CITATION: *Justin Anthony Firth v RG [2018] NTLC029*

PARTIES:	Justin Anthony FIRTH v RG
TITLE OF COURT:	Local Court
JURISDICTION:	Criminal
FILE NO(s):	21641732, 21712182
DELIVERED ON:	12 Feb 2018
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JUDGMENT OF:	Chief Judge Lowndes

CATCHWORDS:

CRIMINAL LAW – APPLICATION FOR STAY OF PROCEEDINGS IN THE LOCAL COURT – POWER OF THE LOCAL COURT TO GRANT A PERMANENT STAY – FITNESS TO BE TRIED.

Criminal Code s 43J, 43K, 43L, 43M and 43N(1)
Local Court (Criminal Procedure) Act ss 121A(1), 122A, 131A(1), (2) and (3)
R v KF [2011] NSWLC 14 considered
Jago v District Court of NSW (1989) 168 CLR 23 followed
DPP v Shirvanian (1998) 44 NSWLR 129 followed
Eastman v R [2000] 203 CLR 1 considered
R v Presser [1958] VR 45 considered
Pioch v Lauder (1976) 13 ALR 266 considered
Ebatarinja v Deland [1998] 194 CLR 444 considered

REPRESENTATION:

Counsel:

Complainant:	Mr I Rowbottam
Defendant:	Ms B Wild

Solicitors:

Complainant:	DPP
Defendant:	NAAJA

Judgment category classification:	B
Judgment ID number:	[2018] NTLC 029
Number of paragraphs:	95

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 21641732, 21712182

BETWEEN:

Justin Anthony Firth
Complainant

AND:

RG
Defendant

REASONS FOR JUDGMENT

(Delivered 12 February 2018)

CHIEF JUDGE LOWNDES

APPLICATION FOR STAY OF PROCEEDINGS IN THE LOCAL COURT

1. The defendant was charged with having committed the following offences on 31 August 2016:

    1. Unlawfully assaulting Cassandra Prideaux, with circumstances of aggravation (contrary to s 188 (2) of the *Criminal Code*).[1]
    2. Threatening to kill a person, namely Cassandra Prideaux (contrary to s 166 of the *Criminal Code*).[2]
    3. Behaving offensively (s 47(d) of the *Summary Offences Act*).[3]

2. The defendant was also charged with having committed these offences on 28 February 2017:

[1] This charge was laid on information.
[2] This charge was laid on information.
[3] This charge was made on complaint, and is an alternate charge.

1. Unlawfully assaulting Stuart Cameron, who was working in the performance of his duties (contrary to s 188A(1) and (2)(b) of the *Criminal Code*).[4]

2. Unlawfully assaulting Stuart Cameron (contrary to s 188(1) of the *Criminal Code*).[5]

3. An application was made on behalf of the defendant to have the criminal proceedings in the Local Court permanently stayed on the basis of the defendant's cognitive impairment, which is claimed to render him unfit to be tried.

4. The defence argues that the Local Court has the power to stay proceedings before it where the question of a defendant's fitness to be tried is raised. It is argued that in the absence of a statutory power in the Local Court to address the defendant's fitness to be tried (a power which is possessed by the Supreme Court), it would be unfair or unjust to continue with the proceedings in the Local Court in a summary manner, and equally unfair or unjust to commit the defendant for trial in the Supreme Court in relation to the indictable charges for the purposes of addressing the defendant's fitness to be tried.

5. The following submissions were made on behalf of the defendant on the matter of unfairness:[6]

    1. If the defendant cannot participate in a hearing then the court must commit the matter to the Supreme Court in order for these issues to be tried. The objective seriousness of the offending in these cases is low.[7] The defendant is denied access to summary jurisdiction by reason of his disability.

[4] This charge was laid on information.
[5] This charge was made on complaint, and is an alternate charge.
[6] Paragraphs 9-12 of the defendant's written submissions.
[7] It is submitted that the seriousness and nature of the offences is a relevant matter when considering whether a stay should be granted: see paragraph 23 of the defendant's written submissions. It is also submitted that the likely sentence or outcome if the defendant were found to have committed the offences is relevant: see paragraph 24 of the submissions. It is submitted that the likely result is that the defendant will be unconditionally discharged upon a finding of guilt following a jury trial: see paragraph 25 of the submissions.

2. It is submitted that the legislative deficiencies give rise to an inequality before the law. Specifically, because the *Criminal Code* and *Mental Health Act* do not allow for the Local Court to adjudicate matters where a defendant is unfit to be tried.
3. In addition 77 of the *Mental Health Act* does not apply to persons such as RG who has a cognitive deficit. Thus he cannot be dealt with in the same manner as someone who has a mental illness by way of dismissal of the charge.

4. The *Mental Health Act* does not provide any regime whereby persons who are unfit to be tried can be placed upon a supervision order. This provides a disincentive for prosecutions and defence to negotiate outcomes in the lower court...

5. Whilst it is recognised that special hearings under the *Crimes (Mental Impairment and Unfitness to be Tried) Act* 1997 exist to address some of the unfairness that otherwise exists when an accused is not fit to be tried, there can be cases where the combination of the factors which led to the accused being unfit and other factors such as delay, loss of evidence and degree of cognitive impairment may combine to justify a permanent stay of proceedings. It is not appropriate to exclude the unfitness factors on the basis that the special hearing process is designed to address those (see *McDonald v R* [2016] VSCA 304 at [45]-[47] (per Redlich JA and Beale AJA (Ferguson JA contra); *R v Littler* (2001) 120 A Crim R 512; *Subramaniam v R* (2004) 211 ALR 1).

6. Instead, it is important to recognize that it will be a rare case where mental infirmity alone can support the grant of a stay (*McDonald v R* [2016] VSCA 304 at [45]; *Subramaniam v R* (2004) 211 ALR 1).

7. The defence submits that committing RG to the Supreme Court on minor assaults that occurred during his care and management illustrates that legislative deficiencies have lead to inequality before the law as a result of his disabilities.

8. To continue with a prosecution in such circumstances would bring about an unfair trial that would erode the public confidence in the courts.

9. It is submitted that this is vitally important to the administration of justice.

10. It is respectfully submitted that the proceedings against the defendant should be stayed.

6. The prosecution opposed the application for a permanent stay of the proceedings.

THE POWER OF THE LOCAL COURT STAY TO GRANT A PERMANENT STAY

7. It is clear that the Local Court, being a court of limited and summary jurisdiction, has inherent or implied power to control its own proceedings, and in appropriate cases to grant a stay of proceedings in circumstances where the processes of the court are being used unfairly and there is a demonstrated abuse of process.[8]

8. In *R v KF* [2011] NSWLC 14 Magistrate Heilpern noted that there is ample authority that the NSW Local Court has the power to permanently stay proceedings where the charge is one that would ordinarily be dealt with to finality in the Local Court: see *Jago v District Court of NSW* (1989) 168 CLR 23. In *DPP v Shirvanian* (1998) 44 NSWLR 129 at 134-135 Mason P observed:

> In my view *Jago v District Court (NSW)* resolves in Australian law the question whether a court has the power in an appropriate case to stay criminal proceedings permanently for oppression amounting to abuse of process. The narrowness of the criteria upon which the power might properly be exercised was expressed in different ways by the various justices. However each (with the exception of Brennan J) asserted the ultimate proposition: see (at 33-34) per Mason J; (at 58) per Deane J; (at 71) per Toohey J; (at 75) per Gaudron J.
>
> *Jago* involved an inferior statutory court, the District Court of NSW. Unless something can be found in the relevant legislation to deprive a magistrate of the Local Court of similar power then there is no basis in point of principle for distinguishing between the District Court and the Local Court. This was the view taken by the Queensland Court of Criminal Appeal in *Williamson v Trainor* [1992] 2 Qd R 572 in relation to a Magistrates Court in that State. Since the passing of the

[8] *Subramanian v The Queen* (2004) 211 ALR 1 at [35].

> *Local Courts Act* 1982 and the enactment in 1992 of Pt 9 of the *Constitution Act* 1902 (later doubly entrenched), magistrates of the Local Court have become constitutionally tenured judicial officers. They have power to impose substantial fines and terms of imprisonment. They are, like all judicial officers, charged with the duty to administer justice according to law.
>
> Since the principle which gives rise to the power in a proper case to grant a stay is that "the public interest in holding a trial does not warrant the holding of an unfair trial" (*Jago* (at 31), per Mason CJ), it follows that such power resides in a magistrate of the Local Court hearing a (summary) trial unless excluded by clear words. The duty to observe fairness, at least in its procedural sense, is a universal attribute of the judicial function. Those aspects of a fair trial known as the principles of natural justice apply by force of the common law and the presumed intent of parliament unless clearly excluded in a particular context. In my view, the same can be said about the power to prevent abuse of process as an incident of the duty to ensure a fair trial. And I can see no principled ground for excluding a power to grant a stay to prevent or nullify other categories of abuse of process.

9. It is equally clear that a stay of proceedings is an extraordinary measure, and one which is to be used sparingly. As pointed out in *Jago* [1989] 168 CLR 23 at 31 a permanent stay of a proceeding is a remedy of last resort, which is only to be granted in exceptional circumstances. When a court grants a stay it in effect declines to exercise its jurisdiction; and "a court may only decline to exercise its jurisdiction where the continuation of the trial of an accused involves fundamental unfairness which is incapable of being overcome by any procedural measures".[9]

10. The fundamental importance of a defendant's fitness to be tried to the trial process was discussed in *Eastman v The Queen*.[10]

11. In *Eastman* Gaudron J pointed out that a criminal trial cannot be fair if the accused is unfit to be tried:[11]

[9] *McDonald v The Queen* [2016] VSCA 304 at [12].
[10] [2000] 203 CLR 1.
[11] [2000] 203 CLR at [62] - [64].

> …unless a person is fit to plead, there can be no trial… if a person stands trial notwithstanding that there is an unresolved issue as to his or her fitness to plead or, if that issue is not determined in the manner in which the law requires, "no proper trial has taken place [and the] trial is a nullity". To put the matter another way, there is a fundamental failure in the trial process…
>
> If a proceeding is fundamentally flawed because the defendant was not fit to plead or if, to use the words in Begum "the trial [is] a nullity", the only course open to an appellate court is to set aside the verdict….
>
> It is sufficient to approach the present matter on the basis that the common law guarantees an accused person a fair trial according to law and that one aspect of that guarantee is that a criminal trial cannot proceed unless the accused is fit to plead.

12. Echoing the analysis undertaken by Gaudron J, Hayne J said that there "can no trial unless the accused is fit both to plead and to stand trial".[12] In a similar vein, Callinan J agreed that it was clearly settled at common law that no one may be tried unless that person is mentally competent to defend him or herself and is capable of understanding the proceedings and the nature of the evidence to be adduced.[13]

13. There is ample authority to support the power of Magistrates Courts generally and the Local Court of the Northern Territory to permanently stay criminal proceedings where a defendant is unfit to be tried on the basis that the continuation of the proceedings would be fundamentally flawed and amount to an abuse of process.[14]

14. Although the question whether criminal proceedings should be permanently stayed on abuse of process grounds generally falls to be determined by a weighing and balancing exercise as explained in *Walton v Gardiner* (1993) 177 CLR 378 at 395-

[12] [2000] 203 CLR 1 at [294].
[13] [2000] 203 CLR 1 at [332].
[14] *Pioch v Lauder* (1976) 13 ALR 266; *Mantell v Molyneux* [2006] NSWSC 955; *R v KF* [2011] NSWLC 14; *Police v AR* (unreported Children's Court of NSW, 18/11/09); *R v AAM; expert A-G (Qld)* [2001] QCA 305.

396[15], where a defendant is "not fit to stand trial in the *Presser* sense the trial is by virtue of that very fact necessarily unfair and the public interest in the trial of the person charged with the criminal offence must give way…" and it is unnecessary when considering to grant a stay on the grounds of unfitness to be tried to engage in such a weighing and balancing exercise. If a defendant is unfit to stand trial, it would be an abuse of process to continue with the proceedings as a continuation of proceedings would involve unacceptable injustice or unfairness.

15. In the present case the application for stay is based on the defendant's unfitness to be tried. It is argued that due to the defendant's unfitness to stand trial it would be unfair or unjust to continue the proceedings – and as there is no statutory process in the Local Court for determining a defendant's fitness to be tried (including the ramifications of a finding of unfitness), the only available remedy is for the Local Court to stay the proceedings.

16. Like any other abuse of process ground, the ground must be established to the satisfaction of the Court. Unless the ground is established there is no basis for granting a permanent stay of the proceedings.

THE LEGISLATION GOVERNING FITNESS TO BE TRIED

17. Before proceeding to consider the merits of the application for stay, it is necessary to look at the legislation governing fitness to be tried in the Northern Territory, as

[15] In *Walton v Gardiner* (1993) 177 CLR 378 at 395-396 the Court stated:
" The question whether criminal proceedings should be permanently stayed on abuse of process grounds falls to be determined by a weighing process involving a subjective balancing of a variety of factors and considerations. Among those factors and considerations are 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".

the relevant legislation impacts upon whether the court should permanently stay these proceedings.[16]

18. There is a statutory "hiatus" or "lacuna" in both the *Local Court Act* and *the Local Court (Criminal Procedure) Act* in that neither Act provides a mechanism to address fitness to be tried. This is in stark contrast to the *Criminal Code*, which provides such a mechanism in proceedings before the Supreme Court.

19. Relevantly, section 43J of the Code provides:

> (1) A person charged with an offence is unfit to stand trial if person is:
>
> (a) unable to understand the nature of the charge against him or her;
>
> (b) unable to plead to the charge and to exercise the right of challenge;
>
> (c) unable to understand the nature of the trial (that is that a trial is an inquiry as to whether the person committed the offence);
>
> (d) unable to follow the course of the proceedings;
>
> (e) unable to understand the substantial effect of any evidence that may be given in support of the prosecution; or
>
> (f) unable to give instructions to his or her legal counsel.
>
> (2) A person is not unfit to stand trial only because he or she suffers from memory loss.

20. Sections 43K and 43 L deal respectively with the presumption of fitness to stand trial and the burden and standard of proof.

21. Section 43M of the Code deals with committal proceedings in the Local Court:

> (1) If the question of an accused person's fitness to stand trial arises at committal proceedings:
>
> (a) the accused person is not to be discharged only because the question has been raised during the committal proceedings;

[16] See for example *Pioch v Lauder* (1976) 13 ALR 266; *Ebatarinja v Deland* [1998] HCA 62.

(b) the committal proceedings are to be completed in accordance with the *Local Court (Criminal Procedure) Act* (whether or not section 10 of that Act is complied with); and

(c) if the accused person is committed for trial – the question is to be reserved for consideration by the court during the trial of the accused.

(2) In the event of an inconsistency between Part V of the *Local Court (Criminal Procedure) Act* and this section, this section prevails to the extent of the inconsistency.

22. Section 43N(1) provides that the question of whether an accused person is fit to stand trial may be raised in the Supreme Court by the prosecution or the defence, or by the court, at any time after the presentation of the indictment. Subsection (2) requires the Court to order an investigation into the accused's fitness to stand trial if:

(a) the question of fitness was reserved during the committal proceedings; or

(b) the Judge is satisfied that there are reasonable grounds on which to question the accused's fitness to stand trial.

CONSIDERATION OF THE APPLICATION FOR PERMANENT STAY

23. In order to grant a permanent stay of these proceedings the Court needs to be satisfied that because of the defendant's unfitness to stand trial it would be unfair or unjust to continue the proceedings – in other words it would be an abuse of process for the proceedings to continue; and the only option or remedy is for the Court to terminate the proceedings by granting a permanent stay.

24. In my opinion, there is not a sufficient basis for granting a permanent stay.

25. A threshold requirement is that the court must be satisfied on the evidence before it that the defendant is unfit to be tried. The need for such satisfaction is self-evident because of the ramifications of a permanent stay.

26. In *Pioch v Lauder* (1976) 13 ALR 266 it was clear that the defendant was not fit to plead, and as the charge in question was a simple offence that could only be dealt with summarily – and there was no statutory mechanism in the Court of Summary Jurisdiction to address the defendant's fitness to plead – it was concluded that the magistrate should go no further and desist from hearing and determining the charge. This was in effect a stay of the proceedings based on the demonstrated unfitness of the defendant to plead.

27. Similarly, in *KF* [2011] NSWLC 14 Magistrate Heilpern declined to grant an application for a permanent stay of proceedings as he was not satisfied that the defendant was unfit to be tried or that the defendant could not receive a fair trial.[17]

28. During the course of his judgment, the Magistrate pointed out the practical and evidential problems in the Local Court when dealing with applications for a permanent stay based on unfitness to be tried, and highlighted the need to exercise caution in dealing with such applications, principally because "the result of a successful application is that the proceedings are stayed or the defendant is discharged", and "there is no supervisory regime" as in the higher courts where there is a statutory process to deal with the question of an accused's fitness to stand trial.[18] The Magistrate's decision underscores the need for a court to be satisfied as to the defendant's fitness to be tried before granting a permanent stay.

29. In my opinion, there is insufficient evidence to show that the defendant in the present case is unfit to be tried in the *Presser* sense.[19]

30. In *R v Presser* [1958] VR 45 at 48 Smith J set out the criteria for a defendant's fitness to be tried:

[17] [2011] NSWLC 14 at [42]
[18] [2011] NSWLC 14 at [18] – [19].
[19] *R v Presser* [1958] VR 45.

> He needs, I think, to be able to understand what it is that he is charged with. He needs to be able to plead to the charge and to exercise his right of challenge. He needs to understand generally the nature of the proceeding, namely that it is an enquiry as to whether he did what he is charged with. He needs to be able to follow the course of the proceedings so as to understand what is going on in court in a general sense, though he need not, of course, understand the purpose of all the various court formalities. He needs to be able to understand, I think, the substantial effect of any evidence that may be given against him; and he needs to be able to make his defence or answer to the charge. Where he has counsel he needs to be able to do this through his counsel by giving any necessary instructions and by letting his counsel know what his version of the facts is and, if necessary, telling the court what it is. He need not, of course, be conversant with court procedure and he need not have the mental capacity to make an able defence; but he must, I think, have sufficient capacity to be able to decide what defence he will rely upon and to make his defence and his version of the facts known to the court and to his counsel, if any.

31. As stated in *Police v AR* (unreported Children's Court of NSW, 18 November 2009) the *Presser* tests, which are applied to determine whether a defendant is unfit to be tried, are directed to the question of whether a defendant comes up to minimum standards which he or she needs to attain before he or she can be tried without unfairness or injustice. The Pressser criteria received approval in the High Court in *Ngatayi v R* (1980) 147 CLR 1 at [8] and *Kesavarajah v The Queen* (1994) 123 ALR 463 at 473-474. The *Presser* criteria are given expression to and included in s 43J (2) of the *Criminal Code* (NT) which provides the test for fitness to stand trial.

32. In order to be fit to be tried a defendant needs to meet all of the *Presser* criteria.[20] If a defendant fails to meet any one of the criteria then he or she must be considered to be unfit to be tried.

[20] *Kesavarajah v The Queen* (1994) 123 ALR 463.

33. The sole evidence that relates to the defendant's fitness to be tried is contained in the psychiatric report of Dr Walton (Exhibit P1). On page 4 of that report Dr Walton states:

> It remains the situation that RG's fitness to be tried is marginal. The main area of difficulty would be in relation to his being able to properly evaluate any evidence given against him. I believe that he would be able to follow relatively simple and straightforward proceedings and provide minimally adequate instructions. Should the matter proceed by way of plea and sentence then I would describe RG as "fit enough" for that procedure.

34. To my mind, this paragraph does not adequately address each of the relevant criteria and specify why the defendant does not meet each of the minimum requirements. Furthermore, it is unclear as to what criteria Dr Walton is referring to when he says that "the main difficulty would be in relation to his being able to properly evaluate any evidence given against him".

35. It is unclear what Dr Walton means by his statement the defendant's fitness to stand trial is marginal. However, the statement strongly suggests that the defendant has a borderline mental capacity – that is one that that barely exceeds the minimum requirements laid out in the *Presser* tests and s 43J(2) of the Code – but nevertheless a mental capacity that renders him fit to be tried.

36. Finally, if the defendant were to plead guilty to the charges, according to Dr Walton the defendant would be fit to plead, and therefore there could be no unfairness in the charges being dealt with to finality in the Local Court.

37. Therefore, at the outset the application for a permanent stay in relation to all five charges before the court must fail because it has not been demonstrated to the satisfaction of the court that the defendant is unfit to be tried.

38. However, even if I am wrong in my assessment of the evidence relating to the defendant's fitness to be tried – and the evidence in fact supports a finding of unfitness – a permanent stay in relation to the three indictable charges would still not be warranted for the reasons that follow.

39. As previously stated, the defendant has been charged with unlawful assault with circumstances of aggravation (s188(2) of the *Criminal Code*), threatening to kill (s 166 of the *Criminal Code*) and unlawful assault (s188A(1) and (2)(b) of the *Criminal Code*).

40. The two unlawful assaults are indictable offences[21] which are governed by s 131A of the *Local Court (Criminal Procedure) Act*. The offence of threatening to kill is also an indictable offence[22] which is subject to the provisions of s 121A of the Act.

41. Section 131A (1) provides that subject to subsection (3)(a), the Local Court may hear and determine an indictable offence summarily if the offence is an offence contrary to sections 186, 188(2), 188A or 189A (1) or (2) (a) of the *Criminal Code*.

42. Section 131A(2) allows the prosecution or defence to apply, before the Court exercises its jurisdiction under subsection (1), for the charge to be heard and determined by the Supreme Court.

43. Section131A (3) provides that the Court my exercise jurisdiction under subsection

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[21] Section 3 (2) of the *Criminal Code* states that an offence is an "indictable offence" if:
(a) an Act states that the offence is an indictable offence; or
(b) subject to subsection 3(a), the penalty that may be imposed on an individual for the offence includes imprisonment for a period of more than 2 years.
Section 3 (3) of the Code states that an offence is a summary offence if:
(a) an Act states that:
(i) the offence is a summary offence; or
(ii) the offence is not an indictable offence; or
(iii) a charge of the offence must be heard and determined summarily; or
(b) the offence is not an indictable offence.

[22] See n 21,

(a) only if the Court is of the opinion that that the charge should be heard and determined summarily; and

(b) whether or not the defendant consents to its exercise.

44. Having regard to the question of the defendant's fitness to be tried (which cannot be determined in the Local Court), the prosecution has applied for the two charges in question to be heard and determined by the Supreme Court so as to activate the statutory process for determining the defendant's fitness to be tried.

45. Section 121A (1) of the Act, subject to s 122A, empowers the Local Court to hear and determine the indictable charge of threatening to kill summarily provided:

(a) both the prosecutor and the defendant consents to the charge being so disposed of; and

(b) the Court is of the opinion that the charge should be heard and determined summarily.

46. However, the prosecution does not consent to the charge being heard and determined summarily by the Local Court[23] because of the question of the defendant's fitness to be tried and the absence of any statutory regime in the Local Court dealing with a defendant's fitness to stand trial.

47. The defence submits that it would be unjust or unfair for the Local Court to decline summary jurisdiction based on the opinion that the subject charges should not be heard and determined summarily due to the defendant's unfitness to be tried having been raised, and to proceed to have the charges heard and determined by the Supreme Court. Instead, the Court should not continue with the proceedings and grant a permanent stay.

[23] This arises by necessary implication from the application of the prosecutor to have the two charges of unlawful assault heard and determined by the Supreme Court.

48. Recourse to committal proceedings for persons charged with indictable offences that are capable of being heard and determined summarily, and who are unfit to be tried in the Court of Summary Jurisdiction, has received judicial consideration in the past.

49. In *Pioch v Lauder* Forster J stated that if the offence before the Court of Summary Jurisdiction were an indictable offence, a committal hearing could proceed notwithstanding the defendant's disabilities,[24] as no plea is required. His Honour went on to say that if the defendant were indicted before the Supreme Court, the usual procedures for dealing with those unfit to plead would apply, inappropriate though they might be. However, because the offence with which the defendant had been charged was a simple offence the matter could not proceed by way of the committal process, and therefore the only option was for the magistrate to go no further and desist from hearing the charge.

50. The decision in *Pioch v Lauder*, however, needs to be read in light of the High Court's decision in *Ebatarinja v Deland* [1998] 194 CLR 444.

51. In that case the defendant, who was charged with homicide, was unable to understand the committal proceedings or the charges. The Magistrate constituting the Court of Summary Jurisdiction stated a case to the Supreme Court of the Northern Territory. Mildren J, who heard the case stated, concluded that committing the defendant for trial in the Supreme Court would be neither unfair nor unjust. On appeal the Court of Appeal upheld the primary judge's finding. However, on appeal to the High Court, it was held that committing the defendant for trial would contravene ss 106 and 110 and 111 of the *Justices Act*.

[24] The defendant was totally deaf and unable to use speech. He was clearly unable to understand the nature of the proceedings or its course, to plead or to give instructions, to understand or to give evidence. The defendant was clearly not fit to be tried.

52. Section 106 of the Act provided that, except in the case of specified exceptions, where a defendant appeared or was brought before a justice charged with an indictable offence the justice should, in the presence or hearing of that person, and if that person so desired, in the presence of hearing of his counsel or solicitor, take a preliminary examination or statement on oath of any persons who knew the facts and circumstances of the case.

53. Section 110 required the justice to ask if the defendant wished to say anything in answer to the charge, having heard the evidence for the prosecution. Section 111 required the justice to ask the defendant if he or she wished to call any witnesses and permitted the defendant to call witnesses.

54. The High Court held that s 106 required a defendant to be capable of understanding what has been put against him as a condition precedent to being committed for trial. Furthermore, the Court held that ss 110 and 111 were mandatory, and a failure to comply with them rendered a committal for trial a nullity. As the defendant was a deaf mute who was unable to understand the charges against him and court proceedings and unable to communicate with his lawyer the magistrate had no power to continue with the committal proceedings.

55. However, it is important to note that the decision in *Ebatarinja v Deland* turned upon a statutory construction of the relevant provisions of the *Justices Act*. Clearly, the defendant could not be committed for trial because the then provisions of the Act prevented a defendant who was, in effect, unfit to be tried from being committed for trial in the Supreme Court. Although in *Ebatarinja v Deland* the High Court disavowed the observation made by Forster J as to the use of the committal process had the charge been an indictable one, and not a simple offence, that was on the basis that the committal process would not have been open to the court of summary

jurisdiction because of the requirements of ss 106, 110 and 111 of the *Justices Act*. There is nothing in the decision of the High Court to suggest that it would be wrong in principle or otherwise improper or inappropriate to commit a defendant (who fails to meet the *Presser* tests) for trial to address his or her fitness to be tried, provided the legislation governing the committal process did not prohibit that course of action.

56. The current committal provisions[25] have removed the impediment identified by the High Court in *Ebatarinja v Deland* – and indeed expressly provide for the use of committal proceedings determining a defendant's fitness to be tried under Part 11A of the *Criminal Code*.[26] Therefore, the observation made by Forster J in *Pioch v Lauder* as to the use of the committal process for defendants who are unfit to be tried remains very apposite in the current legislative landscape.

57. In my opinion, the position in the Local Court in relation to the question of fitness to be tried is as follows.

58. In relation to summary offences where the question of fitness to be tried is raised the only remedy available to the Local Court is to permanently stay the proceedings – or, in the words of Forster J in *Pioch v Lauder*, "to go no further and desist from hearing the charge".

59. Where the issue is raised in relation to strictly indictable offences or indictable offences that are capable of being heard and determined summarily the committal

[25] See Section 43M of the Code referred to earlier.

[26] See *CL (A Minor) v Lee* (2000) 29 VR 570 at [47]:

" A committal proceeding cannot ordinarily be conducted in circumstances where a person is unable to comprehend and participate in the proceedings: *Ebatarinja v Deland* [1998] 194 CLR 444 at [29]. However, the Victorian legislation, specifically s 8 of the *Crimes (Mental Impairment and Unfitness to be Tried)* Act envisages a situation where a committal proceeding can be conducted despite the defendant's inability to participate in the proceedings provided the fitness of the person to stand trial is reserved for the consideration of the trial judge, activating the provisions of the *Crimes (Mental Impairment and Unfitness to be Tried)* Act.

process provides a mechanism for addressing a defendant's fitness to be tried: the defendant is committed for trial in the Supreme Court, with the question of the defendant's fitness reserved for consideration by the court during the trial of the accused.

60. The argument advanced by the defence in relation to the indictable offences with which the defendant has been charged is that "in all the circumstances the continuation of the present proceedings would involve unacceptable injustice or unfairness" to use the words of the High Court in *Walton v Gardiner* (1993) 177 CLR 378 at 392 per Mason CJ, Dean and Dawson JJ.

61. The crux of the argument is that because there is no facility in the Local Court to determine the question of fitness to be tried in relation to summary offences or indictable offences capable of being tried summarily – and in relation to the latter the question can only be determined by the Supreme Court – the defendant is denied by reason by his cognitive impairment access to summary jurisdiction. Furthermore, the continuation of the proceedings by way of the committal process, for the purposes of activating the fitness to be tried provisions of the *Crimes (Mental Impairment and Unfitness to be Tried) Act*, would amount to an unfair or unjust use of the court processes and procedures. Put another way, recourse to the committal process would convert the court processes and procedures into an "instrument of injustice or unfairness",[27] and such misuse of the court process would not only be

unfair to the defendant, but bring the administration of justice into disrepute[28] and erode public confidence in the administration of justice.[29] It is submitted by the

[27] See *Walton v Gardiner* (1993) 177 CLR 378, 392-4.
[28] *Walton v Gardiner* (1993) 177 CLR 378, 392-4.
[29] See *Jago v District Court of NSW* (1989) 168 CLR 23 citing *Moevao v Department of Labour* (1980) 1 NZLR 464.

defence that such unfairness or injustice can only be averted by the Court granting a permanent stay of the present proceedings.

62. In my opinion the argument cannot be sustained.

63. It is arguable that s 43M of the Code has codified and abrogated the common law in the Northern Territory on the issue of fitness to be tried, with the consequence that the Local Court has no power to permanently stay proceedings (by reason of unfitness to be tried) in relation to strictly indictable offences or indictable offences that are capable of being heard and determined summarily.[30]

64. However, even if s 43M has not had that effect, it is difficult to see how recourse to the committal process in the present case could be considered to be an unfair or unjust use – or misuse – of the court's processes and procedures. To the contrary, it is in accordance with the processes and procedures of the Local Court and a proper use of those processes and procedures - consistent with the proper administration of justice.

65. The committal process coupled with the unfitness to be tried provisions of the Crimes (Mental Impairment and Unfitness to be Tried)Act overcomes the unfairness that would result if indictable offences that are capable of being heard and determined summarily (such as those charged against the defendant) were to proceed to be heard and determined in the Local Court. Both processes combine to relieve against the unfair consequences of proceeding to a summary trial in the Local Court.

[30] See *CL (A Minor) v Lee* (2000) 29 VR 570 at [61] and [67} where Lasry J reached a similar conclusion in relation to a comparable statutory process under the Victorian *Crimes (Mental Impairment and Unfitness to be Tried)* Act.

66. As pointed out by Mason CJ in *Jago v The District Court* (NSW) at [21]:

> 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* at p 111 per Wilson J.

67. Both processes provide the Local Court with the means to overcome an unfair trial in the Local Court. Furthermore, they provide a process by which a defendant's fitness to be tried can be more forensically investigated and determined.[31] The present case is very much on point, where the evidence relating to the defendant's fitness to be tried is deficient. If the defendant is committed for trial with the question of his fitness reserved for consideration by the Supreme Court, then his fitness to be tried can be properly investigated and determined. Those processes are also better equipped to identify cases where defendants are feigning physical and mental conditions in order to avoid criminal liability.

68. The processes also overcome the unsatisfactory alternative of a permanent stay of proceedings in the Local Court. A permanent stay does not equate with an acquittal.[32] A permanent stay is "tantamount to the refusal of jurisdiction to hear and determine the matter arising on the presentation of an indictment"[33] or "the power is, in essence, a power to refuse to exercise jurisdiction".[34] Either way, a permanent stay has the effect of a refusal on the part of the court to put the defendant to trial. A permanent stay results in the termination of the proceedings.[35] This is an outcome that does not sit comfortably with the public interest in ensuring that those who are

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[31] See the comments made by Magistrate Heilpern in *R v KF* [2011] NSWLC 14 at [19] regarding the practical and evidential problems in the Local Court in dealing with applications for a stay based on a defendant's unfitness to be tried.

[32] *Edebone v Allen* [1991] VR 659 at 666; *R v Griffiths* (1980) 2 A Crim R 30.

[33] *Jago v District Court of NSW* 168 CLR 23 at [13] per Brennan J.

[34] *Jago v District Court of NSW* 168 CLR 23 at [14] per Gaudron J.

[35] Chris Corns "Judicial Termination of Defective Criminal Prosecutions: Stay Applications" Vol 16 No 1 1997, p 80.

accused of crime stand trial, and is in conflict with the interests and expectations of victims of crime.[36]

69. Criminal proceedings in the Local Court often involve matters of a serious nature. The present proceedings are a case in point. The defence submission that the objective seriousness of the alleged offending is low is not accepted. Nor is it is a forgone conclusion that the defendant would be unconditionally discharged even upon a finding of guilt following a jury trial (as submitted by the defence). A permanent stay based on a defendant's unfitness to be tried may expose the community to risk of harm from a defendant who is not subject to a supervisory regime or treatment plan (which are capable of being put in place as part of the unfitness to be tried regime in the Supreme Court). In my opinion, the present defendant presents such a risk.

70. The mentioned processes also obviate the need for the prosecution, in appropriate cases, to proceed ex officio to have the defendant's fitness to be tried determined in the Supreme Court.

71. Furthermore, far from bringing the administration of justice into disrepute or eroding public confidence in the administration, the processes are consistent with the proper administration of justice and promote public confidence in the administration of justice.

72. The process for addressing fitness to be tried in relation to indictable offences that are capable of being heard and determined summarily may be imperfect - an ideal system being one which by legislation invests the Local Court with power to determine a defendant's fitness to be tried along the lines of the regime that operates in the Supreme Court. However, imperfect as the committal process is for addressing

[36] Corns n 35, p 81.

the defendant's fitness to be tried, recourse to that process in this case would not give rise to an unacceptable unfairness or injustice. The imperfection in the current system does no more than draw attention to the fact that a simple legislative amendment conferring power on the Local Court to investigate and determine the question of fitness to be tried and make consequential orders would provide a tidier and more efficient and effective process for dealing with a defendant's fitness to be tried in relation to indictable offences that are capable of being dealt with summarily.

73. Finally, but certainly not least, it must be remembered that a permanent stay should only be granted in "exceptional circumstances", where the difficulty cannot be remedied by other mechanisms available to the court, and there is simply no other remedy than a stay.[37] In the present case, there is another mechanism available to the Local Court and a remedy apart from a stay.

74. In the interests of completion, I have considered whether, in light of cases like *Subramaniam v R* [2004] 211 ALR 1 and *R v McDonald* [2016] VSCA 304, there are any other grounds that might warrant a permanent stay of the proceedings in relation to the indictable offences. This consideration assumes that the evidence before the court was sufficient to demonstrate that the defendant is unfit to be tried (which I found not to be the case).

75. By way of background, in Subramaniam the appellant was charged with two counts of perverting the course of justice in December 1996. A trial commenced in the District Court of NSW in August 1999, but the jury was discharged because it was unable to reach a verdict.

[37] Corns n 35, p 84. See also *R v Smith* [1995] VR 1 at 14; *Jago v The District Court of NSW* (1989) 168 CLR 23 at 76.

76. The appellant's mental health deteriorated. The appellant applied for a permanent stay of the criminal proceedings. That application was rejected. Almost 12 months later the District Court directed that there be a hearing with respect to the appellant's fitness to stand trial. About 6 months later, the NSW Mental Health Review Tribunal formed the view that the appellant was not fit to be tried. The Attorney General then directed a special hearing be conducted in relation to the subject charges. The special hearing commenced about 6 months later, when another application for a permanent stay was made and refused.

77. The jury returned a verdict of not guilty in relation to one count and a verdict of guilty on the other count. An appeal against conviction was dismissed. The appellant then appealed to the High Court. A principal question in the appeal was whether a stay of the appellant's trial should have been granted. In allowing the appeal, the Court held that the test to apply on the application for the stay was whether, in light of the appellant's deteriorating medical condition, it "would be out of accord with common humanity" to have allowed the special hearing to proceed. The Court found that the trial judge had regard to the whole of the medical evidence, and the possibility of the continuing deterioration of the appellant's mental health and any potential that the trial might have for its aggravation did not provide a sufficient reason for granting a stay of the criminal proceedings.

78. In Subramanian the appellant relied solely on the fact of her deteriorating mental health as the ground for a permanent stay. She argued that her deteriorating mental health adversely affected her in two particular respects – namely that it prevented her from being able to give reliable testimony, and further prosecution of the proceedings could have resulted in a serious worsening of her current mental health. The appellant argued that both her current mental condition and potential for its

exacerbation by reason of the special hearing would be so oppressive to her as to justify a permanent stay. However, although the High Court rejected the ground of appeal relating to the stay, the Court stated:[38]

> This is not to say that notwithstanding the manifest purposes of the Act, there may not still be cases of mental infirmity calling for the grant of a stay even of the special hearing for which it provides although instances of them are likely to be rare.[39] This is so for two reasons: the Act does not, expressly or by implication, forbid their application; and, common humanity would argue in favour of a stay if the risk were a real one, and the likely exacerbation grave.

79. Although Subramaniam can be distinguished from the present case in that the former was concerned with an application for a permanent stay of a special hearing (similar to that provided for in Part 11A of the *Criminal Code* (NT)), it is conceivable that the kind of argument that was relied on in Subramaniam could be advanced in the Local Court to support an application for a stay of committal proceedings for the purposes of having a defendant's fitness to be tried to be determined in the Supreme Court.[40]

80. However, even if the evidence had been sufficient to establish the defendant's unfitness to be tried, the mental infirmity of the defendant in the present case would not provide a sufficient basis for granting a permanent stay of committal proceedings.

81. Similarly, *McDonald v The Queen* provides some guidance as to how a cognitive impairment might provide a ground for a permanent stay.

82. By way of background, the applicant, having been found unfit to be tried by a jury,

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[38] [2004] 211 ALR 1 at [35].
[39] See *R v WRC* (2003) 59 NSWLR 273.
[40] However, any stay of the committal proceedings would not prevent the prosecution from proceeding ex officio to have the question of fitness to be tried to be determined in the Supreme Court.

was facing an imminent "special hearing" under the *Crimes (Mental Impairment and Unfitness to be Tried) Act*. The applicant applied to the trial judge for a permanent stay of the indictment. Upon that application being refused, he sought leave to appeal against the order refusing the stay. The Court of Appeal granted leave, allowed the appeal and permanently stayed the indictment.

83. The stay was granted on the basis of the applicant's cognitive impairment and the combined effect of that impairment together with the disadvantages arising from the unreasonable delay. The Court of Appeal concluded that that combination of factors made the continuation of the proceedings unacceptably unfair.

84. There are no such circumstances in the present case such as to warrant a permanent stay of committal proceedings for the purposes of having the defendant's fitness to be tried determined by the Supreme Court – even if I had been satisfied that there was sufficient evidence to demonstrate that the defendant is unfit to be tried.

85. As mentioned earlier, it is within the power of the Local Court to decline summary jurisdiction with respect to indictable offences that are capable of being dealt with summarily in the event that the court is of the opinion that the offence should not be heard and determined summarily.[41]

86. In my opinion, a proper exercise of the judicial discretion conferred by the relevant provisions requires the Court to decline summary jurisdiction in relation to the subject charges. It is entirely appropriate in all the circumstances for the court to form the opinion that the charges should not be heard and determined summarily, and that the charges should be dealt with by the Supreme Court. The question of the defendant's fitness to be tried having been raised – and there being no facility in the

[41] See ss 121A(1) and 131A(3) of the Code.

Local Court to determine such a matter – there is a proper basis for forming that opinion.

87. In my opinion, the continuation of the proceedings by way of the committal process would not amount to an abuse of process, resulting in unacceptable injustice or unfairness that warrants a permanent stay of the proceedings.

88. In stark contrast, the grant of a permanent stay would amount to an improper exercise of the judicial discretion, as it would, in the circumstances of this case, bring the administration of justice into disrepute and erode public confidence in the administration of justice – especially when a permanent stay should only be granted in exceptional circumstances, where there is no other mechanism or remedy available to the court to address or remedy any unfairness or injustice that strikes at the heart of a fair trial.

89. As regards the two matters on complaint, there is no basis for a permanent stay as the evidence failed to demonstrate that the defendant is unfit to be tried; and therefore it was not established that the continuation of the proceedings would involve fundamental unfairness.

90. In conclusion, this case reveals a lacuna or hiatus in the current legislation governing fitness to be tried. There is no statutory process for determining a defendant's fitness to be tried in the Local Court in relation to summary offences or indictable offences that are capable of being heard and determined summarily. The Northern Territory Law Reform Committee recommended that such a process be introduced by legislation;[42] but to date that recommendation appears not to have been adopted. As stated earlier, the current deficiency could be solved by a simple

[42] See the Law Reform Committee's "Report on the Interaction Between People With Mental Health Issues and the Criminal Justice System" Report No 42 May 2016, recommendation 10.

legislative amendment conferring power on the Local Court to investigate and determine the question of fitness to be tried and make consequential orders.

DECISION

91. The application for a permanent stay in relation to all the charges is refused.

92. I will hear the parties as to any consequential orders or such directions as are necessary for the future progress of this matter.

Dated 12 February 2018

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Dr John Lowndes
Chief Judge of the Local Court of the Northern Territory