



LAWS2701 Criminal Procedure
Notes

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TOPIC 4: Pre-trial Processes 2

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4.1 INDICTMENTS

4.1.1 Timing - s 590 QCC

- Must present indictment within 6 months of committal or the defendant will be discharged (Re Jenkin (1991) 57 A Crim R 124)
- Extension of time: Cicolini [2007] QCA 336
 - Cicolini was an appeal against the granting of an extension. The facts were that committal proceedings on 14 charges took place in the Magistrates Court at Cairns, commencing in June 2005. The proceedings were “disjointed, prolonged and involved a co-accused”. The applicants were committed for trial on 10 April 2006.
 - The Court, in dismissing the appeal, held “the purpose of s 590 is to ensure that indictments are presented within a reasonable time and to encourage the expeditious prosecution of indictable offences.” The words “good cause” however in that section should not be read down to mean that “good cause” only relates to the reasons why the indictment has not been presented within the time prescribed by the section. The question is whether some good reason has been shown for the extension and whether if such an extension is granted a miscarriage of justice is likely to occur.” So concerned with post committal administration and not on the strength or weakness of the case.

4.1.2 Withdrawal of indictment - ‘*nolle prosequi*’ s 563 QCC

Prosecution enters a *nolle prosequi*. Must be in writing (in the lower Courts the police indicate they have ‘no evidence to offer’). May be refused if it may result in an abuse of process.

- ‘The entry of a *nolle prosequi* at the final stage of a trial is effectively an **abortion of that trial** and a unilateral preservation of right by one party - the Crown.....Generally speaking, a trial judge ought not to prevent the entry of a *nolle prosequi* at any stage of the trial **unless its entry is plainly a vehicle of extreme oppression.**’ *Jell* (1990) 46 A Crim R 261.

4.1.3 Form of indictment – s 564 QCC

Must include:

1. the offence with particulars as to the alleged time and place of committing the offence, and as to the person (if any) alleged to be aggrieved, and as to the property (if any) in question, as may be necessary to inform the accused person of the nature of the charge.
2. If any circumstance of aggravation is intended to be relied upon, it must be charged in the indictment...
3. It is sufficient to describe an offence in the words of this Code or of the statute defining.

6.1 FAIR TRIAL

Q: R v Edwards [2009] HCA 20:

‘...whether in all the circumstances the continuation of the proceedings would involve unacceptable injustice or unfairness.’

6.1.1 What is a fair trial?

- Fair trial according to law – but not necessarily fair even though according to law – *Gaudron J, Dietrich v R* [1992] HCA 57
- What happens before a trial (e.g. arrest, bail, committals, etc) can have implications for a fair trial later (*McKinney v R* (1991) 171 CLR 468)
- There is arguably no constitutional right to a fair trial - Trial by jury is commonly considered a feature of a fair trial (s80 of the Constitution)

6.1.1 Factors of a fair trial:

- Impartial jury and judge
- Presumption of innocence
- Disclosure
- Legal representation
- Open trial (public administration of justice)
- Know the charges against you

6.1.2 Grounds for an appeal which undermine fairness of trial:

- Failure to exclude evidence - (Nicholls & Coates)
- Lack of disclosure/committal - (Barton)
- Judge bias (eg. in closing statement)
- Jury bias/irregularities (Edwards)
- Mistake by police in arrest and questioning
- Double jeopardy (Carroll)
- Issues around joinder (De Jesus / Phillips)

Other examples of unfairness:

- Prosecution behaviour / addresses improper
 - Livermore (2006) NSWCCA334 (extravagant remarks of prosecutor, e.g. inflammatory or judgemental)
 - R v KP [2006] QCA 301 (at [38] prejudicial statements)
- Lack of interpreter
 - Re East ex parte Nguyen (1998) HCA 73 (need for interpreter)
 - Ebatarinja [1998] HCA 62 (deaf, mute, illiterate Indigenous man)

Dietrich Principle to be considered (in Legal Representation)

6.1.4 The importance of the judge's behaviour:

- The appearance of bias: 'Impartiality and the appearance of impartiality are necessary for the maintenance of public confidence in the judicial system' - Nth Aust Legal Aid v Bradley [2004] HCA 31 at [27]
- The test for whether a judge is acting impartially:
 - 'whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide..' RPS v R [2000] HCA 3
- A judge should not make comments to either Counsel such as 'the evidence is bizarre' or interrupt Counsel excessively – Copsey [2008] EWCA Crim 2043; Galea (1990) NSWCCA
 - Case of numerous interjections
- Avoid tension between Judges and Counsel – RPS v the Queen 2000] HCA 3
- Sleeping judge – Cesan v The Queen; Mas Rivadavia v The Queen [2008] HCA 52

6.1.5 Pre-trial publicity:

Competing interests:

- Public has a right to know vs fair trial
- Public interest in free expression vs the integrity of administration of justice

e.g. Jury members will hear of the case in the media before they review the evidence at the trial Glennon v R [1992] HCA 16; R v Purdie [2008] TASSC 15

You need to show that the publicity itself has a particular effect on the fairness of the trial. Nothing the court could possibly do can ever ameliorate the effect of the publicity.

R v Purdie:

- Publicity directly before trial was about to start regarding other charges
- Editor and author found guilty of contempt of court and a fine of \$5000

Dealing with pre-trial publicity:

1. Jury directions: 'By the flexible use of the power to control procedure and by the giving of forthright directions to a jury, a judge can eliminate or virtually eliminate unfairness.' Jago, Brennan J [27];
2. Section 47 Jury Act – can question individual jury members about influence of pre-trial publicity
 - Fairly extreme, Patel proceedings and Baden-Clay
3. Adjournment – allow for the media hype to die down (Glennon)
4. Forum change (s557 QCC): Long [2001] QSC 445; Walters (2007) QCA 140
5. Judge alone trial 614 / 615 QCC... Stay on this basis now unlikely?
6. Reporting restrictions

6.2 ABUSE OF PROCESS

Q: R v Edwards [2009] HCA 20:

'...whether in all the circumstances the continuation of the proceedings would involve unacceptable injustice or unfairness.'

6.2.1 What is abuse of process?

'The purpose of criminal proceedings, generally speaking, is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and, on that account, is deserving of punishment ... Although it is not possible to state exhaustively all the categories of abuse of process, it will generally be found in the **use of criminal process inconsistently with some aspect of its true purpose**, whether relating to the hearing and determination, its finality...' see Jago, Brennan J [24].

- Abuse of process may result in unfair trial ...
- Courts duty to protect itself against abuses of its own processes

"Abuse of process will exhibit at least one of three characteristics:

1. the invoking of a court's processes for an illegitimate or collateral purpose;
 2. the use of the court's procedures would be unjustifiably oppressive to a party; or
 3. the use of the court's procedures would bring the administration of justice into disrepute"
- PNJ v The Queen [2009] HCA 6 at [3]

6.2.2 Relationship to fair trial

Jago (1989) 168 CLR 23 per Toohey J at 117

- *To treat **abuse of process** and **fair trial** as entirely distinct concepts carries the risk that the remedies in each case will be seen as necessarily different. That will not always be the case. Greater flexibility and in the end greater justice will be achieved if the **two notions are understood as bearing on each other.***

6.2.3 Examples of abuse of process:

- Inappropriate use of ex officio indictment (Barton v The Queen)
- Lack of offence particularity (Rogers [1998] QCA 83)
- Resubmitting previously excluded evidence (Rogers [1994] HCA 42)
- Double jeopardy / Controversion of earlier acquittal (Carroll (2002) 213 CLR 635)
- Nolle prosequi (Saunders (1983) 2 Qd R 270)
- Purpose of proceedings (Williams v Spautz)

6.2.4 Judges' responsibility to ensure fair trial

R v Benbrika → During the trial, the judge threatened to stay the trial permanently based on breaches of fair trial principles → conditions of incarceration → prolonged isolation and travel time. They didn't have the time or mental energy so they couldn't formulate their defence effectively → unfair.

The responsibility [of a Judge in ensuring a fair trial] is discharged by controlling the procedures of the trial by adjournments or other interlocutory orders, by rulings on evidence and, especially, by directions to the jury designed to counteract any prejudice which the accused might otherwise suffer. - Jago at 47 per Brennan J.

6.2.5 Delay: as abuse of process?

Jago:

- Various delays → bill of indictment not presented until 1987 (6 years after original charges laid)
- D sought stay of proceedings on the basis of delay → appealed but not successful
- HC spent a lot of time analysing whether delay could lead to a stay of proceedings and fair trial principles
- Is there a right to a speedy trial in the Australian constitution? → NO!
- HC looked at articles of ICCR, magna carta etc → but not implemented into domestic law
- They linked delay to fair trial principles and said in certain circumstances, **a particular period of delay may fundamentally affect the ability of the accused to have a fair trial**
 - Delay is a serious problem as it leads to increased costs, wastes preparation and increases stress for both the victim/s and the accused; delay may also create public dissatisfaction with the legal system (Jago).

5 factors for if the effects of the delay amount to an unfair trial (Jago, Deane J at [12])

1. Length of delay,
2. Reasons for delay (Was it the fault of the prosecution?),
3. Accused's responsibility in trying to stop the delay (was the accused able to take steps to mitigate?),
4. Prejudice to accused (argue for stay of proceedings needs to highlight the significant prejudice caused by the delay)
5. Public interest

AGAIN, Q: R v Edwards [2009] HCA 20:

‘...whether in all the circumstances the continuation of the proceedings would involve unacceptable injustice or unfairness.’

Permanent stay = never goes to trial

A delay practically might cause prejudice through:

- Memories fade, death of witnesses
- Degradation of evidence
- Deteriorating physical and mental capacity of the accused (Eg. D is 90 and now has alzheimer's)
- Stay not granted

Case examples:

R v VPH:

- 30 year delay, evidence missing
- Stay refused because accused wasn't able to point to any particular prejudice

R v Kim:

- Sexual offences, but by time he was brought to trial he had a number of medical issues and his prognosis was very poor
- Stay of proceedings granted)

Khoury 2004 QDC 182:

- Charges laid in relation arson
- By 2004 (7 years later) the matter had still not proceeded to trial
- Khoury had gone bankrupt in this time and was unable to afford a lawyer → able to point to actions of the prosecution which showed prejudice (ability to fund own legal representation) (Disorganised prosecution leads to the accused's inability to afford a lawyer).
- Permanent stay granted

Gill (1992) 64 A Crim R 82:

- Death of key defence witness.

Wrigley [1998] QCA 412:

- Dimmed memories not enough.

6.2.5.1 Procedures have been implemented to avoid delay:

1. Disclosure – ensures that charge(s) and pleas are resolved at the earliest possible time
2. Committals – promotes registry and hand-up committal processes
3. Judge-alone trial
4. Improved technology for filing and document exchange

6.2.6 Oppressive prosecution:

- Oppressive Prosecution = Prosecution with an Improper purpose
- Improper purpose = prosecution will be improper if it is brought as a means of obtaining some advantage rather than to carry the prosecution through a conviction (*Williams v Spautz 1992*).

Williams v Spautz:

- University lecturer and student didn't get on well
- Accused student of plagiarism
- Spautz fired from university → started a number of criminal proceedings (over 30) against members of the university
- Abuse of process; spautz' purpose of bringing these proceedings was to pressure the university to give him his job back
- Look at predominant purpose of the proceedings → fairness of trial itself doesn't really matter