent ignorance of the law as it is. I cite foreign authority only, so as to avoid local embarrassment.

> Diagnosis of Child Sexual Abuse, Department of Health and Social Security, London HMSO 1988 ISBN 0-11-3211554; Protecting Children. A guide for social workers undertaking a comprehensive assessment, Department of Health, HMSO London 1988 ISBN 0-11-321159-7;
>
> Key Issues in Child Sexual Abuse, Some Lessons from Cleveland, National Institute for Social Work ISBN 0902789-58-9.
>
> Scottish Law Commission report on the evidence of children and other potentially vulnerable witnesses HMSO ISBN 0-10-216190-9:
>
> Report on the Inquiry into Child Abuse in Cleveland 1987 HMSO CM 412.

In this case the magistrate actually heard from the witnesses concerned, but failed to make any decisions or adjudicate upon their reliability or otherwise. He failed to come to grips with the decision-making process confronting him. Counsel for the defendant did not submit that the witnesses **[13]** were inherently unreliable or that their recall was tainted by the effluxion of time, or indeed, that they should be disbelieved. No grounds were advanced to support a contention that to continue with the hearing on the basis of the evidence thus advanced the court's processes would have been abused.

There is no principle of law which suggests that an adult or a person approaching adulthood must, perforce give unreliable evidence about an incident in childhood. In this case, the youths gave evidence of an event not of early, but of midchildhood. It is notorious that memory of childhood events may become distorted with the passing of time. It is equally as notorious that some events can be recalled with clarity. It is the adjudicative process which a magistrate must bring to that evidence. It was not an abuse of the court's process for him to hear it, which he did. It would not have abused the court's process for him to have continued so as to reach a decision. Accordingly, there were no grounds for him to exercise his discretion on this basis.

I turn now to the final ground, namely that it was better to leave things "dead and buried". The simple fact is that the alleged offences were not dead and buried, but had been revealed by "police digging". There is no inherent harm in such a course, and insofar as the magistrate seems to have implied that it was improper to proceed because of this, he was incorrect. How an alleged offence is detected by the police is not a relevant matter in granting a stay unless it taints the prosecution so that it becomes so unfair to an accused person it would abuse the court's processes to proceed. No such chain of events can be discerned from the evidence in this case. It **[14]** is not for a magistrate to decide, as a matter of social policy or upon some basis of compassion for either the alleged victims or offender that a matter be interred. A magistrate's responsibility is to despatch on the evidence the Information to a point of decision. Having arrived at a conclusion beyond reasonable doubt, different and separate issues arise as to the consequences of that decision. Adjournments, bonds, community based orders, a whole panoply of alternatives are provided. It is at that juncture a magistrate may bring into play views of social policy or compassion.

It follows the magistrate erred in the exercise of his discretion on this ground, and accordingly the appeal succeeds. I will remit these Informations for adjudication before a magistrate other than the one who heard these Informations at first instance. I will hear counsel as to costs.

Solicitor for the appellant: Victorian Government Solicitor. Solicitors for the respondent: Phillips Fox.
