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ALTERNATIVE DEFENCE
WHERE TO LOOK WHEN YOU HAVE NOWHERE TO GO
A look at the principle of Abuse of Process

"Are the court to rely on the Executive to protect their process from abuse? Have they not themselves an inescapable duty to secure fair treatment for those who come or are brought before them? To questions of this sort there is only one possible answer. The courts cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the process of law is not abused"

Lord Morris; Connelly v DPP [1964] AC 1254; [1964] 2 All ER 401; (1964) 48 Cr App R 183; [1964] 2 WLR 1145

Sited in R v Magistrates' Court at Melbourne; ex parte Holman & Ors [1984] VisSC 245; MC 31/1984, 24 May 1984

Introduction

From the separation of the powers of government (resembling by far the ideals of the Commonwealth and our "mother land" the United Kingdom) other principles are born; the principle of the much debated trial by Jury, the principle which forms the very base of our justice system, that of the accusatorial system. Another principle, which migrated from England with the very formation of the Justice System in Australia, is that of abuse of process; the power a court holds to control its own processes.

This paper focuses on the principle in the criminal jurisdiction. It looks at the age old notion and refocuses it use in an attempt to see if it can be applied to the everyday, run of the mill matters which practitioners, especially in the lowers court, find themselves confronted with.

In lower courts, where time is of the essence, one can be faced with prosecutions which just strike as wrong or prejudicial. In my experience the main examples appear to relate to the way that Police conduct a case, from the charging process, to the gathering of evidence, to their involvement as investigators. It too often goes unchecked, when, with limited time, the

Defences focuses on ways to prepare a defence, in what I would call the normal way. This paper attempts to answer the question – where to look when you have nowhere to go? Should practitioners make applications for Stay of the prosecution more often in the Lower Courts? In order to answer these questions, a look at the principle and its application is crucial.

What is Abuse of Process?

"It is clear that Australia Courts possess inherent jurisdiction to stay proceedings which are an abuse of process: Clyne v NSW Bar Association 1960 CLR; Barton v R 1980. Subject to statutory provisions to the contrary, a court also possesses the power to control and supervise proceedings brought in its jurisdiction, and that power includes power to take appropriate action to prevent injustice: Hamilton v Oades 1989 ALJR."

Jargo v The District Court of NSW and others [1989] HCA 46

The principle of Abuse of Process is a principle giving the Courts power to control their own processes to ensure they are not abused or misused. Lowers courts and higher courts possess the power to either terminate proceedings, or grant monetary compensation against those who abused their process.

Civil Jurisdiction

The principle, also known as Stay of proceedings, takes its roots at common law. In the civil Jurisdiction, it takes two forms. The first is as a tort. In actions claiming the tort, parties may seek damages, and/or compensation as a remedy for the wrong caused. Examples include claims against malicious prosecution. In the civil tort, proceedings have often come to an end and at their termination parties seek damages by initiating new proceedings. It may also be used during proceedings where the wrong said to be the Abuse of Process has become apparent. This path unfortunately does not allow for early termination of the proceedings. Although it may be brought during the proceedings to remedy a wrong amounting to an abuse of process, it offers very little by way of putting an end to proceedings which are abusive, unfair or oppressive. See Williams v Spautz (1992) 174 CLR 509.

The second form of the principle, and one which is more readily applied to crime as it offers a real prospect of cessation of proceedings, is a stay of proceedings. Both applicable in the Civil and Criminal Jurisdiction, an application for a Stay of Proceedings puts a stop to a prosecution when it is unfair or oppressive.

Stay of Proceedings

Although there is no limited definition of what amounts to an abuse of process categories of what amounts to abuse and warrants a stay can be sourced from case law. Some examples include:

- Proceedings brought for an improper purpose;

- Proceedings that are vexatious, frivolous or oppressive;
- Proceedings that are seriously and unfairly burdensome, prejudicial or damaging;
- Proceedings productive of serious and unjustified trouble and harassment;

See Ridgeway v The Queen [1995] HCA 66; (1995) 184 CLR 19 at 74-75; (1995) 129 ALR 41; (1995) 69 ALJR 484; (1995) 78 A Crim R 307; (1995) 8 Leg Rep C1, Per Gaudron J, at 74-75.

Recent Authorities:

The test to be applied when determining whether a Stay of Proceedings in the criminal jurisdiction is warranted and whether the Court should exercise its discretion is "whether the continuation of the proceedings *would* involve unacceptable injustice or unfairness, or *would* be so unfairly and unjustifiably oppressive as to constitute an abuse of process"; TS v R [2014] NSWCCA 174, at [1]; see Dupas v R (2010) 241 CLR 237.

The mere risk of unacceptable injustice or unfairness is not enough; R v Edwards [2009] HCA 20; 83 ALJR 717 at [23]. Actual prejudice needs to be evidenced, see Jago per Mason CJ at 33,34, per Brennan at 47.

"In determining whether, in all the circumstances, the continuation of the proceedings would involve unacceptable injustice or unfairness, it is necessary to look at the evidence of actual prejudice in the conduct of the defence. Such evidence is to be considered in light of the powers of the trial judge to relieve against unfairness; such powers include: the giving of appropriate directions and warnings, rulings as to admission of evidence, and control of procedures of the court, generally" RM V R [2012] NSWCCA 35 at 43, per Whealy JA when quoting Woodburne SC DCJ.

Exceptional Circumstances

The Courts are cautious to apply the principle, especially in circumstances where the line between the Court's power to control their processes, overlaps with the right of Prosecutors to prosecute. In the United Kingdom, Lord Bingham LCJ stated in Environment Agency v Stanford [1998] C.O.D. 373, DC, "the jurisdiction to stay, as has been repeatedly explained, is one to be exercised with the greatest caution … The question of whether or not to prosecute is for the prosecutor. Most of the points relied on in support of an argument of abuse are more profitably relied on as mitigation." See also Wandsworth London Borough Council v Rashid [2009] EWHC1844 where it was held that the Magistrates' Court was in error in staying a prosecution.

A court considering a Stay Application must first turn its mind to alternative ways to address any unfairness without terminating proceedings, including any directions that might alleviate the prejudice to the defendant, or any exclusion of evidence. In the case of R v Glennon (1992) 173 CLR 592; 106 ALR 177, the High Court upheld previous authorities which stated that the principle would only be used in exceptional cases and only where there is nothing that could be done to "remedy a fundamental defect".

However it should be noted that, despite the above and the heavy burden placed on the defendant, an applicant on a Stay of Proceedings application need not show that a case is extreme or singular but rather whether the defect can be addressed in the course of the trial. In Dupas v R (2010) 241 CLR 237, at 250 it was held:

"Characterising a case as extreme or singular is to recognise the rarity of a situation in which the unfair consequences of an apprehended defect in a trial cannot be relieved against by the trial judge during the course of a trial. There is no definitive category of extreme cases in which a permanent stay of criminal proceedings will be ordered. In seeking to apply the relevant principle in *Glennon*, the question to be asked in any given case is not so much whether the case can be characterised as extreme or singular, but rather, whether an apprehended defect in a trial is of such a nature that nothing that nothing that a trial judge can do in the conduct of the trial can relieve against its unfair consequences"

Abuse of process and the lower courts

Several authorities have made it clear that the lower courts have jurisdiction to deal with Abuse of Process and order Stay of Proceedings of prosecutions. In Smiles v Federal Cmr of Taxation (1992) 37 FCR 538; 109 ALR 449 at 462-4, the Federal Court found as such, ruling the local court had the power to stay proceedings.

See also R v KF [2011] NSWLC 14, Grassby v The Queen (1989) 168 CLR 1 and Dupas v R [2010] HCA 20.

Autrefois Acquit; Autrefois Convict

Abuse of Process and Stay of Proceedings are closely connected to the age-old doctrine of *Autrefois Acquit* and *Autrefois Convict* which relates to proceedings for which a person has already been tried and a finding in regards to guilt has been made either way. The literal translation being, *Previously Acquitted* and *Previously Convicted*. The English authority of DPP V Humphrys [1977] A.C. 1 found this principle meant any further prosecution for the same offences, facts or event could be argued to be an abuse of process by the prosecution.

Abuse of Process in different jurisdictions

United Kingdom

The leading case in the United Kingdom on Abuse of Process and Stay Applications is the case of Bennett v Horseferry Road Magistrates' Court and Another [1993] 3 ALL E.R. 138, 151, HL. The House of Lords held that a Court should grant a Stay of Proceedings on the basis of Abuse of Process, when:

- it would be impossible to give the accused a fair trial; or
- where it would amount to an misuse/manipulation of process because it offends the court's sense of justice and propriety to be asked to try the accused in circumstances of the particular case.

Per Lord Lowry

This appears in line with the Australian authorities, including the predating authority of Jago v District Court of NSW, where Chief Justice Mason stated "Moreover, objections to the discretions to prevent unfairness give insufficient weight to the right of an accused to receive a fair trial. That right is one of several entrenched in our legal system in the interests of seeking to ensure that innocent people are not convicted of criminal offences."

The principle attempts to balance the right of the public to ensure that guilty persons are tried and convicted of their crime, but also to ensure that public confidence in the Judicial System remains, see DPP v Meakin [2006] EWHC 1067 and Gaudron J; R v Magistrates' Court at Melbourne; ex parte Holman & Ors [1984] VisSC 245; MC 31/1984, 24 May 1984.

In the case of Hui Chi-Ming v R [1992] 1 A.C. 34, PC, abuse of process is said to be something so unfair and wrong with the prosecution that the court should not allow it to proceed, despite it otherwise being a case supported by evidence.

Canada

A recent decision in the Supreme Court of Canada has taken a strict view on the level of oppression that would warrant a Stay of Proceedings. R v Babos, 2014 SCC 16 was decided on a 6-1 majority where the application for a Stay was not granted.

In making its ruling, the Supreme Court relied on the cases of R v Regan, [2002] 1 SCR 297 at paragraph 30, which stated that a Stay is "the most drastic remedy a criminal court can order" and the case of R v O'Connor, [1995] 4 SCR 411 which itself set a high standard for satisfying the onus that an wrong had occurred. The Court found that there are two applicable tests for the making of a successful application (paragraph 32):

1. There must be prejudice to the accused's right to a fair trial or to the integrity of the justice system that will be manifested, perpetuated, or aggravated through the conduct of the trial or its outcome; **[or]**

2. There must be no alternative remedy capable of redressing the prejudice;

and (emphasis added)

3. Where there is still uncertainty over whether a stay is warranted after (1) and (2), the court must balance the interests of the accused and the social interest in having the case heard on its merits.

   Per McLaughlin C.J. and LeBel, Cromwell, Moldaver, Karakatsanis and Wagner JJ at [32].

The Court explained that the first category is a "main category" which "compromises the fairness of the accused's trial" and the second category related to the risk that "the integrity of the judicial process" would be undermined.

In the summing up of their Honour's decisions, the majority found that "when the residual category is invoked, the first stage of the test is met when it is established that the state has engaged in conduct that is offensive to societal notions of fair play and decency, and that

proceeding with a trial in the face of that conduct would be harmful to the integrity of the justice system."

This approach is consistent with other authorities arising in the jurisdiction, including R. v. O'Connor, [1995] 4 S.C.R. 411 where it was held that a Stay may be justified when the State's conduct "contravenes fundamental notions of justice thus undermines the integrity of the judicial process" at paragraph 73. The Court also referred to the case of Canada (Minister of Citizenship and Immigration) v. Tobiass, [1997] 3 S.C.R. 391, at paragraph 91 where it held that the conduct of the State must be "so egregious that the mere fact of going forward in the light of it [would] be offensive". See paragraph [76]

The case of Babos relates to two co-accused, one being Antal Babos, who were faced with numerous firearm offences, production, trafficking and importation of methamphetamine. Eighteen months after they were made, the defence raised with the trial judge that threats had been made by the then Crown that should a plea of not guilty be maintained, additional charges would be laid. The threats went further to states that if the accused would not plead guilty, she would proceed under s. 577 of the Criminal Code "which would preclude the accused from having a preliminary inquiry".

The majority rejected the application for a Stay. Her Honour, Abella J, was in dissent. She took the view that the test should be a balancing exercise between ""the affront to play fair and decency" and "the effective prosecution of criminal cases"" at paragraph [77]. Her Honour was of the view that time between the threats made and the trial, although they mitigated the effect of the unfairness, did "not operate to attenuate what was unpardonable conduct." She went on to say that "time is not a legal remedy for a fundamental breach of the Crown's role, and cannot be retroactively cure intolerable state conduct." [82].

Past application of the Principle – a look at case law

Delay

Delay in a prosecution appears to be one of the most commonly argued basis for a Stay of Proceedings. Delay is often accompanied with another type of prejudice, such as the loss of evidence, the loss of a witness, the health and/or mental capacity of the accused person. One thing is certain, delay is not sufficient, there must be prejudice that attaches to the delay, R v Westly (unreported) NSW Court of Criminal Appeal BC (6 August 2004) 200405173 parra 12; see also R v Birdsall unreported NSWCCA 3 March 1997 BC 9701099.

Jago remains the main authority on cases where delay is in issue. Deane J indicated there are five heads which should be addressed by the applicant when delay is a crux of the application.

1. The length of the delay;
2. The reasons given by the prosecution to explain or justify the delay;
3. The accused's responsibility for and past attitude to the delay;

4. Proven or likely prejudice to the accused;

5. The public interest in the disposition of charges of serious offences and in the conviction of those guilty of crime.

In R v Nicholson BC 9803291 27 July 1998, the delay in question was caused by the process of the District Court where an accused's trial was not reached five times. RESULT?

Higgins & Ors v Tobin & Winn [1987] VicSC 484; MC 60/1987, Justice Nathan found that an application for a Stay had not been made out on the basis of delay. He found that "it was within the Magistrate's province to decide whether the proceedings against the policemen amounted to an abuse of process by virtue of delay" but he was satisfied "that the application is without merit".

Delay and loss of evidence

In making an application for a Stay, applicants must focus on the prejudice, unfairness or oppression that is alleged and provide proof of how it arises. The defence must demonstrate actual prejudice, unfairness or oppression. It is not enough to rely on the likelihood of a prejudice arising. Evidence must be provided to the court to show that there is a real risk that a trial cannot be fair.

In The Queen v Edwards & Anor [2009] HCA 20, the appeal was allowed and the permanent Stay of Proceeding was dismissed. It was held that "the content of the lost data was unknown. In these circumstances it was not correct to characterise their loss as occasioning prejudice".

Their Honours went on to say, "there was no features of the delay that justified taking the extreme step of permanently staying proceedings on indictment. It had not been established that any prejudice arising by reason of the delay could not be addressed by directions".

Destruction of evidence

R v Reeves (1994) 122 ACTR 1. In this case, whilst the defendant was being interview, documents, which were established to be important to his defence, were destroyed. It was held that "as a result of the destruction of the documents it was no possible for Reeves to receive a fair trial. That destruction created a fundamental defect which went to the root of the trial and there was nothing that a trial judge could do in the conduct of the trial that could relieve against its unfair consequences".

Abuse of Process a new application

As stated above, a Stay of Proceedings on the basis of Abuse of Process carries a heavy onus for the applicant is not regularly used. However should this deter practitioners from making such an application?

The following covers examples where, at the lower court level, concerns arise, either in the way the prosecution handles matters or where the law offers little recourse. Looking beyond

the available defences at law, and into the very foundation of our legal system, are alternative avenues available and would it be open and appropriate for practitioners to make an abuse of process application?

Officers in Charge as Victims

My nemesis, and what became the genesis for this paper, is my deep hate for matters in which an accused is faced with a charge of assault or resist a Police officer in the exercise of their duty, when the Officer in Charge is the victim of the assault.

Firstly, there is a real conflict of interest in the prosecution. By the nature of the position, Police are to remain impartial and provide the evidence required for a prosecution. This position is deeply compromised by the conflict which evidently attaches. It has been my personal experience, in cases where the victim also plays the role of investigator, to end up on the eve of the hearing, with two statements, one from the Victim and one from the Officer In Charge's second. CCTV footage, independent witnesses, exhibits of items seized, photographs of defendant's injuries, none of that is provided. Is it the defendant's duty to obtain these crucial pieces of evidence?

Secondly, in circumstances where the most commonly used defence to an assault police charge is self defence, accompanied by a finding that the Officer was acting outside of his duty - often by the use of excessive force, or a wrongful arrest – the conflict becomes more important. The temptation to control the investigation of the prosecution case, which by its very nature needs to be balanced, even if it does not support the prosecution, to avoid being reprimanded should cause concern. And yet, it has become almost common place for an Officer in Charge to be in charge of an Investigation in which he is the victim. Where the alternative to an accused being convicted of the assault, can be that the Officer is reprimanded for unlawful use of his/her powers (unlawful use of force or unlawful arrest), the interest of the Officer is in complete and utter conflict with those of the accused person.

<u>Should practitioners consider a Stay of Proceedings?</u>

The principles of abuse of process, as indicated above, strive to ensure that the Court's processes are note abused. It maintains the confidence of the Public that persons ought to be tried for criminal offences in a fair way. In circumstances where such conflict arises, my question is; how can you secure a fair trial? Is there a remedy available at trial alleviate the prejudice caused by the prosecution? Should the practitioner look at alternative defences like running a Stay Application in these circumstances? And would he be successful?

Adams J, in the case of R v Littler [2001] NSWCCA 173 120 A Crim R 512 at 513 said;

"The investigating police have a duty, in my view, to search out contemporaneous witnesses who might be able to shed light on the relevant circumstances. It is not appropriate to leave this investigation to the defence or, of course, to the complainant."

The case of Littler involved allegations of sexual abuse, however if this statement is read in the context of an investigating officer as victim, one could argue that the investigating office become the 'complainant'. It is clear that, not only does that Police have a duty to investigate

the case in such a way as to ensure fairness to the accused, but that this is not a victim's duty or job.

Adams J went on to say: "Although in a sense, therefore, it is for the applicant to establish such prejudice as would satisfy a stay of proceedings, this should be in the context of a full and adequate investigation by the prosecuting authorities which provides a context that enables the court to evaluate in a sensible way the extent of the prejudice affecting the accused".

In the United Kingdom, it was held that an Abuse of Process argument could be made where the prosecution have manipulated or misused the process of the Court to deprive the defendant of a protection provided by law or to take unfair advantage of a technicality – R v Derby Crown Court ex p. Brooks, 80 CR. APP. R. 164 DC. Police powers and resources give it powers to investigate beyond the everyday person. It gives them authority and access to material which would otherwise not be available. The role of an Officer in Charge is to investigate all avenues to be able to provide a full and franc picture of the facts to the court. Can it not be said that this process is utterly corrupted by the inherent conflict which arises?

AVO proceedings when charges pending

Right to silence is another significant right of our justice system. Yet too often we find ourselves faced with a dilemma, when proceedings for Apprehended Violence Orders are brought forward, either on a Police or on a private basis, when no criminal charges have been issued.

Apprehended Violence Order proceedings are neither civil nor criminal. They fall into the special jurisdiction of lower courts. In New South Wales the Local Court Act 2007 NSW states, in part 4, that such applications form part of the special jurisdiction of the Court.

In defending an application for such an order, a respondent must provide signed statements. In some cases, after the respondent/defendant has filed his statements, Police will then issue charges. Could an Abuse of Process argument be made out in these circumstances? Is it fair that a defendant, in special jurisdiction proceedings, provide signed evidence, but then be faced with a prosecution which may rely on his evidence as if he had waived his right to silence?

The main concern in answering the above, is whether or not the injustice that arises can be overcome in less drastic ways then to order a permanent Stay of Proceedings. Excluding the statement from evidence appears to be the simpler option, however a person would already have provided valuable information to the prosecution. Information it most likely would not have provided if a charge had been issued at the same time.

Applications for Stays are made on a case to case basis and there is no definition of what can classify as abuse of process as stated above. In making an application a defendant would have to satisfy the Court of what the prejudice, oppression or unfairness is.

Mental Health at the Lower Court level

One of the great challenges at the lower court level, specifically in New South Wales, is the application of the Mental Health diversions. In New South Wales the Mental Health (Forensic Procedure) Act 1990 NSW offers, in its bare essence, two options;

1. Section 32, diversion of a person suffering from a mental illness but not mentally ill away from the criminal law system into treatment;
2. Section 33, diversion of a mentally ill person into care.

Section 33(2) states that if a person is not brought back before the court to be dealt with within a period of six months, the charges are taken as dismissed.

Section 14 of the Mental Health Act 2007 NSW states:

(1) A person is a mentally ill person if the person is suffering from mental illness and, owing to that illness, there are reasonable grounds for believing that care, treatment or control of the person is necessary:

(a) for the person's own protection from serious harm, or
(b) for the protection of others from serious harm.

The main concern is that, at the Local Court level, the only available options are stated above. When a person is faced with a client who is suffering from a mental illness, but not mentally ill, pursuant to section 14 (because they are not at risk of harming themselves or others), but simply refuses to accept any diagnosis or receive insight into their mental health, partitioners find themselves somewhat restricted in their available options at the Local Court, or Magistrates' Court level. A section 32 application must be made with the consent of the client as the person, if successful, is diverted away from the criminal system into a treatment plan approved by the Court for a period of six months.

The Commonwealth Crimes Act 1914 has a similar power under section 20BQ where a defendant charged with a federal offence can be diverted away on the grounds of a mental illness or intellectual disability for a period not exceeding three years. Again, however, this requires the consent of the defendant, as the court, in diverting him/her away, need to be confident that they will comply with the treatment plan.

If a person falls outside of section 33 but refuses to make an application under section 32, the only alternative the defence can consider might be an application for a stay based on mental illness and the incapacity of the person to provide instructions or show they understand the proceedings. The prejudice that arises is significant. Unfortunately the Presser criteria are not available in the lower court, so an argument that a person is unfit cannot be made other than through the statute.

Could one argue that when it is obvious to the Police (through the person's history) that a person is suffering from a mental illness, and yet charges issue, a Stay of Proceedings is warranted? Or would it simply fall into the finding that it is a decision of the Prosecutor, whether or not to prosecute a mentally ill person, knowing full well this is the case?

Conclusion

Stay of Proceedings based on abuse of process are a rare application and a defendant carries a heavy onus when seeking a stay. The application must go beyond theoretical prejudice to show that there is truly something unfair, prejudicial or oppressive about the

prosecution which warrants a permanent stay of proceedings despite the public interest in having persons who are guilty being convicted.

Despite the rarity of the applications, there are instances where practitioners are faced with difficult situations and moving forward with a defence in the ‘common way’ may simply not be appropriate and could do a disservice to the defendant. It is worthwhile for all practitioners to consider the principle of a Stay of Proceedings in these cases and seeing whether it can be successfully applied.

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