

IN THE SUPREME COURT
OF QUEENSLAND
AT BRISBANE

THE QUEEN

V

SCOTT ANDREW MEREDITH

(Applicant)

Applicant's submissions – Section 592A(2)(a) – *Criminal Code*

This application

1. Scott Andrew Meredith ("the applicant") seeks an order quashing the indictment presently before the Court charging him with one count of possession of a dangerous drug (cannabis sativa)¹ ("the possession indictment") or alternatively, an order staying it.

The state of proceedings

2. On 27 August 2002, the applicant was charged with the possession and supply of a dangerous drug (cannabis sativa).
3. On 21 February 2003, a magistrate committed him to trial in respect of both charges ("the first committal hearing").²
4. On 15 August 2003:
 - 4.1. the DPP presented the possession indictment in this Court;
 - 4.2. Holmes J adjourned the indictment for mention on 31 October 2003 to await completion of a committal hearing for a related trafficking charge (see below).

The relevant facts

5. The prosecution case, as contained in the police statements³ and depositions from the first committal hearing, was in sum that:

Search of the vehicle

- 5.1. At about 9.50 am on 27 August 2002 the applicant was intercepted whilst driving a Ford XR8 utility (reg no. 180-GFL) ("the applicant's vehicle") southbound on the

¹ Pursuant to section 596 of the *Criminal Code*.

² Conducted before Magistrate Pirie at the Southport Magistrates Court.

³ These statements were sworn under the *Oaths Act* and tendered as evidence pursuant to section 110 of the *Justices Act*; First Committal: deps: P2

Pacific Motorway at Oxenford by Constables Shore and King from Coomera police station. They were in a marked police vehicle.

- 5.2. The sworn account by Constables Shore and King for the interception and search of the vehicle was:
- 5.2.1. They were conducting a “traffic operation” and performing “traffic duties” which “involved anything related to traffic matters” including “bad driving, speeding, drink driving...” but did not involve routinely or randomly pulling over vehicles”.⁴
- 5.2.2. The applicant’s vehicle was observed overtaking “a vehicle in the left hand lane”. It was followed and intercepted because of this manoeuvre.⁵ Constable Shore made a notation in his notebook that the applicant was intercepted “for driver’s license check and [to] determine if [the] vehicle may recently have been stolen.”⁶
- 5.2.3. Constable Shore then asked the applicant to produce a license, which he did.⁷ It had been issued in the Northern Territory. He handed the license to Constable King for him to undertake a police inquiry by radio in relation to it as well as a “vehicle check” of the vehicle. They ascertained that the license was valid and the vehicle was not stolen.⁸
- 5.2.4. Constable Shore then further questioned the applicant.⁹ He also examined the exterior of the vehicle and concluded that it was in a “good” and roadworthy condition.¹⁰ He then searched the vehicle tray – after, he says, the applicant “consented” to such a search¹¹ – because he is “inquisitive by nature” and was “curious”.¹² There were 10 separate bags found in the tray each containing about 450 grams of *cannabis sativa*.

Search of 99 Levington Road

- 5.3. Constable Shore says that he warned the applicant and activated his tape recorder.¹³ Following this:
- 5.3.1. The applicant was arrested and taken to the Coomera police station.
- 5.3.2. Other police were contacted to take over the investigation.¹⁴ A Detective Sergeant Stagoll from Gold Coast CIB then took charge of it.
- 5.3.3. Documents with addresses associated with the applicant were found in the material taken by Constable Shore from the applicant’s vehicle. He was questioned about his connection with these properties. He was not further warned and had no access to legal representation. Again, despite it taking place at a police station, this interview was not recorded.

⁴ First Committal: Constable King deps: P45, L50 and following

⁵ First Committal: Constable King deps: P46, L38; Constable Shore deps: P51, L10-20. Incidentally no ticket ever issued for this ‘offence’.

⁶ First Committal deps: Constable Shore: P52, L30-40

⁷ The constable had a recording device however he says that he did not activate it for this conversation.

⁸ First Committal deps: Constable Shore: P54, L20-30

⁹ This part of the conversation is also said to have not been recorded.

¹⁰ First Committal deps: Constable Shore: P55, L32; P56, 10.

¹¹ First Committal deps: Constable Shore: P56, L25. This is not corroborated or independently recorded.

¹² First Committal deps: Constable Shore: P56, L20 & P59, L1.

¹³ First Committal deps: Constable Shore: P57, L40-60.

¹⁴ First Committal deps: Constable Shore: P60, L10

- 5.3.4. At about 1.25pm, the applicant was taken by Detective Stagoll to a shed at 99 Levington Road, Eight Mile Plains ("the shed").¹⁵ The police find about 23kgs of cannabis plant material spread out on the floor of the mezzanine level of the shed which was not locked, in fact, the door was apparently open.
- 5.3.5. No admissions were alleged against the applicant in respect of the cannabis located in his vehicle or in the shed.¹⁶ He was then charged with the possession and supply of the *cannabis sativa* found.

Authorisation of the searches

6. There were no warrants in existence prior to the searches of the applicant's vehicle or the shed. A search by a police officer without a warrant is not necessarily unlawful: e.g. section 77 of the *Police Powers & Responsibility Act*.¹⁷ In fact a post-search approval order was obtained from Acting Magistrate O'Driscoll under section 78 of the PPR Act in respect of the search of the shed¹⁸ but no application was made in respect of the vehicle search.
7. In his evidence at the first committal hearing, Detective Stagoll¹⁹ generally adopted the version of events as deposed to by Constables Shore and King viz.:
- 7.1. At around 11.00am he (Stagoll) was at 'Gold Coast CIB' and was contacted by Constable Shore and informed of the details and circumstances surrounding what had been found in the applicant's vehicle.²⁰ He then said that he thought it was a "random road watch or something or other".²¹
- 7.2. He took charge of the investigation because he had "better resources" to pursue the investigation.²²
- 7.3. At around 11.20am he drove to Coomera. He questioned the applicant.²³
- 7.4. At around 12.00 pm he directed other police to attend at a location in Slacks Creek to organise a search of the property at 99 Levington Road. He says he made the

¹⁵ First Committal depositions: Detective Stagoll: P32, L50

¹⁶ First Committal depositions: Detective Stagoll: P33, L40

¹⁷ Section 77 Police Powers and Responsibilities Act
Search to prevent loss of evidence

(1) This section applies if a police officer reasonably suspects—

(a) a thing at or about a place, or in the possession of a person at or about a place is evidence of the commission of a part 2 offence; and

(b) the evidence may be concealed or destroyed unless the place is immediately entered and searched.

(2) This section also applies if a police officer reasonably suspects a part 2 offence has been, is being, or may be committed in, on or in relation to a transport vehicle and involves the safety of the vehicle or anyone who may be in or on it.

(3) A police officer may enter the place and exercise search warrant powers, other than power to do something that may cause structural damage to a building, at the place as if they were conferred under a search warrant.

¹⁸ S. 78 Post-search approval

(1) As soon as reasonably practicable after exercising powers under section 77, the police officer must apply to a magistrate in writing for an order approving the search ("post-search approval order").

(2) The application must be sworn and state the grounds on which it is sought.

(3) The applicant need not appear at the consideration of the application, unless the magistrate otherwise requires.

(4) The magistrate may refuse to consider the application until the police officer gives the magistrate all the information the magistrate requires about the application in the way the magistrate requires.

¹⁹ Detective Stagoll was the arresting officer and he compiled the police brief.

²⁰ First Committal depositions: Detective Stagoll: P5, L40-60

²¹ First Committal depositions: Detective Stagoll: P6, L5-10

²² First Committal depositions: Detective Stagoll: P6, L30

²³ First Committal depositions: Detective Stagoll;

decision to not seek a warrant. Under cross-examination he proffered a number of reasons associated with his perception of resource and time constraints, that is, he asserted that there were emergent circumstances justifying a search without a warrant.²⁴ Specifically he spoke of an 'Operational Protocol'²⁵ that he believed required him to obtain warrants from a Court registry, which he says would have further delayed the issue of a warrant.²⁶ [Constable Shore said he is unaware of this protocol and usually obtains warrants from a Justice of the Peace who resides "about 10 mins down the road" from the Coomera station.²⁷]

- 7.5. At around 1.25pm he attended 99 Levington Road with the applicant and other police in order to search the property.²⁸ 23kgs of cannabis was located in a rear shed.
- 7.6. The next day he applied for and obtained a post search approval order for the search of the property. He gave evidence that the reasons why a post-search warrant was justified were set out in the application.²⁹
8. The overall picture presented by these police officers in their statements and sworn evidence up to the end of the first committal was that the finding of the cannabis was a result of the two police officers intercepting the applicant's vehicles for a minor traffic infringement, and that the searches of the vehicle and property at 99 Levington Road without any warrants were necessary and permissible having regard to the emergent circumstances following this fortuitous discovery.

The trafficking charge

9. On or about 15 April 2003, the applicant was served with an Order of this Court, obtained ex parte, restraining all of his property under the *Criminal Proceeds Confiscation Act 2003*³⁰ as well as a Notice to Appear charging him with trafficking in a dangerous drug "cannabis".
10. On or about 17 June 2003, a police brief prepared by a Detective Sergeant Jason Gough (who was a CMC officer at the relevant time) was published.³¹ He had not given evidence at the first committal. This brief contained all of the statements in the first police brief plus some further material.³² This further material put a completely different complexion on the investigation and the evidence given at the first committal.³³ Detective Gough's evidence made apparent that the evidence presented before Magistrate Pirie by the other police was quite misleading and in some respects blatantly untrue.
11. The second committal hearing commenced on 14 October 2003 before Acting Magistrate Stark in Brisbane. After two days it was adjourned for resumption on 8 December 2003.³⁴ There were some noteworthy developments at this hearing:³⁵

²⁴ First Committal deps: Detective Stagoll: P11, L30 – P12; P15, L10-60; P17 – P20, L30; P27 – P29

²⁵ The existence of such a Protocol has not been established.

²⁶ First Committal deps: Detective Stagoll: P27, L10

²⁷ First Committal deps: Constable Shore: P61 - 62

²⁸ First Committal deps: Detective Stagoll: P32, L48

²⁹ A copy of the application and supporting material has not been provided.

³⁰ This Order was subsequently set aside by the Court of Appeal on 30 June 2003 in *Re Criminal Proceeds Proceeds Act 2002* [2003] QCA 249.

³¹ He has since become a part of the Drugs Enforcement Agency.

³² This material comprises Exhibit PM-3.

³³ It is not alleged that the applicant committed any further supplies of dangerous drugs in the interim, rather, evidence of prior and subsequent monitoring and observations of the applicant were now being relied upon.

³⁴ At the time it was originally set down, only two days were allocated by the Court.

Surveillance and monitoring since May 2003

- 11.1. The finding of the cannabis in the applicant's vehicle was not serendipitous. The interception by Constables Shore and King and the subsequent searches of it and the shed were, to use Detective Gough's own words, all "orchestrated" by him.
- 11.2. The applicant had been, for several months before his arrest, a "person of interest" within a covert surveillance and monitoring operation conducted by various agencies including the CMC, the NCA and the QPS:
- 11.2.1. He had been under intermittent physical observation from these agencies since 2 May 2002.³⁶
- 11.2.2. He became a "person of interest" because of the nature of his interaction with some persons under primary surveillance viz., Graham Keating, Shirley Boothman and Noel McGarry.³⁷
- 11.2.3. Detective Gough had been aware since on or about 2 May 2002 that the applicant held a registered interest in the property situated at 99 Levington Road. Surveillance revealed that he had had physical connection with that property on several occasions.
- 11.2.4. These police agencies obtained warrants and intercepted and recorded several of the applicant's telephone conversations with Ms Boothman from on or about 31 May 2003.³⁸ These communications led police to believe that he was making delivery arrangements in respect of a dangerous drug (cannabis sativa) with Ms Boothman.³⁹
- 11.2.5. On 25 August 2003, Ms Boothman is observed meeting the applicant at 99 Levington Road.

Reasons for interception of vehicles and subsequent searches

- 11.3. On 27 August 2003, Detective Gough, after reviewing the compiled surveillance and monitoring information concerning the applicant, directed other police to covertly camp outside 99 Levington Road and keep it under observation from about 8.30 am. The applicant's vehicle was followed from that address by these police.
- 11.4. He then directed Constables Shore and King to intercept and search the applicant's vehicle.⁴⁰ He provided to them:
- 11.4.1. A description of the applicant's vehicle including its registration number.
- 11.4.2. The applicant's name.

³⁵ The depositions from the second committal have not yet been made available. A request for their urgent provision has been made and they will be placed before this Court as soon as they are made available to the applicant.

³⁶ 147-149 Turner Road with Graham Keating carrying "bag" and a "tubular object"

³⁷ McGarry is the applicant's first cousin.

³⁸ Igloo 1 – Warrant With Graham Keating 0421 577923. Meredith's #: 0405 418190

³⁹ Boothman has been charged with trafficking in a dangerous drug (cannabis sativa). Detective Gough gave evidence that he believed that she has indicated consent to the presentation of an ex-officio indictment on that charge.

⁴⁰ Detective Gough could not remember whether it was Constable Shore or Constable King that he spoke to. They both said it was Constable Shore.

- 11.4.3. Information that included Detective Gough's suspicion that the applicant was transporting cannabis that morning.
 - 11.4.4. A direction that the vehicle be searched and the driver's name confirmed.
 - 11.4.5. A direction that the involvement of the covert police agencies be withheld from the applicant.
- 11.5. After the search on the roadside, Constable Shore reported back to Detective Gough as to what he had found, who then instructed that a senior Detective be contacted to continue the investigation. As a result Detective Stagoll was engaged and he contacted Detective Gough. The search of the property at Levington Road was then 'orchestrated' by Detective Gough. He asked Detective Stagoll to do so urgently as he was concerned, having regard to his experience in these matters, that the non-arrival of the applicant at his original destination might prompt the destruction of evidence that might be existent at 99 Levington Road.⁴¹
- 11.6. Detective Gough explained that the timing of the interception was not one which involved any particular sense of emergency. He said that the applicant was viewed at that stage, like two other persons who had had recent contact with Ms Boothman and had also been arrested, as a "sideshow" to his investigation's primary focus which was Boothman et al.
- 11.7. Detective Gough acknowledged that he and other police had sufficient evidence at hand, as at 25 August 2003, to obtain a search warrant in respect of the applicant's vehicle and the property situated at 99 Levington Road had he wished to do so. Such a warrant, he acknowledged would have been valid for up to 28 days.
- 11.8. He gave no satisfactory answer as to why he did not apply for warrants. It is apparent that it was not due to any resource constraints or emergent circumstances.

Claims of privilege against self-incrimination

- 11.9. On the second day of the committal hearing, Constable King and Detective Stagoll each refused to answer questions claiming privilege from self-incrimination at critical points under cross-examination. Constable Shore gave every indication that he would do likewise. They each consulted lawyers (overnight after the first day) who were given leave to appear for all of them.⁴² Their firm position was to refuse to answer any questions at all as to their respective reasons for intercepting and searching the applicant's vehicle and the shed and for not obtaining any warrants.
- 11.10. Detective Gough also engaged counsel but he did not claim privilege to this point.⁴³
- 11.11. Before reaching that point the following matters were elicited from them:
- 11.11.1. Detective Gough indicated that he was aware that truthful evidence may well not have been given by Constables Shore and King and Detective Stagoll at the first committal. He admitted that he had spoken to each of the police witnesses on the morning of the first day of the second committal hearing to discuss the evidence that they had given at the first committal and the possibility that these matters may not have been

⁴¹ That explanation mirrors the evidence given at the first committal by Stagoll as being *his* belief. See para [7.4] above.

⁴² Mr Glen Cranny from the firm Gilshenan & Luton obtained leave to appear for all three of them.

⁴³ Mr SW Zillman of counsel was retained by way of a direct brief.

entirely correct. He said that he had told each of them to “now” tell the complete truth, regardless of what had been said before.

- 11.11.2. Constables Shore and King have a different recollection of what Detective Gough had said to them before they gave their evidence. They all recalled that he had approached them and told them that this issue might be explored in evidence and that “it would all work out in the end”. Neither recalled any discussion about telling the truth now.
- 11.11.3. Constables Shore and King both admitted that on 27 August 2002, they had been directed by Gough to intercept the applicant’s vehicle, verify his identification and to search his vehicle. They detailed how they attempted to raise the issue of the possibility of misleading the Court in not disclosing this in their statements with the officer in charge of Coomera and with Detective Stagoll even before the first committal hearing.
- 11.11.4. Detective Stagoll also spoke of Detective Gough’s discussion with him on the first day of the committal before the commencement of court. He also denied being told to tell the truth. He became very vague about his recollection of this conversation. He then admitted that he had “misled” the Court at the first committal.
- 11.11.5. After retaining legal representation and after having claimed privilege on several questions, Detective Stagoll conceded that there were in fact no “resource” reasons why a search warrant was not sought at the time of the search of 99 Levington Road. He said that he had been directed by Gough to search that property. He also said that he had been told by Gough to not reveal to the applicant that he had been arrested as a result of a CMC investigation, rather to make it all look like a fortuitous event following a random roadside search.

The issues raised

- 12. There are at least three concerning aspects to the matter:
 - 12.1. The perjury – and collusion to mislead - that was almost certainly committed by Constables Shore and King and Detective Stagoll at the first committal.⁴⁴
 - 12.2. The attempt by Detective Gough to interfere with the evidence that these officers were to give at the second committal by his communication to them that issues may be raised as to the efficacy of their evidence at the first committal.⁴⁵ Also, his presentation of a police brief to the DPP, including statements executed and which were intended to be tendered as evidence under section 110A of the *Justices Act*, which he knew contained untruths bears significant examination.⁴⁶
 - 12.3. The consequences that follow the refusal of the relevant police officers to give truthful (and/or complete) evidence as to the factual reasons associated with their search of the applicant’s vehicle and property.

⁴⁴ Section 123 of the *Criminal Code*.

⁴⁵ Gough acknowledged that a conversation between the applicant and McGarry after the first committal suggested to him that Shore, King and Stagoll may not have given a truthful account then. He did not take any steps to address that at all, indeed he says that he did not even seek to verify it.

⁴⁶ Sections 140 and 126 of the *Code*.

13. The first two aspects are important matters to be addressed in the administration of justice and in the investigation of police practices but they do not form the basis for the present application to this Court.⁴⁷
14. The third feature, it is submitted, properly founds the basis for the relief that is sought. A direct consequence of the present refusal of the relevant police officers to give evidence as to their reasons for the searches of the vehicle and 99 Levington Road and for not seeking warrants beforehand is that the applicant faces a clear abuse of process if the prosecution of the present indictment is not stayed.

The issues for determination at trial

15. Evidence elicited from a police search can be excluded in the exercise of judicial discretion: *Bunning v Cross* (1977-1978) 141 CLR 54 at 73 citing *R v Ireland* (1970) 126 CLR 321.⁴⁸ That a dangerous drug was found in the applicant's vehicle and at a property connected to him is a powerful circumstance to support the charges preferred against him.⁴⁹ A primary question at any trial will be the admissibility of this evidence.
16. The revelations at the second committal hearing so far suggest that neither search was conducted lawfully and further that the post-search approval order was obtained by misleading if not dishonest material being placed before the magistrate who issued it. To determine these questions a court will need to hear evidence as to the matters set out in subsection 77(1) of the PPR Act:

77(1) This section applies if a police officer reasonably suspects—

 - (a) a thing at or about a place, or in the possession of a person at or about a place is evidence of the commission of a part 2 offence; and
 - (b) the evidence may be concealed or destroyed unless the place is immediately entered and searched.
17. Therefore, all of the factual considerations surrounding the search at the shed need to be examined, particularly as to why a warrant could not have been or was not otherwise obtained beforehand. The refusal, on the basis of privilege against self-incrimination, by the relevant police officers will not permit this to occur. The improper communications from Detective Gough to these officers on the morning of the second committal have tainted each of them as has the process that has subsequently ensued. This compounds the prejudice and abuse of process faced by the applicant.

The relevant law

18. The relief sought by the applicant is available either under section 596 of the *Criminal Code* to quash an indictment if an event occurs which is "calculated to prejudice" an accused⁵⁰ or pursuant to the inherent power of the Court to order a stay of it if there is

⁴⁷ A formal complaint has been made to the Commissioner for Police and the Crime and Misconduct Commission.

⁴⁸ Relevantly there are 5 principles (1) Whether the breach of the law by police was a result of a mistaken assessment of the law or a deliberate or reckless disregard of the law. The court is more likely to exclude the evidence if it falls into the latter category. (2) The cogency of the evidence. Issues of urgency and/or whether the evidence is perishable or evanescent in nature come onto play. (3) The ease with which the police might have complied with the law, that is, how easily might they have obtained a warrant. (4) The nature of the offence. (5) The intention of the legislature.

⁴⁹ There is however limited, if any, cogent evidence other than the location of these drugs.

⁵⁰ Section 596 of the *Code*:

"(1) The accused person may before pleading apply to the court to quash the indictment on the ground that it is calculated to prejudice or embarrass the person in the person's defence to the charge, or that it is formally defective."

an abuse of process,⁵¹ and/or the circumstances are such that he is not otherwise able to receive a fair trial⁵²: *Jago v District Court (N.S.W)* (1989) 168 CLR 23; *Dietrich v The Queen* (1992) 177 CLR 292.

19. This is not just a case of single act of dishonesty or a mere unsuccessful attempt at a 'verbal' by a rogue police officer. Rather, there is ample evidence to find that there has been a systemic and orchestrated plan to search the applicant's car and house without a warrant when one should and could have been got; a subsequent intentional misleading of a magistrate for the issue of a post search approval under section 78 of the *PPR Act* in respect of the search of the shed and then a collective misleading of the magistrate at the first committal of the circumstances surrounding both searches which located the primary evidence that the DPP would wish to lead against the appellant in any prosecution of the present indictment.
20. Now that this deception has been partly exposed, these police will not give any of the relevant evidence on these critical questions – which questions arise in both pending proceedings – due to the fear of making self-incriminatory admissions to perjury and perhaps some other offences. Yet the DPP has elected to seek to proceed with these prosecutions.⁵³
21. The applicant's entitlement to a fair trial will not ensue unless these police were prepared to give truthful and complete evidence about these matters. It is not simply a case of whether there is other evidence to support the charge; rather the question to be decided is whether the continuation of this prosecution amounts to an abuse of process.
22. The circumstances of this case are exceptional.⁵⁴
23. Accordingly there is ample power and reason to quash the indictment under section 595 of the Code. Alternatively, a stay is warranted until the police are prepared to give a complete account of their conduct in the searches.⁵⁵ (There is also an abuse of process manifest in the part-heard proceedings before the magistrate.)

Andrew Boe
Boe Lawyers
30 October 2003

⁵¹ *Jago* at 24: "It is convenient to commence by considering the inherent power of the courts to prevent abuses of process. It is clear that Australian courts possess inherent jurisdiction to stay proceedings which are an abuse of process: *Clyne v NSW Bar Association* (1960) 104 CLR 186 at 201; *Barton* (1980) 147 75 at 96, 107, 116.

⁵² *Jago* at 29; *Dietrich* at 299: "The right of an accused to receive a fair trial according to law is a fundamental element of our criminal justice system."

⁵³ See paragraph 11 of the affidavit of Paula Morreau filed 30 October 2003.

⁵⁴ *Jago* at 28: "The continuation of processes which will culminate in an unfair trial can be seen as a 'misuse of the court's process' which will constitute an abuse of process because the public interest in holding a trial does not warrant the holding of an unfair trial. (...) the power is discretionary, to be exercised in a principled way... the power will only be used in the most exceptional cases to order that a criminal prosecution be stayed."

⁵⁵ *Jago* at 31: "To justify a permanent stay of criminal proceedings, there must be a fundamental defect which goes to the root of the trial '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*, per Wilson J (at 111)."

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s9789 of 2003

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V

JASON GOUGH & ANOR

**Applicant’s Supplementary Submissions
Application pursuant to section 592A(2)(a) *Criminal Code*
Application no. S9789 of 2003**

Preliminary

1. On 30 October 2003 an application under s.592A of the *Criminal Code* was filed in respect of an indictment before this Court. On 31 October 2003 an originating application was filed seeking declarations and injunctive relief in respect of committal proceedings which are set to resume before Acting Magistrate Stark on 8 December 2003 (“the second committal hearing”). As a result of further administrative communications with the Court both applications were listed for hearing together.
2. At the time that the s.592A application was filed, the depositions from the second committal hearing were not at hand.⁵⁶ Written submissions in support of that application were also filed on 30 October 2003. Paragraph 11 of those submissions is now re-drafted below to *inter alia* include references to the depositions.
3. Following those factual matters are submissions as to the jurisdiction of this court to grant the declaratory and injunctive relief sought.

References to the depositions from the second committal hearing

4. The second committal hearing commenced on 14 October 2003 before Acting Magistrate Stark in Brisbane. After two days it was adjourned for resumption on 8 December 2003.⁵⁷

⁵⁶ They now comprise exhibit “PM-5” to the affidavit of Paula Morreau filed on 20 November 2003.
⁵⁷ At the time it was originally set down, only two days were allocated by the Court. Second Committal deps: P167, L57- P168, L3.

Surveillance and monitoring since May 2003

- 4.1. The finding of the cannabis in the applicant's vehicle was not serendipitous. The interception by Constables Shore and King and the subsequent searches of it and the shed were orchestrated by then CMC Officer Detective Sergeant Jason Gough.⁵⁸
- 4.2. The applicant had been, for several months before his arrest, a "person of interest"⁵⁹ within a covert surveillance and monitoring operation conducted by various agencies including the CMC, the NCA and the QPS:⁶⁰
 - 4.2.1. He had been under intermittent physical observation from these agencies since 2 May 2002.⁶¹
 - 4.2.2. He became a "person of interest"⁶² because of the nature of his interaction with some persons under primary surveillance viz., Graham Keating,⁶³ Shirley Boothman⁶⁴ and Noel McGarry.⁶⁵
 - 4.2.3. Detective Gough had been aware since on or about 2 May 2002 that the applicant held a registered interest in the property situated at 99 Levington Road.⁶⁶ Surveillance revealed that he had had physical connection with that property on several occasions.
 - 4.2.4. These police agencies obtained warrants and intercepted and recorded several of the applicant's telephone conversations with Mr Keating from on or about 31 May 2003.⁶⁷ These and later communications (with Ms Boothman) led police to believe that he was making delivery arrangements in respect of a dangerous drug (cannabis sativa) with Ms Boothman.⁶⁸
 - 4.2.5. On 25 August 2003, Ms Boothman is observed meeting the applicant at 99 Levington Road.⁶⁹

Reasons for interception of vehicles and subsequent searches

- 4.3. On 27 August 2003, Detective Gough, after reviewing the compiled surveillance and monitoring information concerning the applicant, directed other police to covertly camp outside 99 Levington Road and keep it under observation from about 8.30 am.⁷⁰ The applicant's vehicle was followed from that address by these police.⁷¹
- 4.4. He then directed Constables Shore and King to intercept and search the applicant's vehicle.⁷² He provided to them:
 - 4.4.1. A description of the applicant's vehicle including its registration number.⁷³
 - 4.4.2. The applicant's name.⁷⁴
 - 4.4.3. Information that included Detective Gough's suspicion that the applicant was transporting cannabis that morning.⁷⁵

⁵⁸ Second Committal deps: Detective Sargent Gough: P19, L53 – P20, L1; P20, L26-27.

⁵⁹ Second Committal deps: Detective Sergeant Gough: P9, L49 – 55.

⁶⁰ Second Committal deps: Detective Sergeant Gough: P11, L9-11.

⁶¹ Second Committal deps: Detective Sergeant Gough: P9, L49-55; P10, L7-31; 147-149 Turner Road with Graham Keating carrying "bag" and a "tubular object".

⁶² Second Committal deps: Detective Sergeant Gough: P20, L4-9

⁶³ Second Committal deps: Detective Sergeant Gough: P9, L38-40.

⁶⁴ Second Committal deps: Detective Sergeant Gough: P9, L22-25.

⁶⁵ McGarry is the applicant's first cousin.

⁶⁶ Second Committal deps: Detective Sergeant Gough: P11, L28-30, P12, L36-43; P133, L48-50.

⁶⁷ Second Committal deps: Detective Sergeant Gough: P10, L33-43.

⁶⁸ Boothman has been charged with trafficking in a dangerous drug (cannabis sativa). Detective Gough gave evidence that he believed that she has indicated consent to the presentation of an ex-officio indictment on that charge.

⁶⁹ Second Committal deps: Detective Sergeant Gough: P20, L47-56

⁷⁰ Second Committal deps: Detective Sergeant Gough: P23, L1-7.

⁷¹ Second Committal deps: Detective Sergeant Gough: P22, L42-46

⁷² Second Committal deps: Detective Sergeant Gough: P20, L25; Detective Gough could not remember whether it was Constable Shore or Constable King that he spoke to. They both said it was Constable Shore: P21 L8-25.

⁷³ Second Committal deps: Detective Sergeant Gough: P21, L29-30

⁷⁴ Second Committal deps: Detective Sergeant Gough: P21, L32-35

- 4.4.4. A direction that the vehicle be searched and the driver's name confirmed.⁷⁶
- 4.4.5. A direction that the involvement of the covert police agencies be withheld from the applicant.⁷⁷
- 4.5. Constables Short and King did intercept the vehicle because of this request.⁷⁸ After the search on the roadside, Constable Shore reported back to Detective Gough as to what he had found, who then instructed that a senior Detective be contacted to continue the investigation. As a result Detective Stagoll was engaged and he contacted Detective Gough.⁷⁹ Detective Gough briefed Detective Stagoll and re-iterated that the fact that the applicant was the subject of an operation should be withheld from the applicant.⁸⁰ The search of the applicant's property at Levington Road was then 'orchestrated' by Detective Gough.⁸¹ He asked Detective Stagoll to do so urgently as he was concerned, having regard to his experience in these matters, that the non-arrival of the applicant at his original destination might prompt the destruction of evidence that might be existent at 99 Levington Road.⁸²
- 4.6. Detective Gough explained that the timing of the interception was not one which involved any particular sense of emergency.⁸³ He said that the applicant was viewed at that stage, like two other persons who had had recent contact with Ms Boothman and had also been arrested, as a "sideshow" to his investigation's primary focus which was Boothman et al.⁸⁴
- 4.7. Detective Gough acknowledged that he and other police had sufficient evidence at hand, as at 25 August 2003, to obtain a search warrant in respect of the applicant's vehicle and the property situated at 99 Levington Road had he wished to do so.⁸⁵ Such a warrant, he acknowledged would have been valid for up to 28 days.⁸⁶
- 4.8. He gave no satisfactory answer as to why he did not apply for warrants.⁸⁷ It is apparent that it was not due to any resource constraints or emergent circumstances.⁸⁸ See in this respect *R v Koning* [2001] QSC 131 (28 March 2001) per Mullins J and *Dobbs v Ward* (2002) 128 A Crim R 596 per Holmes J.

Claims of privilege against self-incrimination

- 4.9. On the second day of the committal hearing, Constable King and Detective Stagoll each refused to answer questions claiming privilege from self-incrimination at critical points under cross-examination.⁸⁹ Constable Shore gave every indication that he would do likewise.⁹⁰ They each consulted lawyers (overnight after the first day) who

⁷⁵ Second Committal deps: Detective Sergeant Gough: P21, L43-44

⁷⁶ Second Committal deps: Detective Sergeant Gough: P22, L26-32.

⁷⁷ Second Committal deps: Constable Shore: P84, L35-40.

⁷⁸ Second Committal deps: Constable Shore: P86, L25-28.

⁷⁹ Second Committal deps: Detective Sergeant Gough: P25, L1-24; 46-51.

⁸⁰ Second Committal deps: Detective Sergeant Gough: P25, L5-25.

⁸¹ Second Committal deps: Detective Sergeant Gough: P26, L11-49.

⁸² Second Committal deps: Detective Sergeant Gough: P36, L18-28. That explanation mirrors the evidence given at the first committal by Stagoll as being *his* belief.

⁸³ Second Committal deps: Detective Sergeant Gough: P40, L15-23.

⁸⁴ Second Committal deps: Detective Sergeant Gough: P39, L31-33; P41, L49-51.

⁸⁵ Second Committal deps: Detective Sergeant Gough: P42, L7-20.

⁸⁶ Second Committal deps: Detective Sergeant Gough: P42, L56-57.

⁸⁷ Second Committal deps: Detective Sergeant Gough: P36, L18-P37, L5.

⁸⁸ Second Committal deps: Detective Sergeant Gough: P41, L40-44.

⁸⁹ Second Committal deps: Stephen Stagoll: P101, L7-8; P101, 57-P102, L3; P103, L22-24; P104, L50-52; P104, L55; P108, L19-22; P108, L29; P108, L33; P113, L7; P113, L16; P114, L9-14; P114, L19-22; P115, L3; P115, L24-25; P116, L33; P117, L18-22; P160, L23; P161, L35; P161, L38; P161, L42; P161, L48; P162, L26; P163, L10; P163, L32; P163, L37-38; P165, L1; P165, L14-15; P165, L19; P165, L29; Second Committal deps: Scott Williams King: P119, L32-38; P120, L12-15; P120, L20-23; P120, L38; P120, L42; P120, L45-48; P122, L46-47; P123, L29-30; P125, L7-10; P125, L40-41; P126, L23-24; P127, L10-15; P127, L28; P128, L2-3; P128, L56-P129, L2.

⁹⁰ Second Committal deps: Constable Glenn David Shore: P87, L5-8.

were given leave to appear for all of them.⁹¹ Their firm position was to refuse to answer any questions at all as to their respective reasons for intercepting and searching the applicant's vehicle and the shed and for not obtaining any warrants.

4.10. Detective Gough also engaged counsel but he did not claim privilege to this point.⁹²

4.11. Before reaching that point the following matters were elicited from them:

4.11.1. Detective Gough indicated that he was aware that truthful evidence may well not have been given by Constables Shore and King and Detective Stagoll at the first committal. He admitted that he had spoken to each of the police witnesses on the morning of the first day of the second committal hearing to discuss the evidence that they had given at the first committal and the possibility that these matters may not have been entirely correct. He said that he had told each of them to "now" tell the complete truth, regardless of what had been said before.⁹³

4.11.2. Detective Stagoll has a different recollection of what Detective Gough had said to him before he gave his evidence. He recalled that he had spoken to Gough about the "complexity" in "keeping the two jobs totally separate"⁹⁴ and that Gough had said words to the effect "it will sort itself out".⁹⁵ He specifically denied being told to tell the truth.⁹⁶ He subsequently became very vague about his recollection of this conversation⁹⁷ and later stated that Gough had said "Just be honest about what happened, and it'll sort itself out".⁹⁸

4.11.3. Constable King claimed privilege in respect of any such conversation involving him⁹⁹ and the question has not yet been asked of Constable Shore.

4.11.4. Detective Stagoll admitted that he had "misled" the Court at the first committal.¹⁰⁰

4.11.5. Constables Shore and King both admitted that on 27 August 2002, they had been directed by Gough to intercept the applicant's vehicle, verify his identification and to search his vehicle on the pre-text of it being a routine traffic check.¹⁰¹ They detailed how they attempted to raise the issue of the possibility of misleading the Court in not disclosing this in their statements with the officer in charge of Coomera and with Detective Stagoll even before the first committal hearing.¹⁰² Detective Stagoll concurred with this.¹⁰³

5. After retaining legal representation and after having claimed privilege on several questions, Detective Stagoll conceded that there were in fact no "resource" reasons why a search warrant was not sought at the time of the search of 99 Levington Road.¹⁰⁴ Whilst conceding a conversation with Gough on 27 August 2002 as to the apprehension of the applicant,¹⁰⁵ he then claimed privilege in respect of any communications with

⁹¹ P97: Mr Glen Cranny from the firm Gilshenan & Luton obtained leave to appear for all three of them.

⁹² P132: Mr SW Zillman of counsel was retained by way of a direct brief.

⁹³ Second Committal deps: Detective Sergeant Gough: P30, L5 – P33 L25, P153, L34 – P154, L4.

⁹⁴ Second Committal deps: Detective Stagoll: P74, L55 – P75, L1-10.

⁹⁵ Second Committal deps: Detective Stagoll: P77, L1-15.

⁹⁶ Second Committal deps: Detective Stagoll: P77, L20-28; P77, L48-52.

⁹⁷ Second Committal deps: Detective Stagoll: P102, L20 – P107, L60.

⁹⁸ Second Committal deps: Detective Stagoll: P107, L40.

⁹⁹ Second Committal deps: Constable King: P120, L18-23.

¹⁰⁰ Second Committal deps: Detective Stagoll: P75, L1-7; P76, L5-10; P79, L5-13.

¹⁰¹ Second Committal deps: Constable Shore: P84, L23-26, L35-40; P85, L15; Constable King: P90, L20.

¹⁰² Second Committal deps: Constable Shore: P85, L33 – P87, L20; Constable King: P92, L1-45.

¹⁰³ Second Committal deps: Detective Stagoll: P63-68.

¹⁰⁴ Second Committal deps: Detective Stagoll: P164, L38-50.

¹⁰⁵ Second Committal deps: Detective Stagoll: P78, L48-42.

Detective Gough, or Constables Shaw and King on that date.¹⁰⁶

The injunctive and declaratory relief sought in respect of the second committal

6. The applicant seeks declaratory and other orders, the effect of which is to restrain or stay the further prosecution of the second committal hearing which is a criminal proceeding being prosecuted by the first respondent before the second respondent.
7. The applicant seeks the declaratory and other orders contained in the originating application. The first order sought is a declaration.¹⁰⁷

The relevant facts to warrant the relief sought

8. The relevant facts appear in the applicant's submissions filed in support of the application brought under s.592A of the *Criminal Code*, coupled with the updating of paragraph 11 of those submissions in paragraph 4 above.
9. In summary, police witnesses probably engaged in perjury and other misconduct in connection with the matter currently before the second respondent. This has led to police witnesses declining to give relevant evidence at the second committal hearing. This deprives the applicant of the opportunity to have a 'proper' committal hearing.

The purpose of committal hearings

10. The committal proceeding is a significant step in the criminal prosecution process. A properly conducted committal is integral to the prospect of a fair trial: *Barton v The Queen* (1980) 147 CLR 75 at 100 per Gibbs ACJ and Mason J:

"It is now accepted in England and Australia that committal proceedings are an important element in our system of criminal justice. They constitute such an important element in the protection of the accused that a trial held without antecedent committal proceedings, unless justified on strong and powerful grounds, must necessarily be considered unfair".¹⁰⁸

11. In *R v Sloan* (1988) 32 A Crim R 366, Kneipp J observed:

"It was made clear by a majority in that case [Barton] that while what was called the primary function of committal proceedings was to ascertain whether there was a prima facie case against an accused person, an important secondary function is to enable the accused person to know what will be the evidence against him on his trial, to see the witnesses who will be giving that evidence give evidence on oath, and to cross-examine those witnesses."

12. As to the importance of the committal in enabling a person charged to cross-examine prosecution witnesses and to marshal the evidence in deposition form, see *Grassby v. The Queen* (1989) 168 CLR 1 at 15.¹⁰⁹

¹⁰⁶ Second Committal depts: Detective Stagoll: P113, L5 – P114, L40.

¹⁰⁷ The jurisdiction to grant declaratory relief is undoubted and the jurisdiction of the court to grant a declaration under its general jurisdiction is not displaced by the *Judicial Review Act*: see the commentary by Gilbert and Lane, *Queensland Administrative Law* [1.2830].

¹⁰⁸ Also see *Director of Public Prosecutions (Cth) v Bayly* (1994) 126 ALR 290 at 304.

¹⁰⁹ (1989) 168 CLR 1 at 15. Dawson J (with whom Mason CJ, Brennan and Toohey JJ agreed) went on to observe the value of committal proceedings to a person charged may be such as to warrant a trial being stayed or postponed where an *ex officio* indictment has been presented without committal proceedings, in order to prevent an abuse of process of the trial court and to ensure a fair trial.

13. It must be obvious that the further prosecution of the committal proceedings in these circumstances constitutes an abuse of process.¹¹⁰

Jurisdiction of the Supreme Court

14. There are certain doubts about whether a magistrate has power to order a stay of committal proceedings on the grounds of an abuse of process.¹¹¹
15. The Supreme Court has power to stop an abuse of the process of an inferior court or a tribunal. In doing so, the court exercises a direct role (sometimes called its "supervisory" role) over those courts and tribunals. It does so in the exercise of its inherent jurisdiction to administer justice.¹¹²
16. There is, in addition, its judicial review jurisdiction.
17. To the extent that it is necessary to have resort to the court's judicial review jurisdiction, the courts have long allowed judicial review applications in respect of police fraud or misconduct.¹¹³ They have also entertained judicial review applications in respect of allegations that the prosecution or its witnesses have withheld important evidence, even if it relates only to credibility.¹¹⁴ The court's jurisdiction is not confined to fraud. It arises when there has been improper behavior on the part of another party or in circumstances where important evidence has not been brought forward. It is unnecessary to characterize the withholding evidence from the defence as either procedural impropriety or a breach of the rules of natural justice.¹¹⁵ On any view, it amounts to unfairness in the conduct of the proceedings in denying the defendant evidence favorable to his or her defence and the opportunity to marshal evidence in deposition form to secure a favorable termination of the proceedings.
18. In the language of judicial review, the conduct of the prosecution in seeking a committal order in such circumstances amounts to an improper exercise of power or is otherwise contrary to law in that it amounts to an abuse of process. Accordingly, if necessary, the applicant seeks relief pursuant to the *Judicial Review Act* to prohibit the further prosecution of the committal proceeding. Such conduct is amenable to a prerogative order, a prerogative injunction or a statutory order for review.
19. But the preferable and simpler procedural course is for the court to make orders pursuant to its supervisory jurisdiction.

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Boe Lawyers
2 December 2003

¹¹⁰ The general principles are set out in *Bou Simon v. Attorney-General* [2000] FCA 24; 96 FCR 325. But see further below.

¹¹¹ *Grassby v. The Queen* (supra).

¹¹² See for example *R v Lovitt* [2003] QSC 279. And, in the case of those superior courts which have a statutory power to administer justice, in the exercise of its statutory power. See generally *Herron v. McGregor* (1986) 6 NSWLR 246; *Walton v. Gardner* (1993) 117 CLR 378; *Aronson and Dyer "Judicial Review of Administrative Action"*, 2nd ed., p.295.

¹¹³ See, for example, *Hallahan v. Campbell; ex parte Campbell (No. 2)* (1964) Qd.R. 337.

¹¹⁴ *R v. Leyland Justices ex parte Hawthorne* (1979) QB 283 and the other cases cited in *Aronson and Dyer* (supra) at p.252 ff.

¹¹⁵ *R v. Secretary of State for the Home Department ex parte: Al-Mehdawi* (1990) 1 AC 876 at 896 B to C.

IN THE SUPREME COURT OF QUEENSLAND
AT BRISBANE

Southport Magistrates Court
SOUT-MAG-10911/02
X001042 / HIB

THE QUEEN

V

SCOTT ANDREW MEREDITH

(Applicant)

.....

IN THE SUPREME COURT OF QUEENSLAND
AT BRISBANE

s9789 of 2003

SCOTT ANDREW MEREDITH

V

JASON GOUGH & ANOR

Applicant's Reply

1. On 28 November 2003 an application by the Director of Public Prosecutions ("the DPP") seeking to be joined as a party in respect of the proceedings s9789 of 2003 was served upon the applicant.
2. On 1 December 2003 submissions from the DPP (in respect of both applications) were received.¹¹⁶ Some matters in reply are set out below.
3. These matters are in addition to the applicant's supplementary submissions as to the jurisdiction of this Court to make orders in respect of the committal proceedings.

Intervention by the DPP

4. The DPP's application to be included as a party to the applicant's application in respect of the committal proceedings (s9789 of 2003) is unnecessary.
5. The DPP applies on the basis that she is "a party whose presence as a party is necessary to enable the court to adjudicate effectually and completely on all issues raised in the proceeding".¹¹⁷ Whilst the DPP is, by statute,¹¹⁸ empowered to 'prepare, institute and

¹¹⁶ There had been some communications foreshadowing the DPP's position beforehand.
¹¹⁷ Rules 62 and 69 of the *Uniform Civil Procedure Rules 1999*.

conduct' committal proceedings – i.e., to appear for the first respondent and 'conduct' the committal proceedings which are the subject of the present application – it does not follow that she ought necessarily, or for that matter is entitled, to be a "party" to any proceedings.

6. The only parties to the second committal proceedings are the applicant and the first and second respondents. The DPP is appearing for the first respondent at those proceedings. There is nothing prohibiting the DPP from appearing for the first respondent in the present proceedings to ensure that this Court is properly assisted in the determination of them.
7. Nevertheless, the applicant does not oppose the DPP's application to be joined as a party and consents to the order sought by her in relation to abridgement of time for the service of her application.¹¹⁹

The DPP's submissions

8. In respect of the applications for injunctive and declaratory relief, the DPP's submissions seem to include:
 - 8.1. An indication that the Crown "can and will 'step around' the suspected misconduct" by police officers in the investigation and prosecution of the applicant.
 - 8.2. Raising questions as the nature of the relief sought¹²⁰ and entitlement to costs.¹²¹
 - 8.3. An unparticularised assertion that "this is not an appropriate case" in which to make the orders sought.
9. In respect of the s.592A submissions the DPP suggests that as the Crown will, in due course, enter a *nolle prosequi* in respect of the present indictment, the present application should be dismissed. She further contends that the present complaint of abuse of process can be made at some other time after the committal process before the second respondent has been completed and after a further indictment is presented.
10. Underlying the DPP's position in each application is the assertion that there is a case to be made out against the applicant without calling the witnesses who have seemingly perjured or claimed privilege against self-incrimination and that such a course sufficiently addresses the issues raised in these applications.
11. These matters are sought to be addressed below.

Nature of the abuse of process

12. Reference has already been made in the applicant's s.592A submissions to *Jago v District Court (NSW)* (1989) 168 CLR 23 and *Dietrich v The Queen* (1992) 177 CLR 292 as to the power of a court to stay a proceeding where there has been an abuse of process. These concepts should be articulated a little more precisely in light of the DPP's submissions.
13. Firstly, the following observations are made:

¹¹⁸ Section 10(1)(c)(i) of the *Director of Public Prosecutions Act 1984*

¹¹⁹ Pursuant to rule 27(3)(c) of the UCPR.

¹²⁰ Para 11.2.1: "What is subject to Judicial Review in Mr Stark conducting an examination of witnesses where suspected misconduct has arisen?"

¹²¹ Para 11.2.2: "Do costs arise given the provision of s.127 of the Drugs Misuse Act."

- 13.1. The circumstances in which an abuse of process may arise are extremely varied and it would be unwise to limit those circumstances to fixed categories: *Rogers v The Queen* (1994) 181 CLR 251 at 255; *Bou-Simon v A-G of the Commonwealth* [2000] 96 FCR 325 at 339.
- 13.2. "An abuse of process in criminal proceedings was described by Lord Lowry in *Hui Chi-Ming v The Queen* [1992] 1 AC 34 at 57 as 'something so unfair and wrong that the court would not allow the prosecutor to proceed with what is in all other respects a regular proceeding': *DPP v Shirvanain* (1998) 44 NSWLR 129 at 133; *Bou-Simon v A-G of The Commonwealth* [2000] 96 FCR 325 at 339.
- 13.3. "... the power to stay proceedings permanently for abuse of process operates, in practice, as an exception to the duty of a court to hear and determine a matter": *Bou-Simon v A-G of the Commonwealth* [2000] 96 FCR 325 at 339.
- 13.4. Referring to the cases of *R v Jell; ex parte Attorney-General* [1991] 1 Qd R 48, *R v Saunders* [1983] 2 Qd R 270 and *R v Ferguson* [1991] 1 Qd R 35, "While these cases deal with different manifestations of unfairness in the conduct of criminal proceedings, they illustrate the care taken by courts exercising criminal jurisdiction to be ever vigilant to ensure that the criminal processes are not used unfairly; public respect for those processes will not be maintained if they are perceived to be used in an unconscionable manner designed to or having the effect of placing difficulties in the way of an accused person defending himself." *Williamson v Trainor* [1992] 2 Qd R 572 at 581-582.
14. The applicant points in this regard to the clear evidence that:
- 14.1. Police officers King and Shore misled the magistrate at the first committal as to the reasons for their interception and search of the applicant's vehicle.
- 14.2. Police officer Stagoll swore a false statement in his application for a post search approval order in respect of the search of 99 Levington Rd, Eight Mile Plains: document "c" to Exhibit "A" to the second affidavit of Jeffrey David Finch dated 28 November 2003.
- 14.3. Stagoll then misled the magistrate at the first committal as to the reasons for and the legal justification surrounding the search of 99 Levington Rd.
- 14.4. Police Officer Gough then presented evidence from Stagoll, Shore and King to the DPP for prosecution of the applicant for a further offence. He does this *after* having every reason to believe that each of them had misled the first magistrate in this material.¹²²
- 14.5. The DPP prosecutor David Finch was informed of these "problems", before any evidence is presented,¹²³ yet:
- 14.5.1. No disclosure was made to the applicant's lawyers about these matters.
- 14.5.2. The magistrate was not informed that statements being tendered under section 110A contained this misleading evidence.
- 14.5.3. The searches were still sought to be justified on this misleading material.
- 14.6. Stagoll, Shore and King, after being warned and permitted to obtain legal advice, each, in essence, claimed privilege from answering any questions surrounding their

¹²² Second Committal deps: Detective Gough: P29, L19-40.

¹²³ Second Committal deps: Detective Gough: P33, L29-35.

roles in the searching of the applicant's vehicle and property, on the grounds that any such answer may tend to incriminate them of a criminal offence.

15. Consequently, as matters presently stand, the applicant has not been able and will not be able to properly prepare his case to contest the admissibility of the evidence located at places connected to him. This, of itself, is sufficient to warrant a stay of proceedings until these claims against self-incrimination are abandoned.
16. In these circumstances, the fact that the DPP asserts that there is otherwise a *prima facie* case of some offence against the applicant by evidence not "involved in any misleading" is not to the point. In determining this matter, the first issue must be to determine whether there is an abuse of process sufficient to warrant a stay. In this regard, the references in *Bou-Simon v A-G of the Commonwealth* [2000] 96 FCR 325 at 338¹²⁴ to what was said in *Rogers v The Queen* (1994) 181 CLR 251 at 256¹²⁵ and the passage quoted in it from *Walton v Gardiner* (1993) 177 CLR 378¹²⁶ are apposite.
17. The present applications are not concerned with issues of admissibility. In fact the abuse of process is manifest because the issue of the admissibility of the inculpatory evidence cannot be properly litigated by the applicant or determined by the Second Respondent (or, for that matter, this Court).
18. The DPP's forecast position – to 'step around' the problematic evidence - ignores the essence of the propositions in the decided cases, i.e. should a prosecution that has been premised upon lies and deception by the police with, which the DPP has been complicit, be permitted to proceed. Such an abuse would not be cured by the exclusion of evidence relating to the searches. Indeed it is irrelevant in determining whether there is an abuse of process as to whether there remains a *prima facie* case without the evidence of the relevant officers.
19. In any event, it is difficult to see how evidence of the items located in each search – the unlawful drug – can be sought to be led without consideration of the basis for the searches of the vehicle and the property at 99 Levington Road.¹²⁷
20. Moreover, in this context, the DPP's position – of in essence seeking to ignore the dishonest conduct of the police – of itself bears examination.

The applications should be made at some later stage

21. It is then said by the DPP that the relief sought by the applicant can be sought later and for that reason it should now be refused. This is, with respect, absurd. This Court is being asked to refrain from exercising its own jurisdiction when a clear abuse of process has been identified. There is simply no utility in declining to grant or deferring the grant of declaratory and other relief.

- 21.1. Firstly, the nature and purpose of the committal proceedings (see the Applicant's supplementary submissions) are such that the inability of the applicant to properly

¹²⁴ Per Black CJ, Tamberlin and Katz JJ.

¹²⁵ "These statements indicate that there are two aspects to abuse of process; first the aspect of vexation, oppression and unfairness to the other party to the litigation and, secondly, the fact that the matter complained of will bring the administration of justice into disrepute..."

¹²⁶ "This led the majority in *Walton v Gardiner* (1993) 177 CLR 378 to state that the question whether criminal proceedings should be permanently stayed was to be determined by a weighing process involving a balancing of a variety of considerations. Those considerations, which reflect the two aspects of abuse outlined above, include:

'the requirements of fairness to the accused, the legitimate public interest in the disposition of charges of serious offences and in the conviction of those guilty of crime; and the need to maintain public confidence in the administration of justice.'

¹²⁷ See paras 7.3.4 to 7.3.6 of the DPP's submissions.

cross-examine and the consequent inability of the Second Respondent to perform his function under s.104 of the *Justices Act* respectively means that the abuse of process will be further manifested if the committal is not halted.

- 21.2. Secondly, to allow an abuse of process to continue in an inferior Court on the basis that there will be further opportunities to address it at a later time amounts to this Court refraining from exercising jurisdiction.
- 21.3. Thirdly, if the committal proceeding continues, it will generate considerable unrecoverable costs.
22. In the event that the magistrate commits the applicant to stand trial, then the issues raised in this application will simply need to be re-agitated in a s.592A (2)(a) application. In the event that the magistrate decides not to commit the defendant, but he becomes the subject of an *ex officio* indictment, the same argument will arise upon an application under that section in relation to any indictment. In each case this Court will have to decide the same matter presented before it now.
23. It is not as if there is any real prospect that the evidence will change. There is no suggestion or other reason to suspect that the police who have declined to give a complete account of their conduct surrounding the searches of the applicant's car and property, and who have claimed privilege against self-incrimination, intend to adopt a different course.

Nolle Prosequi

24. In respect of the s.592A application, the Crown has indicated an intention to enter a *nolle prosequi* in respect of the indictment presently before this Court.
25. It is accepted that the Courts do not ordinarily interfere in the prosecution's function in entering a *nolle prosequi*.¹²⁸ However, it is well established that the Crown's exercise of this function is subject to a Court's inherent jurisdiction and powers to prevent abuse of its processes occasioned by the withdrawal of the charge in that manner by refusing to return the indictment.¹²⁹
26. The Crown's entering a nolle prosequi in respect of the possession indictment would only be a valid exercise if this Court were to refuse the Applicant's application that it be stayed. Otherwise, it would be tantamount to an abuse of process were the DPP to seek to do so before that point in time. It would fall within the categories of cases listed by Thomas J in *R v Jell; ex parte Attorney-General* as one of the "less meritorious" instances of the entry of a nolle prosequi, namely "when the prosecution has chosen to formulate a particular charge, which, after hearing the defence submissions it wishes it had not done"¹³⁰ or, should the Applicant be successful in his applications, this would merely

¹²⁸ *R v Williams* [1936] QWN 3; *R v Jell; ex parte Attorney-General* [1991] 1 Qd R 48 at 53.

¹²⁹ *R v Saunders* [1983] 2 Qd R 270; *R v Jell; ex parte Attorney-General* [1991] 1 Qd R 48 at 53 per Macrossan CJ: "I think that the correct answer is that there is no restriction arising from the nature of the prosecutor's power... nevertheless the judge who conducts the trial and determines its course may, in an extreme case, refuse to return the indictment to the prosecutor on his request ..."

And at 62 per Thomas J: "It is the positive consequence of entering a nolle prosequi in the given circumstances which is the basis of a possible undue oppression of the accused person... The present case arises not from a desire by the prosecutor to exercise the power to halt a prosecution, but rather from a desire to use at will a procedural device to keep alive the right to prosecute the person concerned.

And at 63 per Thomas J: "The entry of a nolle prosequi at the final stages of a trial is effectively an abortion of that trial and a unilateral preservation of rights by one party – the Crown ... The power of the Court to prevent this happening when it is plainly intended as a means of enlivening an almost dead prosecution, and where the further prosecution must be regarded as an oppressive abuse, is simply an aspect of the court's duty to control its own process and to ensure that the accused receives a fair trial."

[His Honour then affirms the decision of Shepherdson J in *Saunders*.]

¹³⁰ *R v Jell; ex parte Attorney-General* [1991] 1 Qd R 48 at 62.

preserve the Crown's power to present another indictment, which process would for the same reasons as articulated in the Applicant's previous submissions, amount to an abuse of the Court's processes.

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2 December 2003