SUPREME COURT OF QUEENSLAND

CITATION:	*R v Ferguson; ex parte A-G (Qld)* [2008] QCA 227
PARTIES:	**R** **v** **FERGUSON, Dennis Raymond** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 181 of 2008 DC No 1227 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	Miscellaneous Application - Criminal
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	8 August 2008
DELIVERED AT:	Brisbane
HEARING DATE:	22 July 2008
JUDGES:	McMurdo P, Keane and Muir JJA Judgment of the Court
ORDER:	**1. Appeal allowed** **2. Set aside the decision below** **3. Issue a warrant for the apprehension of the respondent, to lie in the registry for four days**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL BY ATTORNEY-GENERAL OR OTHER CROWN LAW OFFICER – where the Attorney-General appeals against the decision of the learned primary judge to stay permanently the proceedings – where the appeal is brought under s 669A(1A) of the *Criminal Code* – whether the Court has the power to dispose of the appeal – whether the appeal is to proceed as one in the strict sense or by way of re-hearing CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – ADJOURNMENT, STAY OF PROCEEDINGS OR ORDER RESTRAINING PROCEEDINGS – STAY OF PROCEEDINGS – PRE-TRIAL PUBLICITY – where the criminal history of the respondent and conjecture as to his propensity to re-offend has been the subject of widespread pre-trial publicity – where the learned primary judge ordered that the proceedings be stayed permanently on the

grounds that the level of prejudicial pre-trial publicity would render it impossible to empanel a jury who are capable of bringing an impartial mind to bear in assessing the evidence and rendering their verdict – whether the learned primary judge erred in the exercise of the discretion to permanently stay criminal proceedings

CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – ADJOURNMENT, STAY OF PROCEEDINGS OR ORDER RESTRAINING PROCEEDINGS – STAY OF PROCEEDINGS – GENERALLY – where the learned primary judge found there to be some evidence which may support a conviction – where the learned primary judge nonetheless found the Crown case to be "weak" – whether the weakness of the Crown's case is a matter to which a primary judge ought properly have regard when determining the question of whether or not to stay permanently the proceedings

Acts Interpretation Act 1954 (Qld), s 49A
Criminal Code Act 1899 (Qld), s 668E, s 669A(1A), s 669A(4)
Jury Act 1995 (Qld), s 43, s 47, s 53(2A)(b), s 69A

Barton v The Queen (1980) 147 CLR 75; [1980] HCA 48, cited
Cheung v The Queen (2001) 209 CLR 1; [2001] HCA 67, cited
David Syme & Co v Canavan (1918) 25 CLR 234; [1918] HCA 50, cited
De Jesus v The Queen (1986) 61 ALJR 1; [1986] HCA 65, considered
Director of Public Prosecutions v Humphrys [1977] AC 1, cited
DJL v The Central Authority (2000) 201 CLR 226; [2000] HCA 17, applied
Doney v The Queen (1990) 171 CLR 207; [1990] HCA 51, applied
Eastman v The Queen (2000) 203 CLR 1; [2000] HCA 29, applied
Fox v Percy (2003) 214 CLR 118; [2003] HCA 22, cited
General Television Corporation Pty Ltd v DPP & Anor [2008] VSCA 49, cited
Hinch v Attorney-General (Vict) (1987) 164 CLR 15; [1987] HCA 56, applied
Hocking v Bell (1945) 71 CLR 430; [1945] HCA 16, cited
Hoyts Pty Ltd v Burns (2003) 77 ALJR 1934; [2003] HCA 61, applied
Jackson v Sterling Industries Ltd (1987) 162 CLR 612; [1987] HCA 23, applied
Jago v District Court (NSW) (1989) 168 CLR 23; [1989] HCA 46, applied
Mickelberg v The Queen (1989) 167 CLR 259; [1989] HCA 35, applied
Moevao v Department of Labour [1980] 1 NZLR 464, cited

Montgomery v H M Advocate [2003] 1 AC 641, applied
R v D'Arcy [2005] QCA 292, cited
R v Dudko (2002) 132 A Crim R 371; [2002] NSWCCA 336, applied
R v Ferguson [2008] QDC 136, overruled
R v Georgiou; Edwards; Heferen (2002) 131 A Crim R 150; [2002] QCA 206, cited
R v Johannsen & Chambers (1996) 87 A Crim R 126; [1996] QCA 111, applied
R v Smith [1995] 1 VR 10, cited
R v Vjestica [2008] VSCA 47, cited
R v W; ex parte A-G (Qld) [2002] QCA 329, cited
Smith v The Queen (1994) 181 CLR 338; [1994] HCA 60, considered
The Queen v Glennon (1992) 173 CLR 592; [1992] HCA 16, applied
von Risefer v Permanent Trustee Company Limited [2005] 1 Qd R 681; [2005] QCA 109, cited
Walton v Gardiner (1993) 177 CLR 378; [1993] HCA 77, cited

COUNSEL: A W Moynihan SC, with M J Copley, for the appellant
P J Callaghan SC, with P E Smith, for the respondent

SOLICITORS: Director of Public Prosecutions (Queensland) for the appellant
Fisher Dore Lawyers for the respondent

[1] **THE COURT:** The respondent has been convicted of many offences against children. Between 1988 and 2003 he was incarcerated for such offences. On 10 November 2005 he was arrested and charged with three further offences. He was in custody after his arrest until 1 July 2008 when the order the subject of this appeal was made.

[2] On 31 March 2008 two of the three new charges against the respondent were tried in the District Court. One count was of indecent treatment of a child, referred to as K, and one count was of indecent treatment of a child, referred to as B. Both offences were alleged to have occurred on 9 November 2005.

[3] At the conclusion of the Crown case, the learned trial judge ruled that there was no evidence to support the second count. The Crown Prosecutor entered a *nolle prosequi* and the respondent was discharged in respect of that count. His Honour intimated to the Crown Prosecutor that he should consider taking a similar course in relation to the count concerning the child K; but the Crown Prosecutor did not accept that intimation. On the application of the respondent's Counsel, the jury were then discharged, with the respondent remaining in custody pending his retrial on that count.

[4] The retrial was set down to commence before a different judge in early July 2008. A few days before the retrial was due to commence, the respondent applied for a permanent stay of the proceedings against him. This application was advanced on two bases: first, pre-trial publicity meant that he could not receive a fair trial; and, secondly, the Crown case was very weak. On 1 July 2008 that application was

upheld by the learned primary judge who made an order permanently staying the prosecution of this count.

[5] The Attorney-General appeals against this order pursuant to s 669A(1A) of the *Criminal Code* 1899 (Qld). That section allows the Attorney-General to appeal to this Court against an order "staying proceedings or further proceedings on an indictment".

[6] No challenge is advanced on behalf of the Attorney-General in relation to the findings of fact made by the learned primary judge. It is submitted, however, that the learned primary judge erred in exercising his discretion permanently to stay the proceedings.

[7] On behalf of the respondent, it is submitted that the learned primary judge did not err, and, in any event, that the appeal under s 669A(1A) of the *Criminal Code* is of such a nature that this Court cannot remedy errors of the kind of which the Attorney-General complains.

[8] We shall discuss the arguments advanced in support of these contentions after summarising the findings of fact made by the learned primary judge and his Honour's reasoning in support of his decision.

The findings of fact of the learned primary judge

[9] As we have said, the learned primary judge's findings of fact are not in dispute. The facts concerning the pre-trial publicity adverse to the respondent were summarised by his Honour. We set them out in full:

> "So far as pre-trial publicity is concerned, I'm entirely satisfied that there have been many references to the accused printed in newspapers having wide circulation throughout this State.
>
> Equally, I accept that there has been a significant reporting of matters relating to the accused on programs broadcast by local television stations.
>
> It is also clear from the evidence before me that there are many references to the accused to be found on the Internet.
>
> The references to the accused have a long history, but for the purposes of this ruling I am considering the 'debate', if such it can be called, which commenced prior to the accused's release from prison in 2003, and which has continued to this day.
>
> These references are of various kinds. They include widespread reporting of:
>
> (a) the fact of his numerous convictions of and imprisonment for sexual offences committed against children;
>
> (b) unattributed reports of his expressing an intention to have sex with children upon his release from prison;
>
> (c) expressions of opinion - usually to the effect that the accused should not be at large in the community, or would constitute a real

risk to children if allowed at large in the community. Such opinions have been reportedly expressed by: (i) Ministers of the Crown; (ii) Federal politicians; (iii) State politicians; (iv) City Councillors, and by others who might perhaps be described in the language of Mr Justice Brennan in *Glendon* [sic], page 611, as: 'Persons who affect to convey the moral conscience of the community and to possess information, insights and expertise in exceptional measure.'

In those references, the accused has been referred to as, inter alia: (a) 'well known paedophile'; (b) 'notorious paedophile' (c) 'unrepentant'; (d) 'considered unrehabilitated'; and (e) 'convicted child molester'.

There are reports in the press, including television coverage, which I can recall, of citizens who lived in close proximity to his residence after his release from prison and of their being outraged by the fact that he was living close to them.

There are reports of his being 'forced' to leave residences at Ipswich, Murgon and Roma after angry demonstrations by some. There are references in the material before me of the accused being 'hounded', of residents being 'in uproar', and of their 'picketing' his residence. There are references to an 'angry mob'.

At the time of his release from prison, there was a lot of debate as to whether it was appropriate for someone with his history and alleged unrepentant attitude to be released at all. The issue was alive during a state election campaign.

In all the material before me there is nothing I can find that in any way might be thought to be favourable to the accused. The most that can be said is that there are some references to expressions of opinion by some (referred to occasionally as 'civil libertarians') that people who have served sentences should not be further constrained; and there is a report of the then Premier of the State urging people to 'keep calm'."[1]

[10] His Honour's summary of the weakness of the Crown case was as follows:

"The only evidence which directly implicates the accused in the commission of an offence against K on the 9th of November, 2005 is the evidence of K. This is comprised of what she said in an interview with a Police Officer, Hayes, that interview having been recorded and tendered in the now familiar way, and her prerecorded evidence given before this court on the 1st of November, 2007.

I was told that K was born on the 2nd of May 2000. She was thus about five and a half years old when the offence is alleged to have been committed.

There must be serious concern about the reliability of K's evidence. Counsel for the applicant has set out in detail in his written

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1 [2008] QDC 136 at 4 – 6.

submissions a number of the matters which give rise to concern. I have had regard to them all, but will only refer to some here.

During the interview the child alleges that the accused did 'something to me right here in my little bum' and points to her waist. She alleges (contrary to the Crown case) that she was in a room with a bed and a cot when she was dealt with. She says it was the accused's friend who read to her, and later says that she was touched whilst being read to. She does not clarify, as it seems to me, how she was touched.

K was not able in any satisfactory way to identify the accused when shown a photoboard containing his photograph along with others.

Another Crown witness was present at the time. His name is Allen Guy. He has been convicted a number of times of sexual offences involving children.

K's evidence in this court is concerning. Whilst she clearly alleges that the accused touched her, she equally clearly identifies the person who touched her as the other man that was present. This is the relevant part of her evidence:

> "BY COUNSEL: See, K, I've spoken to Dennis and he tells me he didn't touch you as you've told us; what do you say about that?-- Umm, well - well, B was with Dennis and I was with Dennis' friend.
>
> HER HONOUR: Now, just-----
>
> MR SMITH: So-----
>
> WITNESS: And I was with his friend.
>
> HER HONOUR: The question that was put to you, K, is this: Mr - Mr Smith said to you that Dennis told him that he didn't touch you?-- Well, B was-----
>
> Did - did he touch you-----?-- -----B was-----
>
> Sorry. Did he touch you-----?-- Well, B - well, B was with Dennis and I was - and I was with his friend.
>
> Did Dennis touch you?-- No, his friend did.'

Counsel for the Crown then re-examined K. In what appears to be arguably cross-examination he secures from K an affirmative answer to the question, 'Did Dennis touch you?'

I have watched the recording of the child's evidence. In my view it cannot be said that the child was in any way overborne when she gave the evidence that I have just referred to. As will be observed, the trial judge intervened not, as I perceive it, because of any concern that the child was overborne, but rather to be confident that the child was understanding what was being asked of her.

> I do not think it necessary to discuss the other submissions made to me in respect to the tenuous nature of the Crown case.
>
> Clearly there is some evidence which might support a conviction.
>
> In my view the Crown case is tenuous."[2]

The learned primary judge's conclusions

[11] In relation to the adverse effects of pre-trial publicity on the respondent's prospects of a fair trial, his Honour expressed the following views:

> "In my view, the nature and extent of the pre-trial publicity render it, to all intents and purposes, impossible to conceive that a jury could be empanelled to try the matter, whose members would not be familiar with the things about the accused which have featured for so long and so often in the press.
>
> Allegations of the sexual abuse of very young children excite very strong emotions in our society. One sees almost week by week in this Court the extent of the intense abhorrence and anger which evidence of such abuse causes.
>
> After 19 years sitting as a judge in this Court, I am entirely convinced that most jurors accept their duties responsibly, try to follow judicial directions faithfully, and often will struggle hard to be entirely objective in their assessment of the evidence.
>
> It seems to me, however, in the circumstances of this case, impossible to conceive that a jury could be empanelled, all of whose members would be able to bring the dispassionate judgment which the law requires to a consideration of the evidence.
>
> My judgment is, therefore, that the accused cannot have a 'fair' trial in respect of this charge because I think it improbable that a jury can be empanelled, all of whom would be able to be dispassionate and follow the judge's directions.
>
> To pretend otherwise would, I think, be disingenuous."[3]

[12] In relation to the weakness of the Crown case, his Honour concluded:

> "I cannot see any rational basis on which a jury could disregard the child's evidence which I have quoted above. At the very least it must create a doubt as to the child's reliability. There are many other concerning aspects of the Crown case."[4]

[13] The learned primary judge summarised his conclusions in the following paragraph:

> "In my view the application for a stay should be granted. I have been mindful of the criteria which I have referred to above, and in particular that it is only in the most exceptional cases that a permanent stay should be granted. Bearing in mind the extraordinary

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2 [2008] QDC 136 at 23 – 25.
3 [2008] QDC 136 at 6 – 7.
4 [2008] QDC 136 at 26.

> nature of the public comment in this case, the fact that it is virtually entirely adverse to the accused, that it varies between rational statements and vitriolic attacks, that the press publicity has been compounded by film shown on television, and that the Crown case is so very weak, I have formed the view that the accused cannot receive a fair trial and that were the trial to proceed there would be a real prospect of a miscarriage of justice."[5]

The arguments on appeal

[14] The Attorney-General submits that the learned primary judge erred in point of law in the exercise of his discretion in that he failed to give sufficient weight to the public interest in having those accused of serious crimes dealt with by the criminal justice system. It was also submitted that his Honour erred in concluding that a jury could not be expected to consider the evidence dispassionately and in accordance with the directions of the trial judge: in particular, it was said that his Honour's conclusion was reached without adverting to relevant provisions of the *Jury Act* 1995 (Qld). It is also contended that his Honour, having concluded that there was sufficient evidence to go to the jury on the issue of the respondent's guilt, should not have stayed the prosecution on the basis of his conclusion that a verdict against the respondent would be unreasonable.

[15] The respondent argues that the learned primary judge's decision was within the proper scope of the discretion reposed in him and that he did not err in any respect. To the extent that the appellant contends that the learned primary judge erred in giving too much or too little weight to one or other of the factors which were relevant to the exercise of his discretion, the respondent argues that that kind of error is not amenable to correction on an appeal under s 669A(1A) of the *Criminal Code*.

Discussion

[16] It is convenient to commence a discussion of the arguments which arise on the appeal by considering the nature of the right of appeal conferred on the Attorney-General by s 669A(1A) of the *Criminal Code*.

The nature of an appeal under s 669A(1A)

[17] Section 669A(1A) of the *Criminal Code* does not make any express provision as to the nature of the appeal or how this Court might dispose of such an appeal. The respondent's first point in this regard, taken in its written submissions, was that the absence of any such express provision means that this Court has not been given any power to dispose of the appeal. The respondent's argument contrasts the niggardly provision in s 669A(1A) with the more detailed provisions of s 668E, s 669A(1) and s 669A(4).

[18] The Attorney-General's response to the respondent's somewhat extreme contention was that the obvious intention of the legislature cannot be set at nought in such a cavalier fashion. On behalf of the Attorney-General, reference is made to s 49A of the *Acts Interpretation Act* 1954 (Qld) which provides:

> "If a provision of an Act, whether expressly or by implication, authorises a proceeding to be instituted in a particular court or

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5 [2008] QDC 136 at 26.

> tribunal in relation to a matter, the provision is taken to confer jurisdiction in the matter on the court or tribunal."

[19] On the hearing of the appeal, the respondent's Counsel did not press this first point. They were correct to take that course. In our view, this Court, having jurisdiction over the appeal, necessarily has the power to determine the appeal.[6]

[20] It may be accepted, as the respondent contends, that this appeal, like all appeals, is the creature of statute;[7] but it does not follow from acceptance of that contention that the legislature's conferral of a right of appeal on the Attorney-General is meaningless. Rather, the right of appeal created, without elaboration by s 669A(1A), must be understood as an appeal in the strict sense.[8] Such an appeal is not in the nature of a rehearing, and the Court has no power to receive further evidence. Such an appeal is available only to correct demonstrated errors in the decision below. The orders which the Court may make do not extend to exercising the discretion afresh based on its own view of the facts.

[21] The question which this Court must address then is whether there has been demonstrated such an error on the part of the learned primary judge that it is amenable to correction on appeal. If there is such an error, then this Court must set aside the decision below, but it is not empowered by statute to exercise the discretion afresh.[9]

[22] With that in mind, we turn now to a consideration of the principles which inform the exercise of the discretion permanently to stay proceedings on indictment.

The principles informing the exercise of the discretion

[23] The right of an accused person to a fair trial is an essential safeguard of the liberty of the individual. As Deane J said in *Hinch v Attorney-General (Vict)*:[10]

> "The ability of a society to provide a fair and unprejudiced trial is an indispensable basis of any acceptable justification of the restraints and penalties of the criminal law. Indeed, it is a touchstone of the existence of the rule of law."[11]

[24] A convenient starting point for a consideration of the principles by reference to which this essential safeguard is preserved is the statement of Fitzgerald P in this Court in *R v Johannsen & Chambers*,[12] that:

> "… there is a strong predisposition towards permitting prosecutions to proceed, with procedural and other rulings and directions moulded to achieve a fair trial which produces a result free of the taint of risk of miscarriage of justice ... A stay should not be granted if the

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6 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 623 – 624; *DJL v The Central Authority* (2000) 201 CLR 226 at 241 [25].

7 Cf *Smith v The Queen* (1994) 181 CLR 338.

8 See *Mickelberg v The Queen* (1989) 167 CLR 259 at 267; *Eastman v The Queen* (2000) 203 CLR 1 at 12 – 13 [16] – [17], 24 [68], 35 [111] – [112], 96 – 97 [290]; *Hoyts Pty Ltd v Burns* (2003) 77 ALJR 1934 at 1942 – 1943 [49] – [52]. See also *Fox v Percy* (2003) 214 CLR 118 at 129 [32].

9 This Court has, of course, inherent powers to prevent an abuse of its process: *von Risefer v Permanent Trustee Company Limited* [2005] 1 Qd R 681.

10 (1987) 164 CLR 15.

11 (1987) 164 CLR 15 at 58, cited with approval in *General Television Corporation Pty Ltd v DPP & Anor* [2008] VSCA 49 at [27], Warren CJ, Vincent and Kellam JJA.

12 (1996) 87 A Crim R 126 at 135.

> prosecution can proceed, uninfluenced by improper purpose, without unfairness to the accused, with a legitimate prospect of success and, in the event of conviction, no significant risk that, because of delay or other fault on the part of the prosecution, an innocent person will have been convicted."[13]

[25] We pause to note that there is no suggestion that the prosecution of the respondent is influenced by any improper purpose or that delay or other fault on the part of the prosecution has given rise to any risk that an innocent person will be convicted. The issues of concern relate to the possibility of unfairness to the respondent because of adverse publicity and the prospects of success of the prosecution.

[26] As to the first of the issues of present concern, there is an abundance of authoritative statements that even where a trial is accompanied by adverse publicity, even adverse publicity concerning the accused's previous criminal convictions, the court should be slow to conclude that the resultant risk of unfairness to the accused is intractable because the jury is unlikely to be amenable to the directions of the trial judge to ignore the adverse publicity and render their verdict based on the evidence.

[27] The principles applicable to the granting of a stay on the grounds that pre-trial publicity prevents a fair trial of the accused received extensive consideration by the High Court in *The Queen v Glennon.*[14]

[28] The respondent in *Glennon* was a Roman Catholic priest who was convicted in 1978 of a sexual offence against a girl. In 1985, when a witness in a case, he was cross-examined about his conviction and about an alleged homosexual rape of one of the accused. The allegation received extensive publicity. The respondent was subsequently charged with a number of offences. The following day a radio commentator alleged serious criminal conduct and sexual impropriety against the respondent and mentioned his previous conviction. The commentator was convicted of contempt of court in respect of his broadcast. The commentator's trial, unsuccessful appeals and imprisonment received extensive media coverage. Two months after the commentator's release from prison, the respondent was charged with 17 sexual offences. At the commencement of his trial in the County Court the respondent sought and was refused a permanent stay of the proceeding. A later application to a judge of the Supreme Court on the same grounds was also refused. The accused was convicted on five of the charges. He appealed to the Court of Criminal Appeal which, by a majority, allowed the appeal on the grounds that the convictions were unsafe and unsatisfactory because of substantial risk that some members of the jury had become aware of the respondent's prior convictions as a result of the pre-trial publicity. The orders of the Court of Criminal Appeal were set aside by the High Court on appeal.

[29] Two members of the majority, Mason CJ and Toohey J, in their joint judgment observed:

> "Apart from the unique case of *Tuckiar v The King** there has been no other instance in the judicial history of this country of an accused's conviction being quashed and a verdict of acquittal then

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13 See discussion of Botting DCJ below: [2008] QDC 136 at 21 – 22.

14 (1992) 173 CLR 592.

entered on account of the potential prejudicial effect of pre-trial publicity."[15]

*(1934) 52 CLR 335. After the prisoner was convicted, his counsel made a public statement in court that confessional evidence admitted against the prisoner was correct. An appeal having been allowed, a verdict of acquittal was entered because, in the view of this Court, the prisoner could not justly be subjected to another trial at Darwin and no other venue was practicable."

[30] In discussing the possibility that jurors might be aware of and act on information acquired outside the trial Mason CJ and Toohey J said:[16]

"Likewise, the suggestion that there was a substantial risk that at least one juror would have acquired knowledge, before the verdict was given, of the respondent's prior conviction was again a matter of mere conjecture or speculation. The mere possibility that such knowledge may have been acquired by a juror during the trial is not a sufficient basis for concluding that the accused did not have a fair trial or that there was a miscarriage of justice. Something more must be shown. **The possibility that a juror might acquire irrelevant and prejudicial information is inherent in a criminal trial. The law acknowledges the existence of that possibility but proceeds on the footing that the jury, acting in conformity with the instructions given to them by the trial judge, will render a true verdict in accordance with the evidence.** As Toohey J observed in *Hinch* ((1987) 164 CLR at 74), in the past too little weight may have been given to the capacity of jurors to assess critically what they see and hear and their ability to reach their decisions by reference to the evidence before them. In *Murphy v The Queen*, we stated ((1989) 167 CLR 94 at 99; see also *Reg v Von Einem* (1990) 55 SASR 199 at 211):

'But it is misleading to think that, because a juror has heard something of the circumstances giving rise to the trial, the accused has lost the opportunity of an indifferent jury. The matter was put this way by the Ontario Court of Appeal in *Reg v Hubbert* ((1975) 29 CCC (2d) 279 at 291): 'In this era of rapid dissemination of news by the various media, it would be naive to think that in the case of a crime involving considerable notoriety, it would be possible to select twelve jurors who had not heard anything about the case. Prior information about a case, and even the holding of a tentative opinion about it, does not make partial a juror sworn to render a true verdict according to the evidence.'

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15 (1992) 173 CLR 592 at 598 (citation footnoted in original). We have not been referred to nor found any other instances of an order for a permanent stay because of pre-trial publicity in Australia. We have, however, found two instances in England: *Taylor and Taylor* (1994) 98 Cr App R 361 and *R v Reade, Morris and Woodwiss*, unreported, Mr Justice Garland, Central Criminal Court, 15 October 1993, discussed in "Pre-trial Publicity and its Treatment in the English Courts", Corker and Levi [1996] Crim LR 622.

16 (1992) 173 CLR 592 at 603 (citations footnoted in original).

> **To conclude otherwise is to underrate the integrity of the system of trial by jury and the effect on the jury of the instructions given by the trial judge.**" (emphasis added)

[31] Particular concern was expressed by Mason CJ and Toohey J in relation to the revelation of an accused's prior convictions to the jury. Their Honours said:

> "Knowledge of an admissible prior conviction for a similar offence stands in a different position from other prejudicial information. Reception of inadmissible evidence of a prior conviction has been said to offend against one of the most deeply rooted and jealously guarded principles of our criminal law (*Maxwell v Director of Public Prosecutions* [1935] AC 309 at 317). And the wrongful reception or transmission of such evidence by or to the jury is calculated to set the prospect of a fair trial at risk. It is then for the trial judge to decide whether it is necessary to discharge the jury in the interests of securing a fair trial (*Reg v George* (1987) 9 NSWLR 527 at 533) and, if the trial proceeds and results in a conviction, for a court of criminal appeal to decide whether the accused has been deprived of a fair trial."[17]

[32] In considering the circumstances in which a stay might be granted their Honours said:

> "On the other hand, a permanent stay will only be ordered in an extreme case (*Jago* (1989) 168 CLR at 34) and there must be a fundamental defect 'of such a nature that nothing that a trial judge can do in the conduct of the trial can relieve against its unfair consequences' (*Barton* (1980) 147 CLR at 111 per Wilson J). And a court of criminal appeal, before it will set aside a conviction on the ground of a miscarriage of justice, requires to be satisfied that there is a serious risk that the pre-trial publicity has deprived the accused of a fair trial. It will determine that question in the light of the evidence as it stands at the time of the trial and in the light of the way in which the trial was conducted, including the steps taken by the trial judge with a view to ensuring a fair trial."[18]

[33] Their Honours considered that the reasoning of the majority of the Court of Criminal Appeal "took little, if any, account of the effect of the trial judge's instructions and disregarded the community's right to expect that a person accused of a serious criminal offence will be brought to trial."[19]

[34] Brennan J, with whose reasons Dawson J agreed, pointed to the oddity of an approach in which pre-trial publicity naturally resulting from the gravity of the crime or the notoriety of the accused could result in an accused's not being tried and punished, if convicted. After referring to the reasons in *Hinch v Attorney-General (Vict)* he said:[20]

> ". . . it appears that some degree of risk, albeit not a substantial risk, to the integrity of the administration of criminal justice is accepted as the price which has to be paid to allow a degree of freedom of public

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17 (1992) 173 CLR 592 at 604 (citations footnoted in original).

18 (1992) 173 CLR 592 at 605 – 606.

19 (1992) 173 CLR 592 at 604 – 605.

20 (1992) 173 CLR 592 at 613 – 614 (citation footnoted in original).

> expression when it is exercised in relation to a crime that is a topic of public interest. Clearly enough, though the fairness of a criminal trial may be at some risk in such a case, the trial proceeds. If a punishable contempt occurs, ex hypothesi there is a real risk of prejudice – perhaps, to adopt the formulation by Mason CJ, a substantial risk of serious interference with a fair trial. But it does not follow that, where a punishable contempt of court has been committed, the trial must be aborted. If that were the consequence of punishable contempt, the penalties imposed for contempt would be far harsher than those presently imposed, for the contempt would totally defeat the enforcement of the criminal law and penalties for contempt would have to reflect that fact. Administration of the criminal law cannot be made hostage to conduct amounting to contempt of court, even if the contempt be flagrant. If it were otherwise, the perpetrators of crimes which shock the public conscience, such as those charged in *Murphy v The Queen* ((1989) 167 CLR 94), would oftentimes go untried and unpunished, for pre-trial publicity prejudicial to an accused is stimulated by the notoriety of the accused and the heinousness of the crime. Yet it would undermine the criminal law's protection of society and its members to refuse to allow the law to take its ordinary course in these cases. The administration of criminal justice by the courts, which proceeds inexorably to its conclusion in each case, would be adventitious if trials could be halted by a punishable contempt. In cases where a punishable contempt is committed – at least where the contempt is flagrant – public obloquy would be substituted for jury verdict and trial by media would supersede trial according to law. No community governed by law could acknowledge that persons outside the control of the State could possess such a capacity for disrupting the administration of criminal justice."

[35] After referring to the need for the trial judge in conducting the trial to take steps to "counter the effect of pre-trial publicity prejudicial to an accused", Brennan J said:[21]

> "**Of necessity, the law must place much reliance on the integrity and sense of duty of the jurors. The experience of the courts (*Reg v Vaitos* (1981) 4 A Crim R 238; *Reg v Gallagher* (1987) 29 A Crim R 33 at 41) is that the reliance is not misplaced. In *Munday* ((1984) 14 A Crim R 456 at 457 – 458)**, Street CJ repeated an unreported passage from one of his Honour's earlier judgments:
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> > '... it is relevant to note that the system of jury trial is geared to enable juries to be assisted in every possible way to put out of mind statements made outside the court, whether in the media or elsewhere. There is every reason to have confidence in the capacity of juries to do this. Judges do not have a monopoly on the ability to adjudicate fairly and impartially. Every Australian worthy of citizenship can be relied upon to discharge properly and responsibly his duty as a juror. Particularly is this so in the context of being one of a number or

[21] (1992) 173 CLR 592 at 614 – 615 (citations footnoted in original).

> group of others all similarly charged with this responsible duty. I have great faith in the multiple wisdom and balance reflected in the verdict of a jury.'
>
> If the courts were not able to place reliance on the integrity and sense of duty of jurors, not only would notorious criminals or heinous crimes be beyond the reach of criminal justice but there would have to be a change in venue for many trials now held in circuit cities or towns where knowledge of the crime and of the alleged criminal easily acquires a wide currency outside the courtroom. **Our system of protecting jurors from external influences may not be perfect, but a trial conducted with all the safeguards that the court can provide is a trial according to law and there is no miscarriage of justice in a conviction after such a trial**." (emphasis added)

[36] Brennan J, in referring to the reasons given by the trial judge, Crockett J, in refusing the application for a stay, observed:

> "In my respectful opinion, his Honour's conclusion was clearly right either on the ground that the present case is not an "extreme case" or on the ground – which, in my respectful opinion, is a ground better founded on principle and more realistic in practice – that the trial of the applicant, provided it was as fair as the Court could make it, would produce no miscarriage of justice. The appeal to the Full Court after conviction was in substance though not, of course, in form, an appeal against the decision of Crockett J (*Boehm v Director of Public Prosecutions* [1990] VR 494)."[22]

[37] More recently, in *R v Dudko*,[23] Spigelman CJ, with whom Simpson J and Blanch AJ agreed, said:

> "Issues of this character have arisen on many occasions in which extensive publicity had been given to particular cases involving clear implications of guilt. *Glennon* involved a Roman Catholic priest who was convicted of sexual offences against a girl. *Murphy* involved the Anita Cobby murderers. Other cases include the case of Ivan Milat (see *Milat* (unreported, Court of Criminal Appeal, NSW, No 60438 of 1996, 26 February 1998)), the 'Mr Bubbles' child sexual abuse case (see *VPH* (unreported, Court of Criminal Appeal, NSW, No 60599 of 1993, 4 March 1994)), the paedophile Phillip Bell (see *Bell* (unreported, Court of Criminal Appeal, NSW, No 60582 of 1998, 8 October 1998)), the child sexual assaults committed by a former member of the Queensland parliament (see *D'Arcy* (2001) 122 A Crim R 268) and the Childers backpacker fire (see *Long* (2002) 128 A Crim R 11). None of these cases satisfied the test of exceptionality, despite the intensity of the media publicity involved.
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> The scope and intensity of the publicity in the present case was of a similar order of magnitude to those considered in these cases. The assertions of guilt in the present case were, particularly in the early publicity, perhaps more consistent and forceful than in the other

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22 (1992) 173 CLR 592 at 616 (citation footnoted in original).

23 (2002) 132 A Crim R 371 at 374 – 375 [19] – [21].

> cases to which I have referred. However, those assertions were particularly prominent in the immediate wake of the escape and became more sporadic and less prominent over time. The worst of the publicity occurred almost two years before the trial itself.
>
> The authorities to which I have referred establish that even in circumstances of a crime of a high level of notoriety, where it would probably not be possible to select a jury panel who had not heard about the case and indeed who may have a tentative opinion, the trial must still proceed. Jurors who may have formed an opinion are not necessarily biased in the relevant sense. There is now a substantial body of judicial statements of the opinion that jurors accept their responsibility to perform their duties by differentiating between the evidence and what they may have heard before the trial."

[38] Similarly, in *Montgomery v H M Advocate*,[24] Lord Hope, with whom Lord Nicholls and Lord Hoffman agreed, noted that:

> "The common law test, which is applied where pre-trial publicity is relied upon in support of a plea of oppression, is whether the risk of prejudice is so great that no direction by a trial judge, however careful, could reasonably be expected to remove it."[25]

Later, his Lordship noted:

> "Recent research conducted for the New Zealand Law Commission suggests that the impact of pre-trial publicity and of prejudicial media coverage during the trial, even in high profile cases, is minimal: *Young, Cameron & Tinsley,* Juries in Criminal Trials: Part II, Vol 1 Chapter 9 para 287 (New Zealand Law Commission preliminary paper No 37, November 1999). …
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> …
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> The principal safeguards of the objective impartiality of the tribunal lie in the trial process itself and the conduct of the trial by the trial judge. On the one hand there is the discipline to which the jury will be subjected of listening to and thinking about the evidence. The actions of seeing and hearing the witnesses may be expected to have a far greater impact on their minds than such residual recollections as may exist about reports about the case in the media. This impact can be expected to be reinforced on the other hand by such warnings and directions as the trial judge may think it appropriate to give them as the trial proceeds, in particular when [the judge] delivers [the] charge before they retire to consider their verdict."[26]

[39] These passages emphasise the need for circumspection on the part of a court in acting upon a prediction of the inability of the jury to render a verdict fairly in accordance with the directions of the trial judge. It is necessary to bear in mind that, pursuant to s 50 of the *Jury Act*, the members of a jury swear "to give a true verdict, according to the evidence, on the issues to be tried …". The passages which we

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24 [2003] 1 AC 641.

25 [2003] 1 AC 641 at 667; followed in *R v Georgiou; Edwards; Heferen* (2002) 131 A Crim R 150 at 154 [23] and *R v Vjestica* [2008] VSCA 47 at [31].

26 [2003] 1 AC 641 at 673 – 674.

have set out above also emphasise that the system of trial by jury proceeds on the assumption that jurors can be trusted to be true to their oath.

[40] The jury trial has not been regarded and should not be regarded, as an exotic and delicate contrivance, the integrity of which cannot survive jurors' knowledge of matters adverse to an accused gained other than through admissible evidence.

[41] The jury has long been recognised in our system of criminal justice as the constitutional tribunal of fact.[27] As observed by Lord Devlin in 1956:

> "Each jury is a little parliament. The jury sense is the parliamentary sense. I cannot see the one dying and the other surviving … So that trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives…We are anxious that government should be strong and yet fearful lest the gathering momentum of executive power crush all else that is in our State. We look for some landmark that we may say that so long as it stands, we are safe; and if it is threatened, we must resist. It is there, this beacon that seven centuries have tended ..."[28]

[42] More recently Spigelman CJ, writing extrajudicially, stated:

> "There is … a specific institution which, in my opinion, is of fundamental importance in maintaining public confidence. I refer to the jury system. The direct involvement as decision-makers of members of the public, in their capacity as such, does more to ensure the maintenance of a high level of trust and confidence in the administration of justice than, perhaps, any other single factor.
>
> Decision-making by jurors is not, of course, the cheapest form of dispute resolution. Nor, however, is democracy the cheapest form of government. The pressure on public expenditure over recent decades is one of the reasons why the use of juries has progressively retreated and, in this State, has almost disappeared in civil matters. There is, however, no real doubt that the jury will be retained as the critical decision making body which imposes the stigma of guilt of a serious crime, leading to the penal consequences of such guilt, on any citizen.
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> …
>
> The role of jurors as representatives of the community is a well understood and longstanding tradition. A jury does not represent the community in the sense of constituting, in some way, a microcosm of the community. That would be impossible. It represents the community by reason of the random process of its selection."[29]

[43] Jury deliberations take place in an environment peculiarly conducive to the unbiased assessment of evidence with a view to determining guilt or innocence. An

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27 *Cheung v The Queen* (2001) 209 CLR 1 at 39 [116]; *David Syme & Co v Canavan* (1918) 25 CLR 234 at 240; *Hocking v Bell* (1945) 71 CLR 430 at 440.

28 Lord Devlin, "Trial by Jury", Revised edition, 1966, Stevens & Sons Ltd, London at 164. See also Michael Chesterman, Janet Chan and Shelley Hampton, "Managing Prejudicial Publicity", 2001, University of New South Wales, Sydney.

29 Address by the Hon J.J Spigelman AC, Chief Justice of New South Wales, for the Annual Opening of Law Term Dinner, 31 January 2005, Sydney. See also Michael Chesterman, Janet Chan and Shelley Hampton, "Managing Prejudicial Publicity", 2001, University of New South Wales, Sydney.

empanelled juror does not commence his or her role as a person undertaking a novel or foreign role. Jurors are aware consciously or subconsciously of the long tradition in this country of criminal trials in which 12 impartial men and women are the deciders of fact, of the unquestioned integrity of the process and its importance to society's fabric. The solemnity and social significance of the jurors' role is reinforced by the formality of the trial and the court room setting. As we have noted, jurors are sworn or make an affirmation to give a true verdict according to the evidence. The trial judge's opening remarks are calculated to reinforce instructions already received by the jury panel.

[44] And, of course, the trial judge's instructions should be fashioned in light of the circumstances of the case with a view to assisting the jury to give a verdict uninfluenced by any irrelevant or improper considerations. Where there has been extensive pre-trial publicity, it is customary for the trial judge to explain the obvious points of distinction between media reports and the evidence presented in criminal cases. Here, the perceived problem lies not so much with any alleged inaccuracy in reporting (although there may well have been some) but more with the revelation of prior convictions, the details of those convictions, the respondent's alleged potential to re-offend and the general opprobrium heaped on the respondent because of his convictions.

[45] The respondent's convictions are for offences of a kind which Gibbs CJ, in *De Jesus v The Queen*,[30] described as "are peculiarly likely to arouse prejudice, against which a direction to the jury is unlikely to guard." Heavy reliance was placed on that observation by the respondent's counsel. It must be understood that this observation was made in a case where evidence of other sexual offences which is inadmissible in respect of the offence charged was admitted as a result of the joinder of several counts of rape on one indictment. The prejudice to the accused thus resulted from the operation of the judicial process itself rather than from influences external to it. As a result, the trial in question was not, in the words of Brennan J cited above, "conducted with all the safeguards the court can provide." Seen in this light, the observations of Gibbs CJ in *De Jesus* do not detract from the force of the statements we have cited from *Glennon v The Queen*.

[46] It was also said on behalf of the respondent that jurors might readily inform themselves of the full detail of the publicity adverse to the respondent, including his previous convictions, by accessing such information on the internet, and that this risk to the fairness of the trial could not be obviated by directions by the trial judge. But s 69A of the *Jury Act* makes it an offence for a jury to make such inquiries "about the defendant in the trial until the jury … has given its verdict, or the [juror] has been discharged by the judge." A court asked to grant a permanent stay of proceedings on indictment should not proceed on the basis of speculation that jurors might, not only disregard their oath to render a verdict based only on the evidence, but also commit an offence in order to do so.

[47] It is also necessary to note that, in Queensland, a judge asked to exercise the inherent jurisdiction permanently to stay proceedings must also be aware that s 47 of the *Jury Act* provides an opportunity to reach a firm view as to whether the jury can proceed in a disinterested way to consider the evidence in accordance with the

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30 (1986) 61 ALJR 1 at 3.

directions of the trial judge. Section 47 of the *Jury Act* was enacted in 1997. It provides as follows:

"**Special procedure for challenge for cause in certain cases**

(1) If a judge who is to preside at a civil or criminal trial is satisfied, on an application by a party under this section, that there are special reasons for inquiry under this section, the judge may authorise the questioning of persons selected to serve as jurors and reserve jurors when the court reaches the final stage of the jury selection process.

Example–
Prejudicial pre-trial publicity may be a special reason for questioning persons selected as jurors or reserve jurors in the final stage of the jury selection process.

(2) The application must be made to the judge at least 3 days before the date fixed for the trial to start unless the judge, for special reasons, dispenses with the requirement.

(3) On the application, the applicant may suggest, and the judge may decide, questions that are to be put to persons selected to serve as jurors or reserve jurors for the trial.

(4) The judge must put the questions in a way decided by the judge.

Example–
The judge might decide that the questions are to be put to the persons selected to serve as jurors or reserve jurors in each other's presence in open court, or that the questions are to be put to each person individually.

(5) If, after hearing the answers of a person questioned under this section, the judge considers further inquiry is justified, the judge may give the parties leave to cross-examine the person on oath (under limits fixed by the judge) to find out whether the person is impartial.

(6) When a person has answered the questions put under this section and any further examination allowed by the judge has finished, a party may make a challenge for cause against the person on the ground that the person is not impartial.

(7) A party who makes a challenge under this section must inform the judge of the reasons for the challenge and, if the party has information or materials relevant to the challenge in addition to the information or materials already before the court, give the judge the information and materials.

(8) After considering the evidence and submissions of the parties the judge must–

(a) uphold the challenge and discharge the person selected to serve as a juror (or reserve juror); or

(b) dismiss the challenge.

(9) If the judge upholds the challenge and discharges the selected person, another person must be selected from the jury panel to fill the vacancy.

(10) When a person is selected to fill a vacancy under subsection (9)–

(a) a party may–

(i) if the party has not already exhausted the party's rights of peremptory challenge – challenge the person peremptorily; or

(ii) challenge the person for cause; in the same way as on the original selection of persons to serve as jurors (or reserve jurors); and

(b) the person is also liable to be questioned, cross-examined and challenged under this section in the same way as the other persons selected as jurors or reserve jurors.

(11) A decision of the judge under this section is not subject to interlocutory appeal but, if the final judgment of the court is liable to appeal, may be considered on an appeal against the final judgment of the court."

[48] The learned primary judge did not advert at all to s 47 of the *Jury Act* or to its other provisions aimed at protecting an accused person's right to a fair trial, such as s 43, s 48, s 53(2A)(b) and s 69A.

[49] There are two broad reasons why the jurisdiction to stay proceedings upon indictment is described in the authorities as one which should be exercised only in exceptional circumstances.[31] The first is that it is, as Byrne J said in *R v Smith*, "no part of the function of the judicial arm of the government to decide whether a citizen should be prosecuted or whether a prosecution is inappropriate".[32] Whether or not a criminal prosecution should be brought by the Crown is a decision for the executive arm of government.[33]

[50] It is at this point that the second reason for describing the jurisdiction to grant a stay as "exceptional" comes into focus. This is that the jurisdiction falls to be exercised only on the footing that the other tools available to the judiciary to ensure that an accused is not tried unfairly can be seen to be ineffective. The exceptional jurisdiction permanently to stay proceedings is truly residual in character in the sense that it falls to be exercised only in those cases where the other legal safeguards of the right of the accused to a fair trial are not apt to secure that right or in the other circumstances mentioned by Fitzgerald P in *Johannsen & Chambers*[34] which, as we have said, are not presently relevant.

[51] In *Jago v District Court (NSW)*, Mason CJ, referring to the court's power to prevent an abuse of process, explained:

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31 *R v W; ex parte A-G (Qld)* [2002] QCA 329 at [16].

32 [1995] 1 VR 10 at 25.

33 See also *Barton v The Queen* (1980) 147 CLR 75; *Jago v District Court (NSW)* (1989) 168 CLR 23 at 39; *Director of Public Prosecutions v Humphrys* [1977] AC 1 at 46.

34 Set out at [24] of these reasons.

> "In essence then, the power to prevent an abuse of process in this context is derived from the public interest, first that trials and the processes preceding them are conducted fairly and, secondly, that, so far as possible, persons charged with criminal offences are both tried and tried without unreasonable delay. In this sense, fairness to the accused is not the sole criterion when a court decides whether a criminal trial should proceed."[35]

[52] Mason CJ then expressed his agreement with the following explanation by Richardson J[36] of the rationale for the exercise of the power to stay a prosecution:

> "The justification for staying a prosecution is that the Court is obliged to take that extreme step in order to protect its own processes from abuse. It does so in order to prevent the criminal processes from being used for purposes alien to the administration of criminal justice under law. It may intervene in this way if it concludes from the conduct of the prosecutor ... that the Court processes are being employed for ulterior purposes or in such a way ... as to cause improper vexation and oppression. The yardstick is not simply fairness to the particular accused. It is not whether the initiation and continuation of the particular process seems in the circumstances to be unfair to him. That may be an important consideration. But the focus is on the misuse of the Court process by those responsible for law enforcement. It is whether the continuation of the prosecution is inconsistent with the recognized purposes of the administration of criminal justice and so constitutes an abuse of the process of the Court."

[53] Mason CJ concluded that:

> "[T]he power is discretionary, to be exercised in a principled way, and the same considerations will govern its exercise. And in each case [whether a wide interpretation of the concept of abuse is invoked or whether it is held that the courts possess an inherent power to prevent their processes being used in a manner which gives rise to injustice] the power will be used only in most exceptional circumstances to order that a criminal prosecution be stayed."[37]

[54] In *Jago v District Court (NSW)*, Gaudron J said:[38]

> "The limited scope of the power to grant a permanent stay necessarily directs an inquiry whether there are other means by which the defect attending the proceedings can be eliminated or remedied. And the purpose directs attention to the legal propriety of the process or proceeding, as distinct from any broad consideration of the general merits of the case.
>
> The features which attend the criminal process enable the general considerations to be refined somewhat in their application to the grant of a permanent stay of criminal proceedings. One particular feature relevant to criminal proceedings is that the question whether

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35 (1989) 168 CLR 23 at 30.

36 *Moevao v Department of Labour* [1980] 1 NZLR 464 at 482.

37 (1989) 168 CLR 23 at 31.

38 (1989) 168 CLR 23 at 77 – 78 (citations footnoted in original).

> an indictment should be presented is and always has been seen as involving the exercise of an independent discretion inhering in prosecution authorities, which discretion is not reviewable by the courts. Originally, the unreviewable nature of that discretion was seen as an aspect of the prerogative power vested in the office of Attorney-General. See, eg, *Reg v Allen* ((1862) 1 B&S 850 [121 ER 929]). More recently, the unreviewable nature of that discretion has been seen as deriving from the nature of the subject matter to be decided and, perhaps, the incompatibility of judicial review with the ultimate function of a court in a criminal trial. See *Barton* ((1980) 147 CLR at 94 – 95), per Gibbs ACJ and Mason J ((1980) 147 CLR at 110), per Wilson J See also *The Queen v Toohey; Ex parte Northern Land Council* ((1981) 151 CLR 170 at 219 – 220), per Mason J. Thus, it may be said that the power to grant a permanent stay of criminal proceedings is not to be exercised on the basis of an opinion that an indictment should not have been presented. See *Humphrys* ([1977] AC at 46), per Lord Salmon.
>
> Another feature attending criminal proceedings and relevant to the grant of a permanent stay thereof is that a trial judge, by reason of the duty to ensure the fairness of a trial, has a number of discretionary powers which may be exercised in the course of a trial, including the power to reject evidence which is technically admissible but which would operate unfairly against the accused. See *Driscoll v The Queen* ((1977) 137 CLR 517 at 541). See also *Harris v Director of Public Prosecutions* ([1952] AC 694 at 707), per Viscount Simon; *R v Christie* ([1914] AC 545 at 564), per Lord Reading. The exercise of the power to reject evidence, either alone or in combination with a trial judge's other powers to control criminal proceedings, will often suffice to remedy any feature of the proceedings which might otherwise render them unjust or unfair. The existence and availability of these powers, when considered in the light of the necessarily limited scope of the power to grant a permanent stay, serve to indicate that a court should have regard to the existence of all its various powers, and should only grant a permanent stay if satisfied that no other means is available to remedy that feature which, if unremedied, would render the proceedings so seriously defective, whether by reason of unfairness, injustice or otherwise, as to demand the grant of a permanent stay."

[55] These considerations of principle have two implications in relation to the determination of the present matter. The first is that the conclusion that the respondent **cannot** be convicted on the basis of a fair-minded verdict of a jury of his fellow citizens is, to say the least, premature before the processes made available by s 47 of the *Jury Act* have been implemented. The second is that it is no part of the function of a judge to pre-empt the decision of the jury on the question of the guilt or innocence of the accused. It is one thing to stay proceedings on indictment, or, for that matter, to rule at the trial, that there is no case for the accused to answer, but it is another thing altogether to pre-empt the jury's function because the Crown's case is seen to be extremely weak.[39]

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39 *Walton v Gardiner* (1993) 177 CLR 378 at 393, 411.

The judge's conclusion that the respondent cannot have a fair trial

[56] In our view, a conclusion by a judge that his or her fellow citizens are not capable of bringing an impartial mind to bear on the evidence in accordance with the directions of the trial judge is a conclusion which should not be reached on the basis of speculation. Section 47 of the *Jury Act* affords a basis for reaching a better informed view on this crucial question,[40] and, more importantly, it is a safeguard of the right of an accused to a fair trial which should be deployed before the court reaches the conclusion that a fair trial is not possible. On this basis, the learned primary judge's conclusion was, at best, premature. In failing to advert to the provisions of s 47 of the *Jury Act*, and the safeguard which they afford an accused person, the learned primary judge erred.

[57] It is conceivable that upon an inquiry under s 47 of the *Jury Act*, it might emerge that jurors had been so saturated with media comment adverse to the accused that the judge could not be satisfied that the right of the accused to a fair trial could be vindicated. The effect of the media coverage may be such as to lead the trial judge to conclude that jurors are overwhelmed by a perception that the expectation of the community is that the respondent must be convicted whatever the weaknesses in the Crown case may be. In such circumstances, the proceedings might properly be stayed. But, ordinarily, even then the court would explore other possible means of dealing with the problem, such as an adjournment of the trial so as to allow perceived pressures to dissipate or, where the prejudice is local in nature, by a change of venue of the trial.

[58] Furthermore, and quite apart from s 47 of the *Jury Act*, we consider that the primary judge's conclusion that it was "improbable that a jury can be empanelled, all of whom would be able to be dispassionate and follow the judge's directions" underrates the average citizen's sense of fairness in the context of the other considerations discussed above.[41] As our discussion of the authorities shows, juries are expected to discharge their duties properly even after sensationalised and prejudicial media reporting of quite horrific crimes. That expectation is informed, both by the necessity to accept, if jury trials are to be maintained, that jurors will be true to their oaths and follow the trial judge's directions, and the justified confidence that jurors do routinely meet that necessity. It may be that, on occasion, orders for a change of venue or an adjournment of a trial may be necessary to defuse potential prejudice from pre-trial publicity. In this case, the learned primary judge did not advert to the possibility that any adverse effect of pre-trial publicity might be dissipated by an adjournment of the trial for a few months. This possibility should have been considered. To fail to address this consideration was an error. An order for a permanent stay of proceedings is nothing less than an acknowledgment that the judicial system cannot deal with the charge. It can be justified only on the basis of a conclusion that a fair trial will not be possible within any reasonable time frame or in any venue within the court's jurisdiction. His Honour's decision was not made within these limits on the exercise of the discretion to order a permanent stay.

[59] For these reasons, we consider that the appeal must be allowed and the order granting the stay set aside. It is a matter for the prosecution whether it proceeds with the indictment against the respondent. If it does, the respondent has a fundamental right to a fair trial. Continuing adverse pre-trial publicity may,

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40 Cf *R v D'Arcy* [2005] QCA 292.

41 See paragraphs [26] - [45] of these reasons.

notwithstanding all judicial and systemic safeguards, imperil that fundamental right. It is, therefore, to be hoped that the media will exercise restraint in its reporting of matters relating to the respondent.

The judge's conclusion that a guilty verdict was not reasonably open

[60] In relation to the weakness of the Crown case, the possibility that a conviction will be set aside on appeal is not a matter on which a judge at first instance concerned with an application for a stay should speculate. His Honour, in granting the stay on the footing that, even though "there is some evidence which might support a conviction", he could see no "rational basis on which a jury could disregard the child's evidence" which was exculpatory of the respondent, put himself in the position of a Court sitting on appeal under s 668E from a conviction upon the verdict of the jury.

[61] Since the decision of the High Court in *Doney v The Queen*,[42] it has been settled that a judge asked to rule on the question whether an accused has a case to answer should not be concerned with whether a verdict of guilty could be expected to survive an appeal on the ground that the verdict was not reasonably open to the jury on the whole of the evidence. The application of that test by a court of appeal to determine whether it is safe for a verdict to stand in terms of the due administration of criminal justice is, of course, yet another of the specific safeguards within our system of criminal justice which must be allowed its own operation in its own time. Where there is evidence which might support a conviction sufficient to go to the jury, the prosecution has, in the words of Fitzgerald P in *R v Johannsen & Chambers* cited above, a legitimate prospect of success, and the public interest requires that the jury should be allowed to decide the case.

[62] In our respectful opinion, the conclusion of the learned primary judge that there is no rational basis on which the jury could prefer the evidence of the complainant which is inculpatory of the accused to the evidence which is exculpatory of him, was not a basis on which the power to order a permanent stay can be sustained. In *Doney v The Queen*,[43] the High Court said:

> "… if there is evidence (even if tenuous or inherently weak or vague) which can be taken into account by the jury in its deliberations and that evidence is capable of supporting a verdict of guilty, the matter must be left to the jury for its decision. Or, to put the matter in more usual terms, 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.
>
> It is necessary only to observe that neither the power of a court of criminal appeal to set aside a verdict that is unsafe or unsatisfactory (as to which see *Whitehorn, Chamberlain v The Queen* [No 2] ((1984) 153 CLR 521) and *Morris v The Queen* ((1987) 163 CLR 454)) nor the inherent power of a court to prevent an abuse of process (as to which see *Jago v District Court (NSW)* ((1989) 168 CLR 23)) provides any basis for enlarging the powers of a trial judge at the expense of the traditional jury function. The power of a court of criminal appeal to set aside a verdict on the ground that it is unsafe

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42 (1990) 171 CLR 207 at 212 – 215.

43 (1990) 171 CLR 207 at 214 – 215 (citations footnoted in original).

> or unsatisfactory, like other appellate powers, is supervisory in nature. Its application to the fact-finding function of a jury does not involve an interference with the traditional division of functions between judge and jury in a criminal trial. Nor does the existence in a trial judge or a court of powers to stay process or delay proceedings where the circumstances are such that the trial would be an abuse of process."

[63] The Court of Appeal exercises a supervisory jurisdiction which provides a further safeguard against the conviction of an innocent person. It is for the Court of Appeal in the exercise of this supervisory jurisdiction to determine whether a reasonable jury could have reached its verdict of guilty beyond reasonable doubt.

[64] It may be objected that a strict insistence upon the observance of the processes of the administration of criminal justice in their proper order is apt to serve unduly to prolong proceedings to the distress and expense of accused persons, and that a more robust approach to the exercise of the discretion permanently to stay proceedings would be more efficient and less expensive in filtering out of the criminal justice system those charges which are unlikely to succeed or which, in all fairness to the accused, should not succeed. But to say this is merely to lament the primacy of the role of the Crown in determining which prosecutions should be brought on indictment and the centrality of the jury as the constitutional tribunal of fact in such cases.

Result

[65] In our respectful opinion, in this difficult case the learned primary judge did not exercise his discretion within the constraints which control its exercise. Accordingly, we would allow the appeal and set aside the decision below. A warrant should issue for the apprehension of the respondent.

ORDERS:

1. Appeal allowed.

2. Set aside the decision below.

3. Issue a warrant for the apprehension of the respondent, to lie in the registry for four days.