# ABUSE OF PROCESS - THE NEW EQUITY IN CRIMINAL LAW

"Abuse of process - The New Equity in Criminal Law" is an appropriate title in view of the increased use of the doctrine of Abuse of Process and its various extensions as applied to the criminal law over the last year.

Matters that were previously thought to be sacrosanct have now been brought within the purview of the doctrine of Abuse of Process and in consequence there has been, in the last 18 months, much new case law on this topic generally.

The purpose of this paper is to examine the growth of the doctrine of Abuse of Process in Australia and to highlight some of the areas into which it either has spread or to which it has the potential to spread, with reference to the criminal law generally.

Basically, this paper deals with the Australian cases from MILLER v. RYAN AND OTHERS (1980) 1 N.S.W.L.R. 93 (decided by a single Judge of the Common Law Division (New South Wales), Mr. Justice Rass on 1st February, 1980 and thereby pre-dating by some 10 months the decision in BARTON'S case (BARTON v. R. (1980) 147 C.L.R. 75), until a recent Judgment of the Full Bench of the Federal Court in EMANUEL v. CAHILL AND DAU unreported Judgment of the Full Bench of the Federal Court of Australia delivered 28th August, 1987.

I do not pretend to have collated within the confes of this paper each and every case that touches upon abuse of process, but I hope that I have managed to examine the main cases that refine and extend the doctrine.

For reasons of space and time, this paper does not examine the English line of Authority that has its genesis in CONNELLY v. D.P.P. (1964) A.C. 1254 and D.P.P. v. HUMPHRIES (1977) A.C. 1 and SANG v. R. (1980) A.C. 402.

However, I will from time to time advert to various English cases as support for the views expressed herein, particularly as to the extent to which the doctrine may apply to our system of criminal justice in Australia.

GENERAL COMMENT

It may be surprising to some, but in essence Abuse of Process has long formed part of our law relating to extradition on a State to State basis, by virtue of the provisions of the Service and Execution of Process Act, Sections 18 and 19.

As will be seen from the wording of Section 18, and in particular, with reference to Section 18(b), that the words of the sub-section bear a curious resemblance to some of the phrases that have fallen from Judges in Australia who have decided Abuse of process cases.

Indeed, the extradition cases must now been seen, like the entrapment cases, as but one facet of the genus "Abuse of Process".

It is my submission that the Service and Execution of Process Act merely enshrines in statutory form one aspect of abuse of process that would otherwise exist at Common law in any event.

Similarly, the exclusionary rules relating to confessions can also now be seen as but one branch of Abuse of Process.

In essence, the reason why confessions are excluded in the exercise of the Judge's discretion or orders, preventing extradition are made under the Service and Execution of Process Act, amounts to no more and no less than a finding that there has been in effect an Abuse of Process of either the investigatory phase or the prosecutorial phase before the Court.

The same reasoning applies (as will be shown later) to entrapment situations, destruction of exhibits and the like.

WHAT IS ABUSE OF PROCESS?

The touchstone of abuse of process appears to be the perceived unfairness or oppression, either intentional or non-intentional, caused to the defendant.

As His Honour, Cox J., stated in THE QUEEN v. VUCKOV AND ROMEO 40 S.A.S.R. 498 at Page 521 the cases :-

> "..... show on the whole a cautious but steady development in recent years of the use of a stay of proceedings on the criminal side as a remedy against prosecutorial oppression in a variety of situations. They are not all concerned with the manner of a man's trial, but extend to the question of whether he should be tried at all. There can be no set categories of cases that call for the exercise of this drastic but necessary power. If it may be used where the police have acted illegally to get the defendant before the court, (e.g. HARTLEY (1978) 2 N.Z.L.R. 199 and BOW STREET MAGISTRATES (1981) 75 Cr. App. Rep. 25), it does not appear reasonable to reject its use in all other cases of serious police oppression."

His Honour then went on to hold (Page 522) :-

> "..... there seems to me to be no good reason in principle for denying the power's application to an entrapment case in which ..... the Trial Judge may properly exclude the prosecution evidence on discretionary grounds and so effectively bring the case to an end.
>
> For these reasons, I am of the opinion that the Court has pwoer to order a stay on public policy grounds of the kind formulated in BUNNING v. CROSS (1978) 141 C.L.R. 54, where the evidence shows it would be unfair to the defendant or an affront to the public conscience to permit the prosecution to proceed."

From the above, it will be seen that Justice Cox is, by his Judgment, allowing abuse of process as a separate and distinct consideration standing alongside of the judicial discretion to exclude real evidence or confessional material.

In this regard, it would appear to be another gorund that should be added to the criteria set out in BUNNING v. CROSS and in CLELAND v. R. (1982) 151 C.L.R. 1.

If evidence obtained by entrapment can be excluded on public policy considerations and the trial stopped or stayed as an abuse of the processes of the court, then it must follow that not only an entrapment situation will result in this course, but also illegal or unlawful police activities of any sort, e.g., those which commonly arise and have arisen in the past in the many cases dealing with the admissibility of confessional materials.

This seems to be yet another extension of the doctrine of abuse of process into areas formerly regarded as sacrosanct. In one sense, therefore, the admissibility of confessions and the propriety of extradition both may be seen as different facets of abuse of process.

A good summary of the principles relating to Abuse of Process is set out in the recent Judgment of Justice Olsson in R. v. GAGLIARDI AND FILIPPIDIS Unreported Judgment Supreme Court of South Australia delivered 1st July, 1987. His Honour said (Page 25) :-

"They may, in my opinion, be summarised in this fashion :-

1. The inherent power of the Court to stay proceedings in the Criminal Jurisdiction is a remedy against prosecutorial oppression. It is not concerned with the manner of a person's trial, but is concerned with the question whether that person should be tried at all. There are no set categories of case. Whilst instances of the exercise of the power will be rare, it will certainly be invoked where the evidence indicates that it would be unacceptably oppressive or unfair to an accused or an affront to the public conscience to permit the prosecution to proceed (THE QUEEN v. VUCKOV AND ROMEO (at Pages 521-2), WHITBREAD AND OTHERS v. COOKE Unreported Judgment of Maxwell J., 9th December, 1986 (Page 50).

2. In considering the exercise of the power, the court is required to conduct a balancing exercise. There must be a weighing up of the relevant interests which are at stake - on the one hand, the accused's right to a fair trial and not to be the victim of unreasonable oppression, and on the other hand, the interests of the Crown in bringing an accused person to trial on a serious

charge (BARTON AND ANOTHER v. THE QUEEN AND ANOTHER (180) 147 C.L.R. 75 at Page 102). Nevertheless, in general, once the Court is satisfied that proceedings constitute an abuse of process, it will usually be unthinkable to continue, because that would mean that the Court was prepared to permit and endorse its process being employed to inflict oppression and unfairness on an accused (see WHITBREAD'S case, Page 51).

3. There are two potential, but distinct and different, facets to be considered. Can there, in all of the circumstances, now be a fair trial of the accused" (HERON v. McGREGOR AND OTHERS Unreported Decision of New South Wales Court of Appeal 12th September, 1986. See also THE QUEEN v. CLARKSON Unreported C.C.A. Supreme Court of victoria 12th May, 1987). In any event, would the continuance of the criminal proceedings against an accused, in all of the circumstances, be so oppressive as to constitute an affront to the public conscience? (MOEVAO v. DEPARTMENT OF LABOUR (1981) N.Z.L.R. 464, REGINA v. JEWITT (1985) 20 D.L.R. 651)."

The cases make it clear that the mere decision to prosecute cannot, as yet, be reviewed as part of an Abuse of Process but the Courts have come close to including, in effect, a review of the decision to prosecute as one of the factors to be looked at in deciding whether or not Abuse of Process has been made out.

Certainly, if the effect of the decision to prosecute is to result in the institution of proceedings which, by the manner in which they are prosecuted, or the proceedings of their very type and nature are oppressive, then the Courts have been quick to find that the decision to prosecute, coupled with the proceedings, results in Abuse of Process.

HISTORY

Whilst judicial pronouncements prior to MILLER v. RYAN and BARTON'S case are rare, they are not entirely lacking.

Two old cases which demonstrate that abuse of process has deep historical roots in Australia are BROWN v. LIZARS (1905) 2 C.L.R. 837. Here, a constable purported to arrest the plaintiff with respect to an offence allegedly committed in South Africa. Apparently, the constable had the suspicion that the plaintiff had committed a felony in the British Colony of Natal. He did not purport to act under any warrant or, indeed, under any Act. Griffiths, C.J., referred (Page 851) to the fact that :-

> "..... It is impossible to hold that the liberty of individuals can now be interfered with without the sanction of municipal law."

And at Page 852 :-

> "In the modern Authorities, it is suggested even that the powers of extradition either to a foreign country or to a British possession cannot be exercised except in accordance with the law which describes in detail the precautions to be taken to prevent unwarrantable interference with individual liberties. In my opinion, extradition cannot be had in the one case or in the other without complying with the forms described by those statutes."

In other words, inferentially, His Honour was holding that to purport to arrest someone but not in accordance with the figures laid down by the Extradition Acts, amounts to an Abuse of process.

His Honour then dealt with the claim by the defendant in BROWN v. LIZARS (which was a civil action brought by the plaintiff against the defendant for wrongful arrest) that the defendant was justified in arresting the plaintiff because the defendant reasonably suspected that the plaintiff had committed an offence. Griffiths C.J. said (Page 852) :-

> "But, even if that proposition were true, it would by no means follow that any constable could set the law in motion - that this great prerogative power, supposed to be an incident of sovereignty to be put in motion by any constable who thought he knew the law of a foreign country, and thought it desirable that a person whom he suspected of having offended against that law should be surrendered to that country to be punished. There is therefore no authority in support of the defence setup in answer to the plaintiff's claim."

Again, in South Australia in 1924, Justice Napier as he then was, in the case of TUCKER v. NOBLETT (1924) S.A.S.R. 326 Abuse of Process was referred to. In this case, it was argued that although the complaint was for but one offence, on the evidence led, two offences were shown. As to that aspect, Napier, J., said (Page 340) :-

> "It may be possible that a case could occur in which the complaint is good, but where evidence is admitted which gives rise to duplicity or uncertainty and where there is some grave embarrassment or prejudice of such a character that it cannot be fairly met by any adjournment; if that should happen and the prosecutor should refuse to elect, I think that the Court must have some inherent power to secure a fair trial and to prevent an abuse of process. If all other means fail, the inherent power may extend so far as to justify dismissal of the complaint."

The third case I wish to refer to is that of R. v. O'LOUGHLIN EX PARTE RALPHS (1971) 1 S.A.S.R. 219, which appears to be the first Supreme Court report of authority in Australia to have dealt with CONNELLY v. D.P.P. (1964) A.C. 1254 in any great detail. Bray C.J. said at Page 228 :-

> "The existence of a general discretion in every court to prevent abuse of process was affirmed by Lord Selbourne and Lord Blackburn in METROPOLITAN BANK LIMITED v. POOLEY (1855) 10 A.C. 210 at Page 214 and Page 240, in passages cited by Lord Pearce in CONNELLY'S case (1964) A.C. 1254 at Page 1361. The existence of a particular discretion in a Judge to stop a second prosecution in appropriate circumstances was affirmed by Lord Alverstone C.J. in R. v. MILES (1889) 3 Cr. App. Rep. 13 at 15 and by Lord Redding C.J. in BARRON'S case (1914) 2 K.B. 570 at Page 575, and it was mentioned with special reference to the power of the Court of Summary Jurisdiction in this State in such a case to dismiss a Complaint by Napier J., as he then was, in TUCKER v. NOBLETT (1924) S.A.S.R. 326 at 340 and by the same Learned Judge as Chief Justice in R. v. DE KUYPER (1948) S.A.S.R. 108 at Page 122. It was emphatically affirmed by Lord Devlin in CONNELLY'S case (1964) A.C. 1254 at Page 1352 and also by Lord pearce at pages 1364 and 1365."

From the foregoing, it will be obvious that there is at least a history going back almost to Federation of the recognition of the concept of Abuse of Process in appropriate cases.

DOES THE DOCTRINE OF ABUSE OF PROCESS APPLY TO MAGISTRATES COURTS AND COURTS OF SUMMARY JURISDICTION?

There has, for some years, been a divergence of views as to whether or not a Magistrate can stop the hearing before him as an Abuse of process or order an indefinite stay of proceedings on the same ground.

The position is further complicated by the fact that a Magistrate sits judicially when hearing summary trials and administratively when hearing committals and/or trials which may at the option of the defendant become summary trials but which up to the closing of the prosecution case can be either committals or later, summary trials.

The position now seems to be beyond doubt that a Magistrate whether acting administratively or judicially, that is, either acting in the course of a summary hearing or a committal hearing does have power to stop the trial and/or indefinitely stay the proceedings if he finds that there is an Abuse of process of his court.

Moreover, there appears to be general supervisory power exercisable by a superior court to direct courts of summary jurisdiction from proceedings in respect of matters where an abuse of process has occurred - see HERON v. McGREGOR.

The existence of the Magistrates Court to stop or stay a trial even though the trial was merely in the nature of a committal hearing, was accepted (but not argued in

EMANUEL v. CAHILL (1987) 71 A.L.R. 302 and HOLMDEN v. BITAR (Unreported Supreme Court of South Australia Cox J., 7th August, 1987). In MILLER v. RYAN (1980) N.S.W.L.R. 93 Rath J., held at page 109 :-

> "I think that the cases I have referred to establish the proposition that every Court has the right, in its discretion, to decline to hear proceedings on the grounds they are an abuse of the processes of the court; see MILLS v. COOPER (1967) 2 Q.B. 459, D.P.P. v. HUMPHRIES where Lord Salmon quotes with approval Lord Parker's words in MILLS v. COOPER. See also per Lord Edmund-Davies. Where a prosecution is oppressive and vexatious, it is an abuse of the process of the Court; D.P.P. v. HUMPHRIES. The discretion extends to every court and will include a Magistrate hearing committal proceedings because, although such an enquiry is not a judicial proceedings; AMMANN v. WEGENER (1972) 129 C.L.R. 415 per Gibbs J., at 436, it is part of the procedure of the courts of law for the enforcement of the criminal law; AMMANN v. WEGENER per Barwick C.J., Gibbs J., and per Mason J. I am therefore of the opinion that the Magistrate did have the power to stay proceedings on the first charges in this case on the ground, if he found it established, that their continuation was an abuse of the process of the court."

As to a Magistrates Court hearing of a summary trial, it would appear that a Special Magistrate has inherent jurisdiction to ensure the orderly running of his Court and that jurisdiction includes the jurisdiction to prevent abuses and to do a number of other things which are ancillary to the smooth running of the Court including the pwoer to stay proceedings.

This is in no way different from the other inherent jurisdictions from time to time a Magistrate may undertake, e.g., the power to order costs on adjournments or the power

to order the payment of costs on subpoenas. For examples of this jurisdiction, see DARCY v. PRE-TERM FOUNDATION CLINIC (1983) 2 N.S.W.L.R. 497.

The inherent jurisdiction of a court is a power "which a court has simply because it is a court of a particular description, it is not something derived by implication from statutory provisions concerning particular jurisdiction" per Menzies J., in R. v. FORBES EX PARTE BEVEN (1972) 12 D.L.R. 1 7 (HC) - a Canadian Authority.

Notwithstanding that a Magistrate sitting as a committing Magistrate is acting in a ministerial or administrative capacity, it is clear that the presiding Magistrate still has a duty to act judicially even though it be in an administrative or ministerial capacity. AMMANN v. WEGENER AND ANOTHER (1972) 129 C.L.R. 415 at page 435 makes this clear.

See also SANKEY v. WHITLAM (1978) 142 C.L.R. 1 per Justice Mason (as he then was) at Page 83.

As Gibbs J., observed in AMMANN v. WEGENER :-

> "It does not necessarily follow that because a Magistrate is not exercising judicial function he cannot be said to sit as a Court" (Page 436)

Therefore, notwithstanding that a committing Magistrate sits as a court, albeit carrying out an administrative function, at least until the end of finding a case to answer he is able to indeed obliged by law to run his

court so as to prevent Abuses of the Processes of the court.

The English Authorities, moreover, make it cleaer that abuse of process considerations do apply to all facets of a Magistrate's work whether sitting as a committing Magistrate or as a first and final court.

Whilst the earlier Authorities raise doubt about the power of the Magistrate, the matter seems to have been put beyond doubt (at least in England) by the case of R. v. CANTERBURY AND ST. AUGUSTINE JUSTICES EX PARTE TURNER 147 J.P. Rep. 193. Here, there were committal proceedings and an argument was put forward that an abuse of process had occurred, the Justices however decided that no abuse of processes of the Court, and being satisfied that there was a case to answer, committed the applicant for trial.

The Queen's Bench Division consisting of two Judges, held that even examining Justices had power to control and prevent abuse of their process by declining jurisdiction in appropriate cases.

The Court said :-

> "That there could be very extreme cases with delays by the prosecution in commencing proceedings which could of itself constitute an abuse of the court process."

I should also point out that at Page 199 of the Report, Justice McNeill said :-

> "It seems to me that the power to exercise a discretion for jurisdiction to decline to hear proceedings on the ground of abuse of process is even more limited where the Justices are sitting as examining Magistrates and not dealing with the case of final determination."

What is clear from the Report, however, is that the court accepted that there was inherent authority in the Justices to stop or stay cases on the ground of abuse of process notwithstanding that these were committal proceedings.

THE EXTRADITION CASES

DELAY AND BREACH OF AGREEMENT

Section 18(6) of the Service and Execution and Process Act has long been a Section which, by its very wording, what is in effect an abuse of process argument.

Section 18(6)(c) is as follows :-

> "6. If, on the application of the person apprehended, it appears to the Magistrate or Justices of the Peace before whom a person is brought under this Section that :-
> (a) the charge is of a trivial nature;
> (b) the application for the return of the person has not been made in good faith in the interests of justice; or
> (c) for any reason, it would be unjust or oppressive to return the person either at all or until the expiration of a certain period the Magistrate or Justice of the Peace may
> (d) or to the discharge of the person;
> (e) order that the person be returned after the expiration of the period specified in the order and order his release on bail until the expiration of that period; or
> (f) make such other order as he thinks just.

From the foregoing it will be seen that under Sub-Section 6(b) and Sub-Section 6(c) considerations not dissimilar from the mainstream of cases on Abuse of Process are required by the Statute to be considered if raised on an application for extradition.

The line of Authorities under the extradition law has only recently been recognised as representing but another facet of the general doctrine of Abuse of process, e.g., see the dissenting Judgment of Justice Olsson in PERRY v. LEAN AND FRY (1985) 39 S.A.S.R. at Page 531 et seq.

In PERRY'S case, the Victorian government sought to extradite Mrs. Perry for the alleged murder by poisoning her former husband  years ago. They waited until she successfully appealed to the High Court her conviction of attempted murder of her current husband and until the South Australian authorities had officially stated they were not going to charge her with any further offences in South Australia.

It was clear that the Victorian decision to proceed, representing an about-face  years later, had been initiated by relatives of the deceased , incensed at the prospect of mrs. Perry (in their eyes) getting off "scott free".

Olson J., vigorously attached the extradition stating that it would be impossible for Mrs. perry to have a fair trial after so many years. He referred in particular to media publicity, death of witnesses and probable inability of Mrs. Perry now to find witnesses to rebut the Crown accusations.

Indeed, Justice Olsson was also a member of the Full Court in CLAYTON v. RALPHS AND MANOS Unreported Judgment

of the Supreme Court of South Australia Court of Appeal delivered 16th June, 1987 and at Page 33 of his Judgment (again dissenting) His Honour says :-

> "The same aspect was adverted to by McHugh J.A., in HERON'S case when having discussed the types of problems also identified by me in PERRY v. LEAN AND FRY 39 S.A.S.R. 515 at page 539 he commented "..... His Honour was here dealing with the well known fact that with the passage of time memories of witnesses are likely to be less certain and that that is one of the inevitable consequences of great delay".

PERRY v. LEANE AND FRY whilst unsuccessful, in that the order for the extradition of Mrs. Perry was confirmed, did highlight the adverse effect of delay and the difficulty that a person would be able to obtain a fair trial as a result of the passage of time.

There were two earlier cases in which extradition from State to State was successfully resisted, both of which are referred to in the Judgments of PERRY v. LEANE and provide striking illustrations of the similarities between the criteria under which it is necessary to establish a case under Section 18(6) and the general doctrine of Abuse of Process. Those cases are WHITE v. CASSIDY (1979) 40 F.L.R. 249 and CARMODY v. HINTON (1980) 23 S.A.S.R. 409.

WHITE v. CASSIDY was a case involving delay. The delay was of some eight years. The consequences flowing from the delay were comounded by the fact that there had been no attempt to arrest the applicant upon his release from gaol in New South Wales. He was, in fact, allowed to return to Tasmania and resume his family ties and to also set himself up in a job.

By the very conduct and dilatoriness of the New South Wales authorities, he was led to believe and was justified in believing that there would be no attempt to extradite him. In essence, therefore, WHITE v. CASSIDY is one of the delay cases and although the delay was with reference to charging and attempting to proceed with extradition the consequences of the delay are in no way different from some of the delays that may occur from the date of commission of the offence to laying of the charge or from the date of laying the charge to the bringing of the defendants to trial.

In all such cases, it is submitted that if the defendant is able to show that it would be unjust and oppressive for the trial to proceed either because of the delay and/or the consequences flowing from the delay then the proceedings should be stayed or the extradition should not take place because in effect it amounts to an Abuse of Process.

The second case of CARMODY v. HINTON, whilst, again, there was some element of delay, the principal ground relied upon by the Magistrate was an apparent change of mind on the part of the New South Wales authorities. As the Magistrate said (Page 413 of the Judgment of Williams A.J.) :-

> "Once having publicised their election not to extradite, it seems to me that it is oppressive that they should change their minds and seek to extradite. The longer it is since the initial election to the change of mind the more oppressive it becomes. The principle remains that people who commit crimes in another State, and, a fortiori who escape illegally from institutions interstate should be extradited upon being located. If the authorities in that State express the wish not to extradite, then it may well be oppressive for them to subsequently change their minds ....".

It is submitted, just as it may in certain circumstances be oppressive for a change of mind on the part of the prosecuting authorities to take place with reference to extradition, so it would be similarly oppressive in the particular circumstances of some cases for authorities to change their minds with reference to the decision to prosecute.

This is a matter which is currently under consideration by a Supreme Court Judge in South Australia in an application by way of Notice of Motion before the Judge in the Criminal Jurisdiction in the matter of R. v. CLAYTON AND CAWLEY (the Dr. Duncan drowning case).

In this case, the decision not to prosecute was made within 12 months of the evidence being amassed and assessed. 15 years later, with very little change in circumstances except that one of the Crown witnesses had gone back on his story, the prosecuting authorities decided to change their decision to prosecute and forthwith prosecuted the three men who had always been under consideration as potential offenders.

As Acting Justice Williams said in CARMODY and HINTON at Page 415 :-

> "Indeed, the crux of his decision not to order extradition was the effect on the respondent of the unequivocal decision not to extradite, coupled with the long delay in reversing that decision."

As will be seen later, one of the headings under which successful applications for stay of proceedings have been made has been the "breach of a bargain" cases where

agreement has been reached between prosecution and defence but the Crown have apparently gone back on the bargain. This is analogous to situations where the Crown has allowed someone to continue their life on the understanding they will not be prosecuted then unilaterally has decided to prosecute.

I cannot leave the Australia Authorities on extradition under Section 18 of the Service and Execution of Process Act without referring to some of the English Authorities. These are (in the case of the early cases) under the FUGITIVE OFFENDERS ACT OF 1881 or, subsequently, under the United Kingdom FUGITIVE OFFENDERS ACT OF 1967.

It should be noted that these two Acts contain quite different provisions; in the Fugitive Offenders Act 1881 Section 10 provides :- "Where it is made to appear to a superior court that by reason of the trivial nature of the case, or by reason of the application for the return of the fugitive not being made in good faith in the interests of justice or otherwise, it would, having regard to all the circumstances of the case, be unjust or oppressive or too severe a punishment to return the fugitive ..... such court may discharge the fugitive".

For an example of the application of this Section, see R. v. GOVERNOR OF BRIXTON PRISON: EX PARTE NARANGAN SINGH (1962) 1 Q.B. 211. The offences took place in 1951, the applicant left India in 1952 and in 1961 he was arrested in London on the charges and the attempt to extradite him to India made.

On the basis that he was not responsible for the delay and on the basis that in the intervening period he had set up a business and started a new life in England, the Court held that the delay was of such a nature and the consequences of the delay were of such a nature that it was unjust and oppressive to return him.

The 1967 Fugitive Offenders Act by Section 8(3) provides (inter alia) that the Court may "order the person permitted to be discharged from custody if it appears to the Court that (a) by reason of the trivial nature of the offence with which he was accused or was convicted or (b) by reason of the passage of time since he is alleged to have committed it or to have become unlawfully at large as the case may be or (c) because the accusation against him is not made in good faith in the interests of justice, it would, having regard to all of the circumstances be unjust or oppressive to return him".

It will be seen that the main difference between the 1881 and the 1967 Acts with the omission of the words "or otherwise" from Section 8(3) of the 1967 Act so that under placitum (c) of the 1967 Act the Court was restricted to considerations of "good faith" or "interests of justice".

Nevertheless, the English Courts have, on occasions, because of delay or because of other considerations, declined to order the extradition of fugitives to other countries.

Two examples are R. v. GOVERNOR OF BRIXTON PRISON: EX PARTE COOKE (1970) 6 Sol. Jo. 827 (a delay case) described by Lord Parker C.J., as a "borderline case", but nonetheless one where the application for Writ of Habeaus Corpus was successful. Yet another example is the wellknown case of KAKIS v. THE GOVERNMENT OF CYPRUS (1978) 1 W.L.R. 779.

In 1973 a warrant was issued for the arrest of Kakis in respect of the death of a Mr. Photiou. Kakis escaped to the mountains, was in hiding for 15 months, and then took part in a coup which ousted the Makarios Government.

In September, 1974 he left Cyprus and went to settle in England, having been given permission by the new Government. He returned to settle up his affairs in 1975 because he believed than an amnesty had been granted to him and after remaining for some months in Cyprus, he was again permitted to leave.

Later, the Government of Cyprus reversed its policy of not prosecuting, rejected the amnesty, and in 1976 it was decided to take extradition proceedings against Kakis.

Kakis' claim was based on delay and the effects of the alteration to his lifestyle that had come about by virtue of his reliance on the actions of the Government of Cyprus. Moreover, he gave evidence that witnesses who would support his alibi would not be able or would not be prepared to travel to Cyprus to testify at his trial now, because of fear of illtreatment or arrest.

The House of Lords held that by reason of the passage of time, it would be unjust or oppressive to return Mr. Kakis since it would detract significantly from the fairness of his trial if he was deprived of the evidence supporting his alibi. It is instructive to refer to the Judgment of Lord Scarman at Page 790 of the report (Page 790(c)) :-

> "The oppressiveness in returning him for trial would arise because during the years that have elapsed since the end of July, 1974, events have conspired to induce in Mr. Kakis a sense of security from prosecution. Yet during these years he has not led the life of a fugitive from justice. On the contrary, he settled in this country openly and - as it must have appeared to him - with the of or at the very least without objection by, the assent authorities in Cyprus. ... The loss of his compellable witness and the buildup of his sense of security both result in the passage of time ..... It is not permissible, in my judgment, to consider the passage of time divorced from the course of events which it allows to develop. For the purposes of this jurisdiction, time is not an obstruction , but the necessary cradle of events, the impact of which upon the applicant has to be assessed".

It is my submission that similar considerations apply when looking at the delay between commission of offence and date of trial in considering Abuse of process generally.

Finally, under this section, an interesting case demonstrating the interaction between extradition and abuse of process is the New Zealand case of R. v. HARTLEY (1978) 2 N.Z.L.R. 199. In this case, Hartley was a member of the Hells Angel Motor Cycle Gang and he took part in a raid upon a house believed to be occupied by members of a rival gang. One such occupant was killed and the members of the Hells Angels Gang dispersed. One of those members (a man called Bennett) went to Australia. Hartley was charged with murder and 11 others (including Bennett were also charged). Bennett appealed on two grounds after being convicted of manslaughter; firstly, that the Court had no jurisdiction to try him because he had been illegally brought back to New Zealand and secondly, that some of the confessional material had been obtained in breach of the Judge's Rules, all because of the illegality in bringing him back to New Zealand.

As emerges from the Report, rather draconian measures were used to deport Bennett from Australia. The method and manner adopted by the police to remove him from Australia and have him returned to New Zealand are referred to at page 214 of the Report.

It appears that the Melbourne Police took him in custody to the airport and bundled him onto a plane which was flying direct to New Zealand and then informed the New Zealand Police of his arrival. There was therefore absolutely no

extradition process under the Fugitive Offenders Act or any New Zealand equivalent thereof and needless to say his return to New Zealand was welcomed by the New Zealand Police with open arms.

The Supreme Court of New Zealand however, when faced with the submission that the return of Bennett to New Zealand constituted illegality and as such they should decline to hear the charge against Bennett because the whole charge savoured as an abuse of process held at Page 216 :-

> "..... In our opinion there can be no possible question here of the court turning a blind eye to the actions of the New Zealand Police which has deliberately ignored those imperative requirements of statute (relating to extradition). Some may say that in the present case a New Zealand citizen attempted to avoid a criminal responsibility by leaving the country; that his subsequent conviction has demonstrated the(attuity)of the shortcut adopted by the Police to have him brought back. But this must never become an area where it would be sufficient to consider that the end has justified the means. The issues raised by this affair are basic to the whole concept of freedom in society."

And further at Page 219 :-

> "When to the breaches of the Judge's Rules is added the fact that the man had been brought back from Australia in a fashion described, we are in no doubt that in terms of justice and fairness the admissions so obtained should not have been used against him. Without them the Prosecution had no sufficient evidence against him. It follows that on this second ground his appeal must be allowed and his conviction quashed, irrespective of the matters we have discussed under the first ground."

In essence, the Court held that although the continuation of the proceedings against Bennett amounted to an abuse of process there was no need to decide that point since the evidence could be excluded on other more substantive grounds.

The extradition cases can be used to demonstrate in a practical way some of the actual prejudice and oppression that is often caused by delay or by prosecutorial or investigatorial impropriety.

CIRCUMSTANCES IN WHICH A PROSECUTION MAY BE STAYED AS AN ABUSE OF PROCESS.

I do not propose to adopt the categories set out by Rosemary Pattenden in her article "The Power of the Courts to Stay a Criminal Prosecution" (1985) Crim. Law Review 175, but rather, to segregate into a number of categories the various decided cases.

1. ENTRAPMENT

As far as can be ascertained in Australia R. v. VUCKOV AND ROMEO is the sole authority holding that in an entrapment situation the doctrine of abuse of process applies. In that case, Cox J., after reviewing the authorities, asks this question: "It is pertinent to ask, before going any further, whether there is anything to be gained by applying the principles of abuse of process to an entrapment case if much the same result can be achieved simply by excluding objectional evidence from the trial on the ground that it was improperly obtained. In my view there is".
He answers this question at Page 518 after reviewing the Canadian Authorities :-
"To allow the courts to be used to pursue a prosecution founded on official incitement would bring the administration of justice into dispute."
He then said (Page 518) that a stay will then prevent any verdict being required on a general issue." Presumably if the Jury rejects a defence

of entrapment will simply find the accused guilty of the offence charged against him. A stay of proceedings appears to me to be in principle a more satisfactory way of dealing with the general problem at least in the general run of cases, than simply excluding the evidence that having been unlawfully or unfairly obtained. None of this, as it seems to me, is inconsistent with the Judgments of the majority of the High Court in BARTON v. R. (1981) 147 C.L.R. 75."

Those interested in entrapment and abuse of process should also read R. v. DUGAN (1984) 2 N.S.W.L.R. 554

2. DESTRUCTION OF EXHIBITS SO THEY ARE NO LONGER AVAILABLE FOR THE DEFENCE

Under this heading there are two cases worthy of note. The first is R. v. LORD AND FRASER (1983) Crim. Law Review 191, where in consequence of the delay between arrest and trial the exhibits deteriorated. In this case, it was conceded by the Crown that any attempts by the defendant's consulting engineers to examine compressors, the subject of the charge, shortly before trial, would have been valueless in "view of the deterioration and the time which had passed".

It was held that in relation to those counts in which the examination of the exhibits was crucial, that these charges should be stayed on the basis

that there was real oppression to the defendant and that to continue would amount to an abuse of process of the proceedings of the court. As the Court said :-

> "..... In determining whether the state of affairs is oppressive to a defendant the intentions or motives of those responsible for the prosecution were irrelevant since a combination of circumstances can arise entirely innocently but as a result of which it would be oppressive to permit proceedings to be continued. In any event, the Crown had here been negligent in their handling and treatment of the exhibits."

Holmden v Ritau (see p. 13)
27 A.C.R 255

NON-EXISTENT COMMITTAL HEARINGS

There are a number of cases that deal with the failure to hold a committal hearing. I shall refer to two in particular.

The first is BARTON v. R. (1980) 147 C.L.R. 75; as is well known, the Bartons and Mr. L. Gruzman Q.C. were charged on ex officio Information with (inter alia) conspiracy to cheat and defraud Bounty Oil Limited.

The Bartons applied by Notice of Motion in the Supreme Court of New South Wales (Common Law Division) seeking (inter alia) an order that the ex officio indictment be quashed or the proceedings thereupon be stayed. By slow degrees, the matter eventually came before the High Court and the past and present Chief Justices of the High Court delivered a joint Judgment in which they examined the role and importance of the committal hearing.

As they say in their joint Judgment at Page 95 :-

> "It is one thing to say that the filing of an ex officio indictment is not examinable by the Court; it is quite another thing to say the courts are powerless to prevent an abuse of process or the prosecution of a criminal proceedings in a manner which will result in a trial which is unfair when judged by reference to accepted standards of justice."

They continued and said :-

> "The courts exercise no control over the Attorney General's decision to commence criminal proceedings, but once he does so, the court will control those proceedings so as to ensure that the accused receives a fair trial."

There are other passages in their joint Judgment emphasising that the necessity for an accused person to receive a fair trial and of the court's inherent power to stop or stay any proceedings brought against an accused in a manner which may preclude an accused from obtaining a fair trial. The touchstone of their Judgment appears to be "unfairness to the accused" (Page 96).

BARTON'S case has been followed in cases involving defective committal hearings, or lack of them. At present, it represents the leading case in Australia on abuse of process.

Although applied in many cases, only recently has any attempt been made to explain BARTON'S case; see, e.g., BARRON v. ATTORNEY GENERAL FOR THE STATE OF NEW SOUTH WALES AND OTHERS Judgment of the Supreme Court of New South Wales Court of Appeal delivered 18th August, 1987 (Unreported). In BARRON'S case, the Court of appeal consisting of Samuels J.A., Mahoney J.A., and Hunt A.J.A., an ex officio Information was laid and an attempt was made to argue that the absence of committal proceedings per se rendered the trial that was proposed to be conducted an abuse of process.

The New South Wales Court of appeal rejected that argument and whilst recognising that the committal proceedings were an important element in the system of criminal justice, they did not consider that they were bound by the joint Judgment of the former and present Chief Justices of the High Court of Australia.

Rather, the New South Wales Court of Appeal found that the absence of a committal hearing "must be considered as subject to the Attorney general's undoubted right to file an ex officio Indictment notwithstanding that the committing Magistrate had discharged the defendant".

As Samuels J.A., said in the last page of his Judgment :-

> "Why I do not feel bound to apply the test propounded in the joint Judgment at Page 100 that a trial held without antecedent committal proceedings unless justified on strong and powerful grounds must necessarily be considered unfair."

And continued :-

> "I think that the evaluation which is necessary, will require consideration of factors other than the loss of the opportunity to cross-examine to which Stephen J., referred as likely to be the most serious detriment.
>
> It seems to me that in the present case it is for the claimant to show the Attorney General's present intentions to proceed on an ex officio Indictment is likely, in all the circumstances, to deprive him of a fair trial."

BARRON'S case must therefore be seen as reading down some of the wider interpretations which have been placed on the Judgments in BARTON'S case.

See also R v. Hasleth & Hasleth.

## DEFECTIVE COMMITTAL PROCEEDINGS

Other interesting cases where abuses of processes were held to have existed are R. v. CORDELL AND POURQUET (1983) 10 Australian Criminal Reports 475. Here a trial was stayed because it was shown that a committal had taken place during which the accused mistakenly thought they were being represented by a legal aid lawyer who in fact was merely there apparently acting as an observer and not representing specifically the interests of any of the accused.

R. v. NGALKIN (1984) 12 Australian Criminal Reports 29. In this case, Ngalkin was committed for trial on the charge of causing grievous bodily harm after a committal had taken place in the course of which only one eye witness had been called. When the matter came on for trial the defence learnt that there were apparently a further four eye witnesses whom the Crown then proposed to call.

As O'Leary, J., said at Page 36 :-

> "..... If ..... those defects are such that the committal proceedings so far failed to achieve their object so as to deprive the accused of the legitimates and advantages that he was entitled to have from them, then there is a proper case for a stay in proceedings on indictment."

The next case is R. v. SUIGZDINIS AND MAURI (1984) 32 N.T.R. 1. This is another Northern Territory case which arose out of the laying of a large number of charges when the matter came on for trial, a committal having in fact taken place.

The argument proceeded on the basis that the laying of the counts went far beyond the offences in respect of which the applicant admitted at the trial and would therefore be a case in effect of a trial taking place on an ex officio basis at least in respect of many of the charges that the defendants were facing.

As in NCALKIN'S case, BARTON'S case was relied on and Justice Muirhead upheld defence counsel's submission and ordered a stay of proceedings.

The next case is R. v. HARRY EX PARTE EASTWAY (1985) 39 S.A.S.R. 203. In this case, there was a failure of a police prosecutor to tender the statements of possible witnesses and the Magistrate refused to direct that the witnesses be called. In order words, the prosecution wanted to show as little of its hand as possible at the course of the committal relying upon minimal amounts of information in witnesses being called or statements being tendered, presumably in the hope of ambushing the defendant when the trial came on for hearing in a higher court.

I should point out that it was a police prosecutor who was responsible for the conduct of the committal and not a Crown Law Officer.

King C.J. said (Page 211) :-

> "It will be seen from the above citation that the responsibility of prosecuting counsel at the trial would by no means be discharged by calling a minimum number of witnesses required to establish the charge. He would be expected to call all the material witnesses unless there were good reasons of the kind discussed in the cases for not calling any of them. The responsibility of the police prosecutor at the preliminary hearing is not fundamentally different. It is not sufficient for him to call only the minimum evidence required to make out a prima facie case. He is also required, in the absence of sound reasons to the contrary, to call all witnesses whom, in the exercise of his discretionry judgment, he considers to be material irrespective of whether their evidence either strengthens or weakens the case for the prosecution."

His Honour continued and concluded by saying :-

> "But the function and responsibility of the prosecutor at the preliminary is essentially the same as that of prosecuting counsel at the trial." (This passage is cited with approval of R. v. WALDEN (1986) 41 S.A.S.R. 421 at 425-6.

FAILURE OF PROSECUTION TO CALL RELEVANT WITNESSES AT PRELIMINARY HEARING.

In R. v. WALDEN mentioned above, the power to stop or stay proceedings as an abuse of process was recognised by the Court of Criminal Appeal in South Australia yet again. WALDEN'S case concerned the failure of the police prosecutor to call relevant witnesses and although the application was unsuccessful the principle was recognised by the Court that if the police prosecutor failed to call relevant witnesses then in certain extreme cases the proceedings thereafter could be stopped or stayed as an abuse of process of the court.

The court referred to BARTON'S case and to R.v.HARRY EX PARTE EASTWAY (op. cit) and adopted Chief Justice King's statement in R. v. HARRY EX PARTE EASTWAY :-

> "In extreme cases, however, there is an undoubted power to stay the proceedings thereby compelling the prosecution to lay a fresh Information and to proceed to a fresh preliminary hearing; BARTON v. THE QUEEN and THE QUEEN v. CORDELL&TOURQUAY and THE QUEEN v. NGALKIN".

In WALDEN'S case the court annunciated three rules which the court gleaned from the recorded cases. These rules may be summarised as follows :-

1. There is obviously a discretion in the prosecutor with reference to the witnesses he decides to call at the committal. This discretion is not directly revievable by the court but the effects of it may be.
2. The court has conrol over its own decisions and will in appropriate cases stay the proceedings if

it thinks that the prosecutorial discretion has miscarried to the extent that an insufficient committal is taking place and that an injustice is or is likely to be done to the accused.

3. That in deciding whether or not to call witnesses at the preliminary hearing, the prosecutor must not make his decision by reference to tactical considerations. "The observance of traditional considerations of fairness ....." requires far more than that.

INADEQUATE COMMITTAL HEARING FOLLOWED BY EX OFFICIO INFORMATION.

R. v. GAGLIARDI AND FILIPPIDIS Unreported Decision of Justice Olsson in the Supreme Court of South Australia (Criminal Jurisdiction) Delivered 1st July, 1987.

In this case, there was a committal hearing held which resulted in the discharge of the defendants.

Notwithstanding the Magistrates Court's decision, the Crown Law Department by way of ex officio Information indicted the defendant before the Supreme Court.

In ordering a permanent stay of proceedings, Justice Olsson referred to a number of facets which cumulatively made this case one of the most rare cases when a court was obliged to intervene to stop or stay the proceedings.

Some of the factors he adverted to in coming to his conclusion were as follows :-

1. That the gross delays had occurred "almost entirely at the hands of the prosecution" - the delays in effect amounted to in excess of three years from the date of the alleged offence.
2. As an added complication, of the delay, witnesses memories inevitably suffered and memories were less likely to be correct, given the passage of time.
3. It was likely that memories had already been refreshed by material that would probably be held to be inadmissible and that therefore the memories

> of some of the witnesses as presented to the court in the supreme Court are likely to be "contaminated" by inadmissible sources in an irremedial fashion.

His Honour referred to the fact that "the convoluted and long delayed committal proceedings were, in the main, the direct result of an inept presentation of the prosecution case ....." and that "judged by any reasonable standard, the committal proceedings now under review degenerated into an abortive shambles which entirely failed to fulfil the normal purposes of such proceedings" (Page 29).
He also adverted to the financial loss the defendants had suffered, the costs that had been thrown away, and the obvious "abnormal anxiety and disruption to the domestic lives of the accused stemming from what had occurred".

Finally, His Honour concluded his summary of the transgressions of the prosecution by saying :-

> ".... I am driven to the ineluctable conclusion that, so far as the accused are concerned, enough is enough. The totality of the presumptive and obvious actual prejudice and the oppression which necessarily result from a continuance of proceedings upon the ex officio Information, both generally and also keeping in mind some very real residual issues of illegalities and its bearing on the admission of key evidentiary material is such that it would be an affront to the community conscience to subject the accused to them. Any fair minded member of the community would be pardoned for thinking that, the accused having run the gamut of lengthy and expensive committal proceedings and having been discharged, there ought to be compelling reasons either to present them for trial notwithstanding or, alternatively, expose them to a re-run of a fresh committal. Such reasons are not apparent ....."

DELAY

Somtimes it has been said that it is not the fact of delay but the effect of delay which is important.

Obviously, if a long delay can be shown, the case for a stay will be stronger if serious effects of the delay can be proved.

The doctrine of presumptive prejudice, however, makes the task of the counsel for the accused somewhat easier.

As at today, Abuse of Process can be established by mere delay - if sufficiently long and if between the date of the charge being laid and date of the trial.

For recent cases on delay see :-

> JOEL v. MEALEY Yeldham J., Supreme Court of New South Wales 14th April, 1987.
>
> R. v. CLARKSON Crockett, O'Brien and Gobbo, J.J. Supreme Court of Victoria 12th May, 1987.
>
> WATSON v. ATTORNEY GENERAL FOR NEW SOUTH WALES Street C.J., Hope J.A., and Priestly J.A. Supreme Court of New South Wales 29th May, 1987.

In the last case, Priestly J.A. relied, as had McHugh J.A., in HERRON v. McGREGOR (ibid) on the American decision of BARKER v. WINGO 407 U.S. 514 (1971) and used by the Privy Council in BELL v. D.P.P. (ibid).

Priestly J., referred in particular to the four factors identified in these cases as crucial in assessing whether the delay was such that Abuse of Process had been made out.

Those four factors which were originally ennumerated in BARKER v. WINGO but have now been applied in several occasions in Australia, arriving on our shors via Jamaica and England in BELL'S case are :-

(a) The length of the delay.

(b) The reason given for the delay by the prosecutor.

(c) The responsibility of the accused for asserting his rights.

(d) The prejudice to the accused.

(See BELL v. D.P.P. (ibid) at Pages 951-2.)

DELAY

The Constitutional Right to a Prompt Trial

There are a number of cases in which it has been sought to raise the constitutional issue that the reasons of Magna Carta (25 Edward 1) C29 12 97. The first case in which Magna Carta appears to have been referred to as a relevant factor relating to abuse of process issues is the case of R. v. McCONNELL (1985) 2 N.S.W.L.R. 269 at Page 272.

In McCONNELL'S case, it was held that "the whole history of delay in this matter constitutes an infringement of the constitutional rights of the accused to a prompt trial". His Honour then proceeded to state that since the delay was in breach of the constitutional rights of the accused, that rendered the proceedings void and illegal.

He concluded by saying :- "It appears to me, therefore, that I ought to acquit the accused"; then he discharged him.

McCONNELL'S case was referred to with approval in several other cases in New South Wales, principally in WHITBREAD v. COOKE (CAMBRIDGE CREDIT NO. 4), in the Judgment of Maxwell J., at Page 59 where he referred to the fact that R. v. McCONNELL had been followed in another New South Wales case of R. v. CLIMO AND BENTLEY by Heron D.C.J.

In CAMBRIDGE CREDIT however, Maxwell J., held that he was procluded from investigating whether or not there had been a breach of constitutional rights since, in his view, Magna Carta only referred to the question of delay between the arrest and commencement of the action and the hearing.

In CLAYTON'S case, Mr. Justice Olsson (at Page 29 of his Judgment) also referred to Magna Carta, which had been conceded by the Solicitor General as being received law upon the foundation of the Colony of South Australia.

His Honour pointed out that the usual formulation of Chapter 29 of Magna Carta was :- "We will not deny nor defer any man either justice or right".

His Honour referred to the Authorities which establish that the word "defer" has been interpreted as meaning "delay". Olsson J., like other Judges before him, held that if constitutional issue did arise in the case of delay from the time of arrest and trial.

Conversely, no constitutional issue based on Magna Carta arose in respect of delay from the time of commission of offence to the arrest.

From the foregoing, it will be seen that the courts have, in Australia, recognised that Magna Carta does apply and in at least one case (R. v. McCONNELL) the constitutional right for a speedy trial has been specifically recognised

and in other cases the principles of McCONNELL'S case has also been recognised.

It therefore is logical to expect that delay between arrest and hearing will result in the future in applications for the proceedings to be declared void or illegal based on the accused's constitutional right to a speedy trial following upon arrest.

In this regard, reference should also be made to BELL v. D.P.P. OF JAMAICA (1985) 2 All. E.R. 585 where the constitution of Jamaica was examined by the Privy Council and, in essence, the Privy Council acknowledged the concept of presumptive prejudice.

At Page 950 of the Report occurs the following passage :-

> "The longer the delay in any particular case the less likely it is that the accused can still be afforded a fair trial."

They then stated :-

> "The question then is whether in the circumstances of the present case the applicant's rights for a "fair hearing within a reasonable time" has been infringed."

This right given under the constitution of Jamaica to "a fair hearing within a reasonable time" seems to be in no material way different from the rights given to the citizens of Australia under Magna Carta.

In the end, the privy Council held that the Appeal should be allowed and that the appliant was entitled to a declaration that the relevant section of the Jamaican Constitution providing for the right to a fair hearing within a rasonable time had been infringed.

THE DOCTRINE OF PRESUMPTIVE AND ACTUAL PREJUDICE ARISING FROM DELAY.

You will have noticed, that in the course of his Judgment in GAGLIARDI and FILIPPIDIS, Olsson J., refers to presumptive and actual prejudice.

Actual prejudice is obvious, but what is presumptive prejudice?

This term has only recently found its way into Judgments but it has been braced enthusiastically by Judges in more than one State.

The first detailed exposition of presumptive and actual prejudice was by Mr. Justice Maxwell in CAMBRIDGE CREDIT NO.4 (WHITBREAD v. COOKE) Judgment Maxwell, J., Common Law Division, New South Wales Supreme Court, 9th December, 1986.

His Honour said at page 56-57 of his Judgment :-

> "The unfairness and oppression encompassed in these authorities and passages arise because of the prejudice to the accused due to failing memories and lost evidence. IT IS NOT FOR THE ACCUSED TO AFFIRMATIVELY SHOW PREJUDICE. It is recognised that "what has been forgotten can rarely be shown". BARKER v. WINGO 407 U.S. 514 (1971) at 532.

And further at Pages 82 and following of his Judgment he dealt with the distinction between presumptive prejudice and actual prejudice in these terms :-

> "I am satisfied that the only distinction between presumptive prejudice and prejudice demonstrated without the aid of of a presumption, is the means by which the prejudice may be proved. Prejudice established by means of the presumption referred to in the authorities is as real and significant for all purposes of these proceedings as any prejudice can be. Once the plaintiffs have proved facts establishing the period of delay since the dates of overt acts ..... the authorities hold that the

> facts so established will be taken as evidence also of the kinds of prejudice to which the authorities refer, namely, deterioration of memory (of the plaintiffs , their witnesses and witnesses for the prosecution), loss of relevant evidence, prejudice which, even where written records have been kept, cannot be proved affirmatively, the difficulty of gathering evidence and, generally, the substantial risk that a fair trial of the facts is no longer possible.....".

As to this type of prejudice His Honour said (Page 83) :-

> "The presumption of prejudice is based on the inferences which reason and experience of human affairs naturally draw from the proven facts of delay and, also, but not less importantly, on the unreasonableness and impossibility of requiring persons who find themselves in the position of the plaintiffs to prove positively what prejudice has resulted from delay."

Presumptive prejudice was referred to in South Australia by Olsson J., in CLAYTON v. RALPHS AND MANOS Judgment of the South Australian Court of Appeal 16th June, 1987 and in similar terms although not by utilising identical language in PERRY v. LEANE.

SUMMARY OF PRINCIPLES WHICH CAN BE EXTRACTED FROM AUTHORITIES RE DELAY

1. A delay may constitute an infringement of a person's constitutional right to a prompt hearing; see R. v. McCONNELL (1985) 2 N.S.W.L.R. 270.

2. An abuse of process can be constituted by :-

   (a) Where in addition to delay there is an element of mala fides on the part of the prosecutor sufficient to justify the description of the proceedings as vexatious or an abuse of the process of the court.

   (b) Mere delay, prolonged to such a degree where it can be truly described as oppressive, vexatious or harassing; R. v. McCONNELL (ibid).

3. An abuse of process can be constituted by, not only a delay between arrest (or the commencement of an action) and the hearing but also by delay in the bringing of proceedings; GILL v. McGREGOR AND OTHERS (unreported Judgment of the N.S.W. Court of Appeal 12 September, 1986).

4. A long delay in bringing proceedings by itself is not necessarily enough to render proceedings an abuse of process. However, the circumstances of a case may make the delay so oppressive as to amount to an abuse of process; GILL v. McGREGOR AND OTHERS (ibid).

5. In determining whether a delay requires the intervention of the court, regard may be had (inter alia) to :-

(a) the length of the delay;

(b) the reasons given by the prosecution for the delay;

(c) the responsibility of the accused for asserting his rights;

(d) prejudice to the accused including the impairment of his defence; BELL v. D.P.P. OF JAMAICA (1985) I.A.C. 937.

6. In considering whther a stay should be granted on the basis of delay the interests of the community must be taken into account. Justice is not confined to the position of the accused alone; RE ARNOLD AND OTHERS (1977) N.Z.L.R. 327 at 336.

OTHER EXAMPLES OF ACTION ON THE PART OF THE PROSECUTION IN WHICH ABUSE OF PROCESS WAS RAISED

Apart from the cases on delay and the consequences of such delay, there remain a number of cases where criticism has been made of the prosecution.

(a) The failure of the prosecution to provide the names of witnesses before a summary trial in the Magistrates Court; ADAMS v. ANTHONY BRYANT (1986) 67 A.L.R. 616.

(b) The failure of the prosecution to provide copies of tape recordings of the accused and transcripts of such tapes; EMANUEL v. CAHILL (1987) 71 A.L.R. 302.

(c) The employment of tactics designed to prevent the defendant securing a trial before a Magistrate in a situation where either a Magistrate could deal with the charge or send it up to a higher Court; EMANUAL v. CAHILL (ibid).

(d) The prosecution going back on a deal or agreement either express or implied with the accused; R.v. GEORGIADIS (1984) V.R. 1030. See also R. v. MILNES AND GREEN (1983) 33 S.A.S.R. 211 per Cox J., at Pages 24-7 and CARMODY v. HINTON (ibid).

(e) Duplicitous proceedings - the prosecution proceeding on two sets of different charges using much of the same factual basis and evidence; MILLER v. RYAN (ibid).

(f) The filing of a nolle prosequi when the accused should have received a verdict of not guilty from the Jury was held to amount to an abuse of process in R. v. SAUNDERS (1983) 2 Qd.R. 270.

(g) Repeatedly putting the defendant on trial for the same offence following abortive trials or successful appeals by the accused to the Court of Criminal Appeal; R. v. DONALD (1983) 34 S.A.S.R. 10.

## CONCLUSION

Abuse of Process is indeed becoming a growth industry as instances of prosecutorial oppression or unfairness are recognised. Courts in Australia appear to be more ready to control the proceedings in their courts to prevent or stop anything savouring of unfairness or oppression to an accused.

The criteria for their exercise of discretion may not have changed, but the threshhold level at which they will exercise their undoubted powers to stop or stay proceedings as an abuse seems to (with certain exceptions) require less evidence of unfairness or oppression as the body of case law grows in Australia.

Circumstances in which it would have been unthinkable for the trial to be stopped or stayed a few short years ago have now suffered a reversal; now it would be unthinkable if the trial were to proceed.

Whilst particular Judges are of course more likely to respond to claims of unfairness and oppression there is a growing body of Judges that have set their face sternly against any short cuts in unfairness on the part of the prosecution.

Some of those Judges have, in the past, fulfilled high offices in the prosecutiondepartments of particular States of the Commonwealth.

Faced with Judges who are not prepared to accept anything less than a fair and high standard of prosecution, prosecutors have learnt to their cost that they cannot shelter behind the inability of the accused to prove as a positive fact that a particular act or omission on the part of the prosecutor will seriously affect the fairness of the trial.

The doctrine of presumptive prejudice that quite properly has been relied upon by the New South Wales and South Australian Judges (so far) has meant that an accused need not demonstrate on the balance of probabilities matters which by their very nature invariably cannot be shown by evidence to exist, but nevertheless in all probability do exist.

Moreover, the extension of Abuse of Process considerations into entrapment situations has had the effect of going a long way to remedying the legacy of the English Courts which do not recognise entrapment as a defence and making the Australian position much closer to that of the American Courts which do recognise entrapment as a defence.

As to the limits of the doctrine of Abuse of Process, only time (and perhaps the High Court in the near future) will tell.

On present indications, new areas, new examples, will be identified. Many of the current practices of the police which are inflicted on Aborigines may well be caught by the Doctrine and cause cases to be stopped or stayed indirectly.

One thing seems clear, Abuse of Process is here to stay - both literally and in the legal sense.

M.L. ABBOTT Q.C.

October, 1987.