Judicial Termination of Defective Criminal Prosecutions: Stay Applications

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The decision by prosecution authorities to lay criminal charges against an accused carries with it an expectation that the available evidence justifies prosecution; that in the normal course of events, the prosecution will proceed to completion in terms of a conviction or acquittal after all the prosecution and defence evidence has been heard. However, in some circumstances, a judge or magistrate is empowered to terminate the criminal proceedings either before, or at the close of, the prosecution case without calling upon the defence to present its case. The purpose of this article is to describe existing legal principles governing the judicial power to terminate criminal proceedings, focusing upon orders to stay proceedings on the grounds of some defect in the prosecution case. The first part of the article sets out the different procedures available to terminate criminal proceedings, followed by a more detailed discussion of the power to grant a permanent stay. The two recent cases of *R v Smith*[1] (Victorian Court of Appeal) and *R v Ridgeway*[2] (High Court) are then examined.

The judicial power to terminate criminal proceedings gives rise to a number of fundamental tensions. First, it has long been recognised that prosecution decisions—such as whether to lay charges and if so, the nature of those charges, which witnesses to call on behalf of the Crown, and the entering of a *nolle prosequi*—are in general, beyond judicial review,[3] and to a lesser extent, are beyond governmental review.[4]

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1 [1995] 1 VR 10.

2 (1995) 129 ALR 41.

3 For example, where an accused has been discharged at committal, the judiciary have no power to review the decision of the DPP if the DPP decides to nevertheless proceed with the prosecution: *R v Fox* [1992] 1 VR 673.

4 In most jurisdictions in Australia, the Attorney-General, as first Law Officer, retains some prosecutorial powers along with the DPP (for example the power to issue contempt proceedings).

The requirement of 'independence' in prosecutorial decision-making is reflected in a clearly recognised demarcation between prosecutorial functions and judicial functions.[5] It is generally recognised, for example, that judges should not publicly criticise prosecution authorities for commencing a particular prosecution or for failing to call a particular witness.[6] The power of the judiciary to terminate criminal proceedings, overriding the prosecution, thus appears to conflict with the concept of prosecutorial independence.

The second tension arising from the judicial 'termination' power relates to the practical and ideological function of the jury. A basic tenet of the jury system is that the determination of 'the facts' is the sole province and function of the jury, whilst the determination of 'the law' is the sole province of the judge. The jury's interpretation of 'the facts' is largely a determination of the strength of the prosecution case. By terminating the proceedings, the judge is in effect taking the case away from the jury. The judicial power to terminate criminal proceedings, without requiring the jury to deliberate on the facts, thus appears to conflict with the central fact-finding role of the jury. In view of these two tensions, it is not surprising that the judicial power to terminate criminal proceedings will only be exercised sparingly.[7]

Apart from the need to maintain independence within criminal justice decision-making, a further tension arising from the power to terminate criminal proceedings is the community's interest—particularly the interests of the victims of crime—in ensuring that those who commit criminal offences will be convicted and punished. From this perspective there would need to be compelling reasons or justification for terminating any criminal proceeding.

5 In *Jago v The District Court of New South Wales and Others* (1989) 168 CLR 23 at 77, Gaudron J stated:

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

6 *The Queen v Apostilides* (1984) 154 CLR 563; *Whitehorn v The Queen* (1983) 152 CLR 657; compare with *Darren Shaw* (1991) 57 A Crim R 425.

7 In relation to granting stay applications, see for example: *Jago v The District Court of New South Wales and Others* (1989) 168 CLR 23 at 31 and at 60 and 78; *Attorney-General's Reference (No 1 of 1990)* [1992] 3 All ER 169 at 176; *R v Smith and Others* [1995] VR 10 at 14; *R v Clarkson* [1987] VR 962 at 973, and *Attorney-General (NSW) v Watson* (1987) 20 Leg Rep SL 1 at 1.

This article is concerned with the circumstances in which the judiciary will terminate defective criminal proceedings and how the courts resolve the tensions referred to above. It is suggested in this article that the courts are able to 'manage' these apparent tensions through a combination of ideological and technical mechanisms. The ideological mechanism used to justify the termination of criminal proceedings is a reference by the courts to overriding notions of 'fairness' to the accused and the need for courts to protect the very 'integrity' of judicial processes and the criminal justice system from various forms of abuse. Unless the courts are prepared to protect the legal system and accused persons from such abuses, the foundations of the legal system will be threatened.

The 'technical' mechanism employed by the courts to resolve the above tensions is the development of stringent criteria which have to be satisfied before judicial termination of criminal proceedings will be justified. Such stringency is required because of the inherent dangers in the judical power to terminate criminal prosecutions, as referred to above. If, however, the criteria for granting a stay are too narrow or restrictive, then the courts will not be able to protect either their own processes, or accused persons, from abuse of process; unless of course, some other mechanism is available to remedy the problem.

Against this background, this article focuses upon the judicial power to grant a permanent stay of proceedings, and in particular, the emergence of a relatively new ground for a stay, namely that the prosecution is 'doomed to fail'. A number of recent cases dealing with this issue are examined to illustrate the way in which the courts use the ideological and technical mechanisms referred to above in order to strike a balance between the competing considerations. Before considering the power to grant a stay, a brief overview of judicial powers to terminate criminal proceedings is provided.

Available Procedures to Terminate Criminal Proceedings

A court is able to terminate criminal proceedings at various stages of the proceedings.[8] First, after the close of the prosecution case, but

8 In most jurisdictions the trial judge can hold a pre-trial hearing prior to the empanellment of the jury, in order to identify and hopefully resolve contentious factual or legal issues. At such a hearing, the prosecution may announce it does not intend to lead any evidence (for example, because a key witness has died) and the judge can then formally record a verdict of 'not guilty': see D Just, 'Judicially Directed Acquittals' (1991) *Law Institute Journal* 933. However, this manner of judical termination is not so much a unilateral decision to terminate, but rather a

prior to the defence case, the judge can *direct the jury to acquit* the accused, with or without a request to do so by the defence.[9]

Even where the judge invites the jury to acquit, the jury can reject that advice and return a verdict of guilty.[10]

The relevant cases illustrate the concern of appeal courts that trial judges ought not usurp the fact-finding function of the jury. So long as there is some evidence capable of supporting a conviction, no matter how weak or tenuous that evidence is according to the trial judge, the fact-finding function of the jury should not be undermined. At most, the trial judge can only suggest or invite the jury to acquit. In *The Queen v Prasad*, King CJ stated:

> It seems to me that to say that a judge can direct a jury to bring in a verdict of not guilty when there is evidence capable in law of supporting a conviction is to infringe one of the basic principles of trial by jury.[11]

Second, after the close of the prosecution case, but before the defence case is put, the defence can submit that there is *'no case'* for it to answer and, if successful, the proceedings are terminated by the recording of an acquittal. The test is the same as for directed acquittals:

> the question to be decided is not whether on the evidence as it stands the defendant ought to be convicted, but whether on the evidence as it stands the defendant could be lawfully convicted. This really is a question of law.[12]

formalising of the prosecution decision not to proceed and therefore is not examined in this article.

9 'If there is no case to answer the judge should direct the jury as a matter of law that there must be a verdict of not-guilty and the jury is bound to accept and act on that direction': *The Queen v Prasad* (1980) 23 SASR 161 at 162.

It would appear that even if defence counsel does not make a no-case submission, the judge is still empowered to give a directed verdict if satisfied there is no case to answer. The key issue is whether there is some evidence which could go before the jury. The commonly accepted test is:

'whether on the evidence as it stands the accused could lawfully be convicted, that is to say, whether there is evidence with respect to every element of the offence charged which, if accepted, would prove that element': *May v O'Sullivan* (1955) 92 CLR 654 at 658.

In *Doney v R* (1990) 171 CLR 207 at 215, in a unanimous judgment, the High Court put the test another way:

'a verdict of not guilty may be directed only if there is a defect in the evidence such that, taken at its highest, it will not sustain a verdict of guilty'.

10 *Raspor v The Queen* (1958) 99 CLR 346.

11 (1980) 23 SASR 161 at 162. See also *Doney v R*, note 9 above.

12 *May v O'Sullivan* (1955) 92 CLR 654 at 658.

This is a question of degree and involves evaluating the strength of the prosecution case. The test does not require the defence to establish that the prosecution must inevitably fail but simply that the case is not strong enough to secure a conviction.

Finally, before the prosecution begins to lead evidence, a *permanent stay* (or interim stay) can be granted at the commencement of curial proceedings, usually by way of a preliminary hearing or *voir dire*.[13] The criteria for granting a permanent stay are varied but essentially involve the notion that the continuation of the proceedings would be an abuse of the processes of the court and/or unfair to the accused. The details of these criteria are discussed below. It is important to note however, that even though the granting of a stay is not equivalent to the recording of an acquittal, the criteria for granting a stay are more stringent than for a no-case submission or a directed acquittal.

Stay of Proceedings

From at least the 1890s, English common law has recognised an inherent power of all courts to order a permanent stay of proceedings.[14] Initially the rationale for this power was to prevent 'oppression' to the accused from groundless or frivolous proceedings and to prevent the court's own processes from being abused. The concept of 'abuse of process' has emerged as the modern quintessential basis for the granting of a stay, although courts in Australia and other Commonwealth countries have emphasised that the categories of 'abuse of process' are not fixed. Arguably, the most common and well known bases for the granting of a stay are prejudice and unfairness to the accused arising from delay in the prosecution,[15] and the so-called double jeopardy rule.[16] More recently, in *R v Dietrich*[17] the High Court ruled that an indigent, unrepresented accused facing serious criminal

13 It is generally accepted that a stay application ought to be made prior to the calling of any prosecution evidence but there is no common law rule preventing a stay application being made during the trial: *Edebone v Allen* [1991] VR 659 at 662.

14 For an overview of the development of stays, see RG Fox, 'Criminal Delay as Abuse of Process' (1990) 16 *Monash University Law Review* 64 and ALT Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings* (Clarendon Press, 1993) ch 1.

15 For example, *Jago v District Court of New South Wales* (1989) 168 CLR 23; *Barton v R* (1980) 147 CLR 75 and ALT Choo 'Abuse of Process and Pre-Trial Delay: A Structured Approach' (1989) 13 *Criminal Law Journal* 178 and RG Fox 'Criminal Delay as Abuse of Process' (1990) 16 *Monash University Law Review* 64.

16 Choo, note 14 above, at pp 16-42.

17 (1992) 177 CLR 292.

offences has a right to a 'fair' trial and if the judge forms the view that a fair trial could not be held because of the accused's lack of representation, then the trial should be stayed until legal representation is available.

A lesser known basis for a stay is that the prosecution will not succeed. The primary reason why a prosecution is doomed to fail is because some critical evidence is lacking. However, there are many reasons and circumstances why some critical evidence may be lacking. For the purposes of this article, a distinction can be made between cases which are inherently weak because the investigators have been unable to obtain the required evidence, and cases where evidence of the guilt of the accused is overwhelming but that evidence is excluded by the exercise of the judicial discretionary power to exclude evidence. In the former case, no difficulties arise; the evidence is simply too weak to justify a trial. However, in the latter case, the issues are more complex because of the competing considerations and interests described above, and because there may be alternative remedies to a stay that could deal with the problematic evidence.

What is a Stay?

A stay is essentially a decision of a court to decline to adjudicate on the issues raised in a case. The decision to stay proceedings is a discretionary matter. The granting of a stay is not equivalent to an acquittal[18] but in practice, results in the termination of the proceedings. The source of the power can be statutory but is usually expressed in terms of an inherent power (or, in the case of inferior courts, an implied power) of all courts. As stated by Dawson J:

> every court undoubtedly possesses jurisdiction arising by implication upon the principle that a grant of power carries with it everything necessary for its exercise [*ubi aliquid conceditur et id sine quo res ipsa esse non potest*].[19]

As mentioned in the introduction to this article, the power to stay proceedings does not appear to sit comfortably with the notion of prosecutorial independence and discretion. However the courts have resolved this tension by stating for example:

18 *Edebone v Allen* [1991] VR 659 at 661 and *R v Griffiths* (1980) 2 A Crim R 30.

19 *Grassby v The Queen* (1989) 168 CLR 1 at 16. There is no doubt that courts of summary jurisdiction possess the same powers as superior courts to grant a stay: *Edebone v Allen* [1991] VR 659. However, a Magistrates Court hearing a committal has no power to stay the proceedings because a committal is not a judicial hearing: *Grassby* (1989) 168 CLR 1.

> These arguments misconceive the nature of the broader discretion which they seek to resist. The question is not whether the prosecution should have been brought but whether the courts, whose function it is to dispense justice, with impartiality and fairness both to the parties and the community which it serves, should permit its processes to be employed in a manner which gives rise to unfairness.[20]

The power to permanently stay criminal proceedings creates a tension not only with the doctrine of prosecutorial independence and the fact-finding function of the jury, but also with the broader public interest in ensuring that those accused of crime stand trial, and in particular, conflicts with the interests and expectations of the victim of the crime. According to Brennan J in *Jago v District Court (NSW)*:

> The victims of crime who are not ordinarily parties to prosecutions on indictments and whose interests have generally gone unacknowledged until recent times, must be able to see that justice is done if they are not to be driven to self-help to rectify their grievances. If a power to grant a permanent stay were to be exercised whenever a judge came to the conclusion that prejudice might or would be suffered by an accused because of delay in the prosecution, delay in law enforcement would defeat the enforcement of the law absolutely and prejudice resulting from delay would become a not unwelcome passport to immunity from prosecution.[21]

This tension is analogous to, and indeed linked to, the judicial discretion to exclude illegally or improperly obtained evidence. In *Ireland's* case,[22] Barwick J formulated the balance in terms of some convictions, derived from the use of improperly obtained evidence, which 'may be obtained at too high a price'. In *Bunning v Cross*,[23] the majority of the High Court referred to the need for the trial judge to resolve

> the apparent conflict between the desirable goal of bringing to conviction the wrongdoer and the undesirable effect of curial approval, or even encouragement, being given to the unlawful conduct of those whose task it is to enforce the law.[24]

The courts have continuously referred to the concept of 'high public policy' as the rationale for excluding unfairly or illegally obtained evidence. Central to this concept of high public policy is the require-

20 *Jago v The District Court of New South Wales* (1989) 168 CLR 23 at 28, and see Brennan J at 58. For similar comments see *Connelly* [1964] AC 1254 at 1354

21 *Jago v District Court (NSW)* (1989) 168 CLR 23 at 50. For similar dicta see *Glennon v R* (1992) 173 CLR 592.

22 *R v Ireland* (1970) 126 CLR 321.

23 (1978) 141 CLR 74.

24 Id at 74.

ment that the processes of the law must be complied with and respected by all citizens, particularly law enforcement officials, and if the courts fail to ensure such compliance and respect then the Rule of Law itself is threatened. This high public policy factor exists independently of the right of any particular accused to a 'fair' trial. As discussed below, in deciding stay applications, the courts refer to a slightly different 'high public policy' factor, namely the requirement that the public have confidence in the integrity of court processes.

The public policy referred to in *Bunning v Cross* is the need to ensure that law enforcement officials themselves obey the law, but the public policy referred to in relation to stay applications is the need to ensure that the court's processes are not abused by oppressive proceedings or proceedings that would be unfair to the accused. The two public policies are conceptually interrelated but each has a different focus. Moreover, as discussed below, the two public policies are also technically interrelated in that both a stay and the exclusion of tainted evidence may be available as remedies in the one case; the question is, which one is the more appropriate?

Terminology and Grounds for a Stay

Traditionally, the courts have determined that a stay will be granted whenever there has been an 'abuse of process'. The difficulty is that the concept of 'abuse of process' is extremely wide and inevitably vague. In a formal or literal sense, it refers to some misuse of court proceedings, such as for an illegitimate or misguided purpose. What are being abused, in this sense, are the curial avenues available to aggrieved citizens or the State. However, the term 'abuse of process' has broader meanings which include, or overlap with, other concepts such as 'unfairness' to the accused and an 'undermining' of the integrity or legitimacy of the legal system. Because of these overlaps, a number of writers have criticised the continued use of the term 'abuse of process' as the basic ground for granting a stay.[25]

25 Paciocco, for example, has argued that the concept of 'abuse of process' is now deficient as 'a concept that is intended to perform the constitutional function of demarcating the legitimate jurisdiction of courts to stay prosecutions brought pursuant to the royal prerogative of the Crown': see DM Paciocco, 'The Stay of Proceedings as a Remedy in Criminal Cases: Abusing the Abuse of Process Concept' (1991) *Criminal Law Journal* 315 at 315. According to Paciocco, many court decisions granting a stay in criminal proceedings have nothing to do with protecting the processes and procedures of the court but rather are more concerned with ensuring that any trial is 'fair' and ensuring that the integrity of the courts is not undermined resulting in a loss of public confidence in the administration of criminal justice. Since

The grounds upon which a stay will be granted have been variously expressed in the cases. These grounds can be classified under three categories:

- when the continuation of the proceedings would constitute an 'abuse of process',[26]
- when any resultant trial would be 'unfair' to the accused, and
- when the continuation of the proceedings would tend to undermine the integrity of the criminal justice system.[27]

The latter ground is not limited to abuse of the trial court procedures and processes but extends more generally to abuses of the administration of criminal justice process as a whole. Clearly, there can be significant overlap between these various grounds for the stay; an unfair trial, for example, would tend to bring the administration of justice into disrepute. Conversely, in some circumstances the holding of a trial may not be technically 'unfair' to the accused yet still undermine the integrity of the legal system because of some impropriety in the investigation or prosecution of the case. The conceptual niceties are, to say the least, challenging. However, for the purposes of this paper, it is important to note that the justification for granting a stay extends beyond any abuse of process and includes circumstances where it would be 'unfair' to the accused for the proceedings to continue. There are an infinite number of reasons why the continuation of a criminal trial would be unfair to an accused and include delay from the date of charging or committal, ill-health of the accused, and date of the alleged offences.

Whilst the notion of a 'groundless' proceeding as a basis for a stay has been recognised in the civil context for at least a century, the use of permanent stays, in criminal prosecutions in Australia has only developed relatively recently. On the basis of the two appellate decisions discussed below in this article, the application of the 'groundless' basis for such stays is limited to exceptionally narrow circumstances where it is clear beyond any argument that the prosecution must inevitably fail, or is doomed to fail. To repeat, such 'doomed' prosecu-

Paciocco's analysis in 1991, a number of appellate decisions in Australia have reshaped the circumstances in which a permanent stay of criminal proceedings will be justified.

26 For full discussion of this concept see ALT Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings*, note 14 above, at pp 1-16.

27 *Jago v District Court of New South Wales and Others* (1989) 168 CLR 23 at 30; *Moeva v Department of Labour* [1980] 1 NZLR 464 at 481; *Hunter v Chief Constable of West Midlands* [1982] AC 529 at 536; *Rogers v R* (1994) 68 ALJR 699.

tions can arise either because critical evidence has been excluded, pursuant to the judicial discretion to exclude unlawfully obtained evidence, or because of some inherent weakness in the prosecution case. In either event, the justification for staying the prosecution arguably extends beyond the concept of 'abuse of process', and includes 'unfairness' or 'oppression' to the accused which is likely to bring the administration of criminal justice into disrepute.

It is perhaps paradoxical that not only is the test for a stay more stringent than the no-case submission and directed acquittal, but if granted, the stay is a less satisfactory remedy in that it is not equivalent to an acquittal and, in theory, the prosecution could be reactivated at some time in the future if new evidence came to light, or the reason for the stay was remedied.[28] In many cases however, there is simply no other remedy than a stay, and indeed a number of decisions have emphasised that a stay should only be granted in 'exceptional' circumstances where the difficulty cannot be remedied by other mechanisms available to the court.[29]

In summary, the test for a no-case submission and for a directed acquittal differs from, and is less stringent than, the test for a permanent stay. With a no-case submission and a directed acquittal, the focus is on the forensic strength per se of the prosecution evidence, and determining the likelihood of the accused being convicted on that evidence. Considerations of 'unfairness' to the accused or 'high public policy' are not formally part of the test. In contrast, with an application for a stay, whilst the strength of the prosecution evidence may be a relevant consideration, the focus is on the broader question of whether the continuation of the proceedings would tend to bring the administration of justice into disrepute or would be unfair to the accused.

Staying Defective Criminal Prosecutions: Historical Context

In *R v Smith*[30] and in *R v Ridgeway*,[31] the Victorian Court of Appeal and the High Court respectively considered the circumstances in which a permanent stay could be granted on the basis that the prose-

28 *R v Griffiths* (1980) 72 Cr App R 307 (CA).

29 See *R v Smith* 1 [1995] VR 1 at 14; *Jago v District Court (NSW)* (1989) 168 CLR 23 at 76; *Lawrence v Lord Norreys* (1890) 15 App Cas 210 at 219.

30 [1995] 1 VR 10.

31 (1995) 129 ALR 41.

cution evidence was defective. In *R v Smith* the court held that, to grant a stay, it was not sufficient for the defence to simply make out a no-case submission; something more had to be established, namely that the prosecution will 'inevitably fail'. In *R v Ridgeway* the High Court held that, in the circumstances of that case, where the prosecution is based on illegally obtained evidence, the appropriate course is not for the trial judge to simply stay the proceedings, but rather to exclude such evidence by exercising the *Bunning v Cross* discretion and if, as a result of that exclusion, the prosecution cannot succeed, then a stay should be granted. Before considering these two cases in greater detail, a brief historical overview of staying defective proceedings is provided.

It has long been established that a court cannot stay a criminal prosecution merely because the judge thinks the Crown case is weak or that, in the opinion of the judge, the prosecution should never have been commenced.[32] The former is a matter for a no-case submission and the latter would constitute judicial trespass into the Executive domain of prosecutorial decision-making. However, it has also been long established that in civil proceedings, where it is obvious that the plaintiff's case has no merit and no hope of succeeding, a stay should be granted as an abuse of process. One of the earliest authorities for this is *Castro v Murray*,[33] decided in 1875. Ten years later, in *Metropolitan Bank v Pooley*,[34] Lord Blackburn stated:

> from early times (I rather think, though I have not looked at it enough to say, from the earliest times) the court had inherently in its power the right to see that its process was not abused by a proceeding without reasonable grounds, so as to be vexatious and harassing—the court had the right to protect itself against such an abuse.

Shortly thereafter, Rules of the Court were developed which included provision for the staying of civil proceedings where the writ disclosed no reasonable cause of action or was frivolous or vexatious.[35] In 1964 the power of a court to order a stay in criminal proceedings was confirmed by the House of Lords in *Connelly v DPP*.[36]

32 *R v Chairman of London County Sessions Ex Parte Downes* (1953) 37 Cr App R 148 and *DPP v Humphreys* [1977] AC 1 at 26.

33 (1875) LR 10 Ex 213.

34 (1885) LR 10 App Cas 210 at 220-221.

35 For example, Order 23.01 of the Victorian Supreme Court Rules states that where a proceeding is '(b) scandalous, frivolous or vexatious or (c) is an abuse of process of the court', the court may stay the proceedings generally.

36 [1964] AC 1254 relying on *Rex v Lynch* [1903] 1 KB 444 and *Metropolitan Bank v Pooley* (1885) LR 10 App Cas 210. For a full discussion see R Pattenden 'Abuse of

In Australia, the first High Court decision confirming this ground for a stay appears to be *Walton v Gardiner and Others*[37] in 1992-1993. Mason CJ, Deane and Dawson JJ postulated the test in terms of whether the proceedings 'can be clearly seen to be foredoomed to fail',[38] referring to *Metropolitan Bank v Pooley* and *General Steel Industries Inc v Commissioner for Railways (NSW)*[39] as authority. *Walton v Gardiner* was not, however, a criminal proceeding, but rather involved the issue of whether the New South Wales Supreme Court had a power to order a stay of proceedings in the NSW Medical Tribunal in relation to alleged medical misconduct. In the earlier leading case of *Barton v The Queen*,[40] Gibbs ACJ and Mason J referred to the power of courts in the United Kingdom to stay proceedings brought 'without reasonable grounds', but stated 'the High Court has not yet had to decide whether the power of the courts to prevent an abuse of the process extends so far'.[41] This judicial uncertainty appears to have arisen because the commencement of proceedings without reasonable grounds is not necessarily abusing the processes of the court, but seems to go to the forensic strength of the case. The prospect of success of any case is a question of degree, and is often difficult to predict because of the vagaries of trial proceedings, unless of course there is some patent and obvious reason that the prosecution is unlikely to succeed. Indeed, one of the most challenging and difficult decisions for prosecution authorities is deciding which prosecutions are likely to succeed and which are likely to fail.

R v Smith

In this case,[42] the five respondents had been granted a permanent stay of proceedings by the trial judge at a preliminary hearing in the Victorian Supreme Court. The respondents were Victorian police officers charged with the murder of Graeme Jensen who had been shot in the course of an attempted arrest. Three other police officers had also been charged with the murder of Jensen, but refused a stay. The basis of the stay was that the proceedings were doomed to fail, and

Process in Criminal Litigation' (1989) 53 *Journal of Criminal Law* 341, and R Pattenden 'The Power of the Courts to Stay a Criminal Prosecution' [1985] *Criminal Law Review* 174.

37 (1993) 177 CLR 379.

38 Id at 393.

39 (1964) 112 CLR 125 at 128-130.

40 (1980) 147 CLR 75.

41 Id at 97.

42 *R v Smith* [1995] 1 VR 10.

therefore constituted an abuse of process as established by the High Court in *Walton v Gardiner*. The trial judge had taken the view that this requirement for a stay was satisfied if the Crown evidence was not sufficient to make out a case to answer. The Victorian Director of Public Prosecutions appealed against the granting of the stay.

On appeal, Brooking J held that a proceeding does not constitute an abuse of process merely because a successful no-case submission could be made: 'process is not abused merely because it is employed without success'.[43] His Honour held that what must be shown is something more than a successful no-case submission:

> It must now, it seems, be taken to be established, not only in the United Kingdom but also in Australia, that if civil or criminal proceedings are brought without reasonable grounds the prosecution of those proceedings is an abuse of process and may be stayed as such ... not if it can be said of them only that they will very likely fail, but if it can be said of them that it is quite clear that they must inevitably fail.[44]

Brooking J relied on the High Court decision in *Walton v Gardiner*[45] as authority for this proposition. However, in *R v Smith* a novel question of law arose, put by Brooking J thus:

> It is one thing to suggest that criminal proceedings are clearly doomed to failure because on the undisputed facts it is plain that some affirmative defence exists or even because it is plain that the Crown has no evidence whatever which might be said to go towards proving some essential element of the offence. It is another thing where the contention is only that the Crown will probably fail on the facts because the foundation of its case is 'slender' ... But what if the contention, as in the present case, is that the evidence which will be relied upon by the Crown to prove some essential element of the crime is not sufficient to enable the jury to be satisfied beyond reasonable doubt? I know of no previous case, civil or criminal, reported or unreported, in which it has even been argued by an applicant, let alone judicially determined, that a civil or criminal proceeding should be stayed as an abuse of process because it will not be possible for the plaintiff or prosecution to prove some fact essential to the judgement sought.[46]

According to Brooking J:

> It may be—we need not decide this—that in a quite exceptional case, where it is plain beyond argument that there was no evidence available of

43 Id at 14.

44 Id at 14 and 15.

45 (1993) 177 CLR 378.

46 *R v Smith* [1995] 1 VR 10 at 15.

> some essential element of the crime, a trial judge, being satisfied of this at the outset, could properly determine that the prosecution should be stayed as an abuse of process ... But the present case is not at all that kind of case.
>
> The submission in this case was, not that there was no evidence whatever that might be relied on as tending to establish a fact, but that the evidence available was insufficient to enable a jury to find that fact.[47]

However, Brooking J held that he did not need to finally determine that issue because there simply were no grounds for the trial judge to have granted a stay as '[i]t could not be said that it was clear beyond argument that the Crown would be unable to make out a case of murder against the respondents'.[48]

Byrne J reaffirmed that a stay should be used sparingly and only where it is not possible to remedy the defect by some other power of the court (for example, determination of a question of law pre-trial) and that a judge should be wary of trespassing:

> into areas which are out of bounds ... It is no part of the function of the judicial arm of government to decide whether a citizen should be prosecuted or whether a prosecution is inappropriate ...[49]
>
> In my view in a case such as the present, the power to order a permanent stay of a criminal proceeding before the court should be limited to the case where it is plain beyond argument that the prosecution case suffers from some incurable vice. Such a vice must be readily apparent and clearly fatal to the prospects of success of the prosecution. I cannot readily imagine that such a vice could arise out of some insufficiency of evidence relied on by the Crown unless a matter such as an incurable absence of admissible evidence on some essential element.[50]

Byrne J concluded that the Crown case did not suffer from any such 'incurable vice', and allowed the appeal and quashed the stay order. Justice Eames agreed with the formulation provided by Brooking J, and also allowed the appeal.

In summary, *R v Smith* provides a narrow and strict test for when a criminal prosecution may be permanently stayed on the basis that the prosecution is unlikely to succeed. An application for such a stay must demonstrate that the proceedings will inevitably fail. The case raises the interesting procedural point that whilst the onus is on the appli-

47 Id at 16.

48 Id at 24.

49 Id at 25.

50 *R v Smith* [1995] 1 VR 10 at 29.

cant to satisfy the court on the balance of probabilities that it should grant the application,[51] the applicant must also show that it is inevitable that the proceedings will fail, a test which appears to be higher than 'beyond reasonable doubt'. Establishing this 'inevitability' seems to require that there be no doubt at all that the case will fail.

Ridgeway v The Queen: Entrapment

Before discussing the case of *Ridgeway*,[52] it is necessary to review briefly the basic principles governing the admissibility of illegally or unfairly obtained evidence, as these principles formed the theoretical framework for each of the judgments in *Ridgeway*.

Prior to *Ridgeway*, the way in which Australian courts approached the issue of illegally or improperly obtained evidence depended upon the extent of the illegality or impropriety of the law enforcement officials. The early cases establish that if 'real' evidence (photographs, fingerprints and other non-confessional items) has been obtained illegally, then the trial judge has a discretion whether to admit or exclude such evidence, and in exercising that discretion, has to balance the competing factors described above in *Ireland's* case,[53] focusing upon the 'high public policy' consideration that law enforcement officials operate within the law.[54]

In relation to evidence of a confession or admission obtained illegally or unfairly, the first question for the trial judge is whether the confession or admission was 'voluntary'. If the confession or admission was made involuntarily, then the trial judge has no discretion at common law but to exclude that evidence.[55] If made voluntarily, then the judge has a discretion whether to admit or exclude the evidence. In exercising that discretion, the first issue to be decided is whether it would be 'unfair' to the particular accused to admit the evidence. The notion of 'unfairness' means resulting in an unfair trial for the accused. If the judge decides that it would not be unfair to admit the evidence, a final issue arises of whether it would be against 'public policy' to admit the evidence.

51 *Attorney-General's Reference (No 1 of 1990)* [1992] QB 630.

52 *Ridgeway v The Queen* (1995) 129 ALR 41.

53 (1970) 126 CLR 321.

54 For example, the general interests of the community in maintaining a healthy and respected legal system, as distinct from the personal individual interests of a particular accused in receiving a fair trial.

55 P Gillies, *The Law of Criminal Investigation* (Law Book Co, 1982) ch 2.

In this context the notion of public policy refers to the same 'high public policy' set out in *Ireland's* case, emphasising the need for courts to protect their own processes and the administration of justice generally from abuse. The focus is not on any unfairness to the accused per se, but rather on the (mis)behaviour of the investigative officers. Initially the courts took the view that it would only be in exceptional circumstances that confessional evidence would be admissable under the 'unfairness' test, but excluded under the public policy test.[56] However, more recent decisions indicate that the two bases for excluding evidence operate independently of each other, albeit with some overlap.[57]

Given these rules, the general approach of the courts to illegally or unfairly obtained evidence has been not to rely on the granting of a stay, but to excercise the various judicial discretions to exclude evidence. This is not surprising given the rigorous prerequisites for the granting of a stay, and the possibility that there may be evidence other than that excluded capable of supporting a conviction. In the case where the accused has been entrapped into committing the crime, there has been significant authority for the proposition that the granting of a stay, rather than excluding the evidence, is the appropriate order.[58] However, prior to *Ridgeway*, the High Court had not determined the question of how the courts should deal with evidence obtained through illegal police entrapment practices.

In *Ridgeway*, the appellant was convicted in the District Court of South Australia of being in possession of heroin which had been imported into Australia contrary to the *Customs Act* 1901 (Cth). The importation was in fact a 'controlled delivery' organised by the Australian Federal Police (AFP) and the Malaysian Police using a police informant. There was no doubt that by assisting in the importation of the heroin, the AFP members had themselves committed criminal offences (aiding and abetting) although none had been

56 *Cleland v The Queen* (1982) 151 CLR 1 at 9, referring to Brennan J in *Collins v The Queen* (1980) 31 ALR 257 at 317.

57 See for example: *Foster v The Queen* (1993) 113 ALR 1 at 7; *Pollard v R* (1992) 110 ALR 385, and *R v Williams* (1986) 161 CLR 278.

58 *R v Vuckov and Romeo* (1986) 40 SASR 498; *R v Massey* (1994) 62 SASR 481; *Thompson and Thompson* (1992) 58 A Crim R 451; *R v Steffan* (1993) 30 NSWLR 633 and *Sloane* (1990) 49 A Crim R 270. In England, the House of Lords has held that the trial judge has no discretion to stay proceedings or exclude evidence in an entrapment case and that the fact of entrapment is a matter for sentencing: see *R v Sang* [1980] AC 402. For a full discussion of the position in the United Kingdom see ALT Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings*, note 14 above, at pp 148-181.

charged. The Full Court of the Supreme Court of South Australia dismissed Ridgeway's appeal against conviction. On appeal to the High Court, the issue was how the trial judge should have dealt with the illegally obtained evidence—for example, evidence of the importation of the heroin. That basic issue involved the question of whether a defence of entrapment is recognised at common law in Australia, and whether the evidence of the imported heroin should have been excluded, or a stay granted in relation to the entire proceedings.

The clearest aspect to the High Court's judgment in this case is the unanimous decision that in Australia, 'entrapment' is not recognised at common law as a substantive defence to the commission of any criminal offence. This part of the judgment is not surprising given the refusal of the courts in England, Canada and New Zealand to recognise such a defence. This ruling had significant implications for the court in deciding the critical question of how the trial judge ought to have dealt with the illegally obtained evidence; if entrapment is not a defence, then the illegally obtained evidence of the heroin would be prima facie admissible unless excluded by the trial judge, or unless the proceedings were stayed.

The judgments in *Ridgeway* reveal a number of different approaches. The majority held that the correct approach was not to grant a stay, but rather to first exclude the evidence pursuant to the *Bunning v Cross* public policy discretion.[59] As a consequence of that exclusion, the prosecution case could not succeed and, on that basis, the majority held that a permanent stay should ultimately be granted. The remaining three judges had different views. Gaudron J held that the appropriate response was to grant a permanent stay of the proceedings rather than use the *Bunning v Cross* discretion to exclude that part of the prosecution case:

> there is no scope for the extension of the *Bunning v Cross* discretion to bring a prosecution to a halt by the exclusion of the prosecution evidence in its entirety: if a prosecution is to be brought to a halt it can only be because, in the circumstances, it constitutes an abuse of process.[60]

Her Honour then stated that there are no fixed categories of what constitutes an 'abuse of process' or what is 'vexatious' or 'oppressive', and that the question whether a prosecution based on entrapment

59 *Ridgeway v The Queen* (1995) 129 ALR 41: per Mason CJ, Deane, Dawson and Brennan JJ (Toohey Gaudron and McHugh JJ dissenting).

60 Id at 82.

constitues an abuse of process does not necessarily require that the trial be unfair to the accused. According to Gaudron J, if the proceedings weaken public confidence in the administration of justice then it is an 'abuse of process'.

McHugh J agreed with Gaudron J that a stay, rather than exclusion of the evidence, is the appropriate remedy in entrapment cases, but was not prepared to grant a stay in *Ridgeway's* case because it was not a true case of entrapment. Moreover, McHugh J held that the *Bunning v Cross* discretion should not be used to exclude the evidence, and thus the appeal should be dismissed. His Honour took the view that the public interest considerations in the *Bunning v Cross* discretion apply to cases where the crime committed by the accused was not induced by the police, but where, as in *Ridgeway's* case, the improper police conduct induced Ridgeway to commit the crime, different considerations apply and for this reason the *Bunning v Cross* discretion should not be used.

Justice Toohey held that a permanent stay is the appropriate remedy where entrapment is used as the basis for an argument that the continuation of the proceedings would be an abuse of process, although, according to His Honour, this was not a true case of entrapment, and thus a stay was not appropriate: 'I do not think that to proceed with the charge against the appellant was to make an improper use of the process of the District Court'.[61] His Honour held that the illegally obtained evidence of the heroin should accordingly be excluded on the *Bunning v Cross* discretion, not on the basis of any unfairness to Ridgeway, but rather on the basis of the public policy considerations.

Before discussing this case, it is useful to clarify the reasoning of the majority. The majority held that if a stay is to be granted it would only be *after* the evidence was excluded in circumstances where the exclusion of the evidence meant the prosecution could not succeed. If the prosecution cannot succeed, then the continuation of the proceedings would be oppressive and vexatious, hence justifying a stay. The majority held that a stay was not the appropriate immediate remedy in this case because:

> once it is concluded that our law knows no substantive defence of entrapment, it seems to us to follow that the otherwise regular institution of proceedings against a person who is guilty of a criminal offence for the genuine purpose of obtaining conviction and punishment is not an abuse of process by reason merely of the circumstance that the commission of

61 Id at 73.

> the offence was procured by illegal conduct on the part of the police or any other person.[62]

However, the majority went on to confirm that the question of the admissibility of the illegally obtained evidence would usually be determined at a preliminary hearing and if, following that ruling, a determination is made to exclude the evidence then

> it will be apparent that it would be an abuse of process for the Crown to proceed with the trial. The reason why that is so is not that the commission of the charged offence was procured by illegal conduct on the part of the police. It is that the proceedings will necessarily fail with the consequence that the continuation of them would be oppressive and vexatious.[63]

The majority conceded that *in practice* there may be little difference between excluding the illegally obtained evidence and granting a stay, but there was a critical 'distinction in principle' between staying proceedings on the grounds that the proceedings are themselves an abuse of process (which was not accepted), and staying proceedings on the grounds that the proceedings must fail. Ultimately the majority ordered that the appellant's conviction be quashed and the charges be stayed permanently.

Discussion

The decisions of *R v Smith* and *R v Ridgeway* confirm that in criminal proceedings, if the prosecution will inevitably fail, this constitutes a ground for a permanent stay. The rationale for this rule is that the continuation of the proceedings would be unfair and oppressive to the accused, and thus an abuse of the processes of the court. This clarifies the question posed by the High Court in *R v Barton* as discussed above. The usual course would be for the defence to make the stay application at the earliest possible stage, prior to the prosecution calling any evidence. For this reason a no-case submission could not be made.

However both *R v Smith* and *R v Ridgeway* adopt a very restrictive approach to the concept of 'abuse of process' and to this extent limit the application of permanent stays. In *R v Smith* the court held it is not an abuse of process for the prosecution to bring proceedings against an accused even where 'on the evidence as it stands the defendant could

62 Id at 55. The majority judgment was delivered by Mason CJ, Deane and Dawson JJ.

63 Id at 56.

not be lawfully convicted'.[64] In these circumstances a stay is not appropriate because, apart from there being no abuse of process, there exists another remedy in the form of the no-case submission. *R v Smith* thus reinforces the traditional principle that a stay should only be ordered in very exceptional circumstances.

A similarly restrictive approach can be seen in *R v Ridgeway* where the majority held that it is not an abuse of the court's processes to bring to trial an accused person where the prosecution case is based on illegally obtained evidence. According to the majority there is no abuse of process because the prosecution was commenced in good faith in the sense that it was not brought for any improper motive and it was not 'unfair' to the accused. Apart from there being no abuse of process, there existed an alternative remedy, namely the exclusion of the tainted evidence by the judicial discretion to exclude. However, once that evidence is excluded, the prosecution case cannot succeed and on that basis a stay can be granted.

Conclusion

In Australia, the judicial power to terminate criminal prosecutions, either before or after the close of the prosecution case, will only be used in very narrow circumstances. Where the prosecution case is completed, for both directed acquittals and no-case submissions to Magistrates, the prosecution evidence must suffer from a defect such that it will not sustain a verdict of guilty. There must exist a complete lack of evidence in relation to one or more elements of the alleged offence. The absence of the critical evidence could be simply an inherent weakness in the prosecution case or could be the result of the exercise of the judical discretion to exclude evidence. In any event, if this legal test is satisfied, the court is justified in taking the case away from the jury on the basis that there is simply no sufficent prosecution case for them to consider.

Where the prosecution case has not commenced or is not completed, the appropriate remedy for a defective prosecution case is an order permanently staying the proceedings. Again, this will only be granted in very narrow circumstances. The fact that an accused has been entrapped into commiting offences by the illegal actions of the police is not in itself a sufficient ground to stay the proceedings.

64 [1995] 1 VR 10.

In both *R v Ridgeway* and *R v Smith*, the courts have not been prepared to extend the notion of 'abuse of process' and in both cases have confined the permanent stay to the circumstances where the defence can establish that the prosecution will inevitably fail.

In summary, the judicial power to terminate defective criminal proceedings attempts to balance a number of competing considerations. On the one hand the judiciary is concerned not to trespass into the exclusive domain of either prosecution decision-making or jury fact-finding. The 'integrity' of the justice system includes maintaining the independence not just of the judiciary but also of key institutions, such as the jury and prosecution authorities. A related consideration is the interests of the victims of crime, and the general community, in ensuring that those who commit crime are in fact convicted and punished.

These considerations militate against judicial termination of proceedings. In relation to permanent stays, the English Court of Appeal has stated:

> if they were to become a matter of routine it would only be a short time before the public, understandably, viewed the process with suspicion and mistrust.[65]

On the other hand, the judiciary has a fundamental duty to protect not only accused persons from unfair or oppressive prosecutions, but also a duty to protect the very processes of the courts to ensure that those processes are not abused. What is at stake is not simply the interests of the particular accused but the broader public policy interest of the community having faith and confidence in the administration of justice. This consideration favours the exercise in appropriate cases of the judicial discretion to terminate criminal proceedings.

The discussion of the above cases has attempted to show that the way in which the courts strike a balance between these competing considerations is through the development of stringent legal criteria that have to be satisfied before the termination of proceedings can be justified, and by reference to broad notions of 'fairness' to the accused and maintaining the 'integrity' of the justice system; notions which represent the building blocks of the Rule of Law.

65 *Attorney-General's Reference (No 1 of 1990)* [1992] 3 All ER 169 at 176.