SUPREME COURT OF QUEENSLAND

CITATION:	*Gilbert v Volkers* [2004] QSC 436
PARTIES:	**JULIE THERESE GILBERT** (applicant) v **SCOTT ALEXANDER VOLKERS** (respondent)
FILE NO/S:	SC No 9030 of 2004
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	16 December 2004
DELIVERED AT:	Brisbane
HEARING DATE:	4 November 2004
JUDGE:	Holmes J
ORDER:	**Application dismissed**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – PROSECUTION – LEAVE OR DIRECTION OF THE SUPREME COURT TO EXHIBIT CRIMINAL INFORMATION – DISCRETION TO GRANT OR REFUSE – GENERALLY – where the applicant was the complainant in respect of four charges of indecent dealing brought against the respondent – where the respondent was committed to trial on those charges – where the Director of Public Prosecutions found no true bill after examining the evidence and other material provided by the respondent's solicitors – where the applicant seeks leave under s 686 of the *Criminal Code* to present an indictment in respect of three of the alleged offences – whether the Court will grant leave under s 686 *Criminal Code* (Qld), s 686, s 687, s 694 *Criminal Code* (WA), s 720 *Ex parte Marsh* [1966] Qd R 357, considered *Gouldham v Sharrett* [1966] WAR 129, applied *Hoch v The Queen* (1988) 165 CLR 292, cited *M v JMP and RP* (1999) 108 A Crim R 129, cited *R v Lewis* [1994] 1 Qd R 613, cited *Re Smith* [1993] 2 Qd R 218, cited

COUNSEL: Mr Hanson QC for the applicant
Mr Byrne QC for the applicant, with Ms Brasch, for the respondent

SOLICITORS: Quinn & Scattini Lawyers for the applicant
Ryan & Bosscher Lawyers for the respondent

Background

[1] The applicant was the complainant in respect of four charges of indecent dealing brought against the respondent, Mr Volkers. He was committed for trial on those and other charges, but the Director of Public Prosecutions, having examined the evidence and other material provided by the respondent's solicitors, found no true bill. The applicant seeks leave under s 686 of the *Criminal Code* to present an indictment in respect of three of the alleged offences.

Private prosecution under the Criminal Code

[2] Section 686 is in the following terms:

> **"Information by leave of the Court by private prosecutors**
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> (1) Any person may by leave of the Supreme Court present an information against any other person for any indictable offence, alleged to have been committed by such other person.
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> (2) An information presented by leave of the Court is to be signed by the person on whose application the leave is granted, or some other person appointed by the Court in that behalf, and filed in the Supreme Court.
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> (3) The person who signs the information is called the prosecutor.
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> (4) The information is to be intituled 'The Queen on the prosecution of the prosecutor (naming the person) against the accused person (naming the person)', and must state that the prosecutor informs the Court by leave of the Court.
>
> (5) Except as otherwise expressly provided, the information and the proceedings upon it are subject to the same rules and incidents in all respects as an indictment presented by a Crown Law Officer and the proceedings upon such an indictment as hereinbefore set forth."

[3] Section 687 requires the prosecutor, before presenting any information, to give security that he or she will prosecute the information without delay and will pay any costs ordered to be paid to the accused person. (I was informed in this case that the applicant was in a position to give such security.) The following sections deal with the entering of a plea and appointment of time and place for trial, and with judgment of conviction in default of plea in the case of misdemeanours. Section 694 contemplates, as a circumstance enlivening the court's discretion to award costs, the prosecution being brought to an end by *nolle prosequi* of a Crown Law Officer. In

Gouldham v Sharrett[1] the Full Court of the Supreme Court of Western Australia regarded the equivalent provision of that state's *Criminal Code* as indicating that the Crown retained control over the proceedings.

Judicial consideration of s 686

[4] Sub-section 686(1) provides no criteria for the grant of leave, and the provision has received relatively little judicial consideration. Section 720 of the *Criminal Code* (WA) is in identical terms to s 686(1), except for a qualification that the indictable offence must be one "not punishable with death". In *Gouldham v Sharrett* the court refused an application for leave under s 720 in respect of an allegation of perjury. The Attorney-General had indicated that he would not proceed with the charge. Having emphasised that the refusal of the Attorney-General to file an indictment was "a matter of great weight", Wolff CJ, with whom the other members of the court concurred, went on to identify these considerations:

> "(1) Is the type of offence of such grave character that the determination whether to prosecute should be left to the Attorney-General: e.g. prosecutions for such offences as non-capital homicide, perjury, and so on?
>
> (2) Is the admissible evidence in support of the prosecution inherently credible and sufficient to found a prima facie case?
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> (3) If there have been no proceedings for committal, is there any good reason why the usual proceedings for committal before justices should not be resorted to?
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> (4) Has the accused already been committed for trial by a petty sessional court?
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> (5) Has the Attorney-General entered a *nolle prosequi* or intimated that he will not file a bill?
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> (6) Is the administration of justice likely to be impaired by reason of some discreditable motive on the part of the prosecutor?
>
> (7) Is the situation such that if leave is refused a grave injustice will be done to the applicant or somebody standing in close relationship to him?"[2]

[5] Two weeks before the decision in *Gouldham v Sharrett*, Wanstall J gave judgment in *Ex parte Marsh*[3], one of the few Queensland cases dealing with private prosecution. There the applicant sought to proceed against a police officer who, he alleged, had assaulted him. Wanstall J reviewed the origins of the procedure in English law and the history of its use in Australia. He noted that New South Wales decisions of the nineteenth century had regarded the Supreme Court's power to permit the bringing of private prosecutions as a peculiarity of the early days of the colony. There did not appear to have been any previous use of the procedure in

[1] [1966] WAR 129 at 136.
[2] [1966] WAR 129 at 137 – 138.
[3] [1966] Qd R 357.

Queensland. But given the enactment of s 686 in the *Criminal Code* in 1899, the most, he observed, that could be made of the historical background was that the legislature would have expected that the "tradition of sparse use" would continue.[4] He did not, however, think there was any warrant for regarding the discretion as trammelled by restrictions as to the type of offence for which leave could be granted, since the provision itself made no such distinction. The discretion's exercise, he said, "should not be conditioned by any but the sort of consideration which habitually guides the exercise of any judicial discretion."[5]

[6] The headnote to *Ex parte Marsh* is in these terms: "The use of the procedure set out in s. 686 of *The Criminal Code* ... should be regarded as unusual and extraordinary, and the Court should not countenance its use unless the case presents some unusual, if not extraordinary, feature", and the case has sometimes been cited as authority for the proposition that leave can only be granted in unusual or extraordinary cases. That, I think, overstates what is actually said in it. Wanstall J regarded this feature as circumscribing his exercise of discretion: there had been in that case no committal, and to permit the applicant to present an indictment would deprive the accused of the protection afforded by firstly, the committal procedure and secondly, the Attorney-General's consideration of whether a true bill should be found. There was, Wanstall J concluded, no "unusual or extraordinary feature" which would justify his sanctioning a procedure which deprived the accused of that protection,[6] and he declined to give the leave sought.

[7] It is one thing to say that the use of the procedure is unusual and extraordinary; as a matter of history, that is demonstrably correct. One can also infer a legislative expectation, against that background, that its adoption would not become an everyday affair. But it is another matter to ascribe to Wanstall J the view that the procedure should only be countenanced in cases presenting unusual features. It is apparent that his Honour did not reach that view in relation to the granting of leave under s 686 generally; he arrived at it specifically because of the absence of any committal hearing in the case before him. Wanstall J's approach was noted by the Court of Appeal in *Re Smith*[7], the court observing that he had overlooked the possibility of granting leave with a stay so as to permit committal proceedings to take place. The decision was not otherwise criticised; in particular, there was no suggestion that he was wrong in regarding the discretion as unconstrained by the type of offence alleged.

[8] In the present case, some of the questions posed in *Gouldham v Sharrett* are readily answered. The respondent has been committed for trial, and the Director of Public Prosecutions has indicated that she will not present an indictment. Because a committal has taken place, the concern which Wanstall J regarded as impinging on his exercise of discretion does not exist, and there is, I consider, no warrant for requiring any "unusual or extraordinary" circumstance to be demonstrated. Generally speaking, there is no limitation on how the discretion falls to be exercised, other than the guide provided by public interest considerations. In

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[4] At 364.
[5] At 366.
[6] At 366.
[7] [1993] 2 Qd R 218 at 221 - 222.

considering what the public interest indicates, I propose to have regard to the *Gouldham v Sharrett* criteria, with some qualifications.

Gravity of the alleged offence

[9] It was argued for the respondent that the alleged offence was of such a grave nature, as an allegation of a sexual offence against a child, that it ought only be prosecuted by the Director of Public Prosecutions. In that regard I was directed to *M v JMP and RP*[8] in which White J, having observed that the abuse of children was "rightly regarded with abhorrence by the community" and attracted substantial penalties, concluded that an offence of incest involving penetration allegedly committed against a child was of so grave a nature that its prosecution ought be left to the Attorney-General[9].

[10] It is hard to know what precisely Wolff CJ had in mind in his reference to offences "of such grave character" that the decision whether or not to prosecute should be left up to the Attorney-General. On what basis does one classify an offence as sufficiently serious to warrant leave to present an information, but insufficiently serious to require the Attorney-General's (or the appropriate prosecuting authority's) attention? The suggestion that there are some offences which ought to be the sole preserve of the Attorney-General's discretion to prosecute may have its root in this common law distinction, made in Blackstone's list of matters which could be the subject of a private complaint:

> "any gross and notorious misdemeanours, riots, battery, libels, and other immoralities of an atrocious kind, not particularly tending to disturb the government (for those are left to the care of the attorney general) but which, on account of their magnitude or pernicious example, deserve the most public animadversion." [10]

[11] But there is nothing in s 686 to suggest any intended continuance of such a distinction; and Wanstall J in *Ex parte Marsh* did not think it was warranted. One might regard some offences as better left in the hands of the state prosecuting authorities: those, such as Blackstone referred to, which tend "to disturb the government" or those affecting the administration of justice. However that may be, the offences alleged here do not have that character. I do not think there is any reason to regard them as belonging to a class which ought to be reserved for the Attorney-General's attention.

The evidence put forward by the applicant

[12] What is set out below, I must emphasise, is an outline of the allegations against the respondent for the purpose of analysing whether a prima facie case exists. It in no way constitutes any finding as to what did in fact occur, and takes no account of what evidence might be advanced by the defence, because that is not before me. And equally, it should be clear, my consideration of the evidence and conclusion on

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[8] (1999) 108 A Crim R 129.
[9] At 139.
[10] William Blackstone, *Commentaries on the Laws of England Volume 4* (1769) 304 - 305.

it should in no way be taken as a review of the decision of the Director of Public Prosecutions (or the opinion of her New South Wales counterpart) that the prosecution should not proceed. As will become apparent, there was evidence before them which is not before me. I was provided with statements from only two prosecution witnesses, the applicant and a complainant whom I shall refer to as B, with a portion of the committal depositions. I have not, plainly enough, had occasion to hear the oral account of any witness. I am in no position to evaluate the prosecution's prospects of success at trial. My assessment is therefore an extremely limited one purely for the purposes of this application, made on different criteria and material from that to which the Director was applying her discretion to prosecute.

[13] In early 2002, the applicant became aware that the respondent had been charged with sexual assault. In April of that year she was approached by police officers who were interviewing all of the swimmers who had been coached by the respondent. On 30 April 2002, she gave a statement concerning alleged offences by the respondent. In essence, her complaint began with events in late 1984, when she was 13 years old and the respondent was her swimming coach. She trained at premises which comprised both a pool and a gym in which there was a sauna and a massage room. During an evening training session, the applicant alleged, the respondent directed her into the massage room. He instructed her to lie on her back on the massage table. He began massaging her shoulders and then started to feel and caress her breasts. A similar event occurred about a week later. Again the respondent directed the applicant into the sauna. On his instructions she pulled her togs down to her waist and lay down on her front. In the course of that massage, first of her back and then of her chest, the respondent again caressed her breasts.

[14] According to the applicant's statement, on an occasion in January 1985, the respondent asked her to meet him at the caravan he occupied on the swimming pool premises. Again, he began by massaging her back, and then moved to her legs. On this occasion she was wearing shorts over her togs. The applicant said that she felt the respondent lift her togs and place his hand inside, rubbing her vulva and clitoris. In the course of that process, she said, she experienced what she recognised, as an adult, as an orgasm. Some two days later she went to the respondent's caravan again. On this occasion he massaged her back but then moved his hands to her legs and started to move them up under her shorts. At that point she said 'No', and he desisted. She left the caravan, and there were no further events of that kind. She did not tell anybody of her experience until 1993, when she told her husband in general terms that she had been 'molested' by the respondent.

[15] The applicant's statement was tendered as evidence in committal proceedings conducted in July 2002, and she was cross-examined on it. She does not appear to have said anything inconsistent with its content. In relation to the fourth incident, she said that the massage had involved her inner thighs right up to her groin, under her shorts to where her tog line was, but the respondent did not on that occasion touch the vaginal area.

[16] The indictment proposed by the applicant has only three charges which represent the first, third and fourth alleged offences, rather than all four incidents recounted in

the applicant's statement, in respect of which the respondent was ultimately committed for trial. The reason for that is, I think, a simple one. The statement of the applicant which is annexed to her affidavit is missing a page dealing with the second alleged offence, and it seems probable that it was, therefore, overlooked in the drawing of the indictment. I have obtained the missing page; there seems no reason that the account of what is alleged as the second incident should be regarded in any different light from the other allegations.

[17] In January 2003, apparently as a result of information in statements supplied by the defence to the Director of Public Prosecutions, the applicant was asked to give a further statement. In it, she gave more detail of the four incidents, the physical surroundings in which they occurred and how she was able to place the events in time. She also gave more background to them, describing her training sessions and the layout of the swimming pool complex, and providing the names of the other swimmers who had trained with her. She explained, among other things, that the respondent often left the pool during training sessions, leaving a blackboard containing his instructions as to what the squad was to do. In her initial statement she had referred to seeing another swimmer, K, going into the sauna with the respondent. In this statement (having, apparently, been told that K denied that allegation) she amended her account to say that her recall was of seeing K and the respondent at the doorway leading into the sauna and massage room.

[18] On 22 November 2001, another complainant, B, gave a statement to the police, with later addenda in April 2002 and February 2003. The account she gave was this: in 1987, when she was 12 years old, she was one of the swimmers being trained by the respondent. Her account was this: she and another young swimmer went to his house to baby-sit his daughter. After spending most of the morning in the pool at the house, the other girl went to have a sleep and B was left watching television in the lounge room. She sat on the floor; the respondent, sitting on the lounge behind her, offered a massage. B was wearing togs with the straps pulled down below her armpits and a t-shirt over them. The respondent removed the t-shirt and massaged her neck, putting his tongue into her ear while he did so. He then began to caress her stomach and moved his hands upwards to her breasts which he massaged, caressing the nipples before moving his hands back down onto her stomach. He stopped what he was doing then. She did not tell anyone of the incident, but on other occasions noticed the respondent behaving in a familiar way with another swimmer, A, putting his tongue into her ear and his arm around her shoulder. Ten years later she encountered A at the Brisbane Entertainment Centre; the outcome was that they spoke to each other about their experiences with the respondent. Like the applicant, B was cross-examined at the committal, without any obvious impact on the strength of her evidence.

[19] A also gave evidence at the committal proceedings, but no statement from her was tendered here, and it was not suggested that she would be called as a witness. It is doubtful that the evidence she gave at the committal would be admissible as similar fact evidence in a trial of the charges which the applicant wishes to bring. I will not, therefore, set it out in detail. It involved allegations of the respondent's having massaged her buttocks on one occasion, and on a number of other occasions, when giving her lifts to training, having rubbed her vaginal area.

[20] The balance of the evidence before me relevant to the alleged offences consists of two affidavits filed in response to later suggestions that the applicant's assertion that she had experienced orgasm rendered her account implausible, and that it was unusual that the alleged offences were not said to have included any exposure or touching of the respondent's own genitals. The first affidavit is made by a Dr Brennan, the medical director of a sexual assault service with expertise in sexual health and sexual assault matters. She points out that orgasm, as a reflexive response, can be achieved at a certain level of stimulation notwithstanding distress, and she refers to a paper on the subject of sexual arousal and orgasm during non-consensual sex. Another affidavit, of Associate Professor Middleton, a psychiatrist, contains his views on the nature of sexual abuse of children, expressed at length and in a rather combative style. Saliently for present purposes, it includes his opinion which, heavily summarised, is that orgasm is not unusual in non-violent sexual abuse involving deliberate stimulation of the victim. He also gives an opinion that perpetrators of sexual assault do not inevitably, on early encounters, seek physical stimulation of themselves; but that seems to me a classic jury question, rather than a matter of medical expertise.

The DPP's decision

[21] The respondent was committed for trial on two charges of indecently dealing with complainant A, one charge of indecently dealing with complainant B and four charges of indecently dealing with the applicant. After the committal, certain material was provided by the defence to the officer of the Director of Public Prosecutions responsible for the case. That material, which seems to have consisted of some twenty witness statements, is not before this court. On 18 September 2002, the decision was made not to proceed: in legal terminology, to find no true bill. In the days following that decision the respondent's solicitor, Mr Shields, had contact with the media about it; that contact will be further considered in considering the applicant's motivation in seeking leave.

[22] In April 2003, after a report by the Crime and Misconduct Commission on the decision not to prosecute, the applicant's solicitors received a letter from the Director of Public Prosecutions. It explained that the decision to discontinue the prosecution was no reflection on the applicant's credibility, but rather recognised difficulties in the way of prosecution, in the form of absence of independent evidence, the age of the offences (more than 15 years) and the requirement for a *Longman* direction. A jury would, it was said, have to consider the unlikelihood, given the risk of discovery, of a swimming coach undertaking an obvious and prolonged offence during a training session. Those difficulties had led to the conclusion that the prosecution could not exclude a reasonable doubt. In that letter, the Director of Public Prosecutions offered to refer the matter to counsel outside Queensland, if any evidence capable of being corroborative were found by a police investigation currently on foot.

[23] That in fact occurred. The office of the New South Wales Director of Public Prosecutions was asked to review the committal depositions and statements, fresh statements taken by the police after the committal, a number of transcripts made of an interview given by the applicant for an ABC programme, *Australian Story*, and

the Crime and Misconduct Commission report. The report which the New South Wales Director of Public Prosecutions gave on that material was put into evidence, with the deletion of parts relating to complainants other than the applicant.

[24] The report raised some concerns about the applicant's credibility. It expressed the doubts I have already referred to, as to the absence of any allegation of the respondent exposing himself or encouraging any touching of his own genital area, and the unlikelihood of the applicant having experienced an orgasm. The maker of the report also expressed certain views as to the applicant's motives, based on the (apparently extensive) *Australian Story* transcripts. In relation to the applicant's credibility, she pointed out that the applicant had returned to the respondent in 1997 to gain accreditation as a swimming coach, and referred to the likely damaging effect of the witness K's denial of the allegation that she had gone into the sauna with the respondent, leading to the applicant's amendment of her statement.

[25] The report went on to identify other factors relevant to the public interest in a prosecution: that the offences were, relatively speaking, at a low level of seriousness and had occurred a long time ago; that the respondent was a person of good character with references in support of him; that the likely outcome, even if he were convicted, would be a non-custodial penalty; that the publicity had already constituted a significant penalty for the respondent and, even if he were guilty, would provide a deterrent to any future misconduct. The conclusion reached was that there was no prospect of conviction on the charges because three were trivial in nature (those involving the touching of the breasts and the last instance, in which the respondent was said to have desisted when the applicant said "No") while the fourth, involving the allegation of rubbing of the applicant's clitoris and vulva, was inherently unlikely.

[26] It is unnecessary for me to make any comment on what is in the report. As I have already said, a good deal of the material, including statements taken in the further police investigation, is not before me. And it would be entirely futile for me, even if it were appropriate, to try and weigh the reasons for the Director of Public Prosecutions' decision not to prosecute, because I do not have the means of doing so. The fact that the Director has decided not to prosecute must of itself be accorded some weight, in the exercise of my discretion, although no analysis of it can be attempted; but it cannot, needless to say, be conclusive.

Prima facie case

[27] On the evidence before me I have reached the following views. The evidence of B, which involves an allegation of a similar *modus operandi* to the first two of the applicant's complaints, might well be admissible as similar fact evidence, its probative value deriving from "the improbability of the witnesses giving accounts of happenings having the requisite degree of similarity unless the happenings occurred."[11] Should the defence seek to raise the suggested implausibility of the applicant's description of experiencing orgasm, that contention could be addressed by appropriate medical evidence (probably physiological rather than psychiatric)

[11] *Hoch v The Queen* (1988) 165 CLR 292 at 295.

called in the Crown case, or in rebuttal, if it is a matter of surprise. Because I do not have other witness statements, I am unable to assess any discrepancies which may exist between them and the evidence of the applicant and B, and, of course, my conclusion takes no account of any evidence available to defend the charges; but on this material it seems to me that there is a prima facie case on all four charges, including the three counts contained in the proposed indictment. There is no obvious cloud on the applicant's credibility such as to render convictions unattainable; the difficulties seem limited to those inevitable in any case in which recall of events many years ago is required.

The applicant's motives

[28] Counsel for the respondent, Mr Byrne QC, criticised the applicant for having generated adverse and damaging publicity against the respondent. She had, he said, identified herself to the media, had sought an inquiry by the Crime and Misconduct Commission, and had participated in a number of media stories both before and after she became aware of the possibility of a private prosecution. It was discreditable for a prospective prosecutor to engage in such conduct. Counsel pointed to the observation of Pincus JA in *R v Lewis*[12] that adverse publicity deliberately generated by a person for whom the Crown was responsible might require the granting of a permanent stay of any trial, and sought to draw an analogy here. Particular complaint was made of a public appeal and fundraising effort conducted in order to fund the security for costs necessary to a private prosecution. As part of that appeal it was promised that donations would be refunded if the respondent were convicted, giving rise, it was said, to a situation in which members of the public had a financial stake in the respondent's conviction.

[29] It is necessary to consider the applicant's actions in the context of the various decisions and reports in relation to the dropping of the charges, and the publicity which ensued. A selection of comments made by the respondent's solicitor, Mr Shields, in the aftermath of the original decision not to prosecute, was tendered. He is quoted in the *Sydney Morning Herald* of 19 September 2002 as saying that his firm had maintained from the outset that the accusations were false, and that the Director's decision had vindicated that stance. In comments taken from the radio programme *Australia Talks Back*, on Radio National on 23rd September, Mr Shields is recorded as asserting that his firm's investigations "proved categorically that [the respondent] could not have committed any of the offences with which he was charged"; that what was in the complainant's statements was "incorrect" and had been "disproven"; that 20 witness statements "along with the psychiatric history for one of the complainants" had made it possible to "categorically disprove the allegation" and that those statements had proved the respondent's innocence. On 24 September 2002, Mr Shields gave an interview on ABC *Drive Time* radio in Brisbane, in which he said that the allegations against the respondent were "fundamentally flawed" and "baseless"; that he should never have been charged; and that taxpayers should not have to "foot the bill of some ludicrous trial", nor should the respondent be forced to sell his house in order to defend himself.

[12] [1994] 1 Qd R 613 at 636.

[30] The applicant says that she was already upset by the Director's decision not to prosecute, which had been widely publicised, when she heard of Mr Shields' statements. She took his comments as suggesting that the complainants, including herself, were shown to be liars, and felt angry and bullied. In October 2002, she made a complaint to the Crime and Misconduct Commission about the decision not to proceed.

[31] However, it seems that the Commission had already begun its investigation after concerns were raised in various quarters. In its report, delivered in March 2003, the Commission found no evidence of misconduct on the part of any individual in the police service or any member of the staff of the Director of Public Prosecutions' office, although it did identify defects in both the investigation and the Director's decision making process. Those conclusions and the evidence on which they are said to be based are not evidence in relation to any issue before me, although to some extent the conclusions coincided with the arguments of the applicant. The report was put into evidence as part of the background of public debate and criticism which, counsel for the applicant submitted, was a factor in considering whether a trial was in the public interest.

[32] Before the release of the Crime and Misconduct Commission report, the applicant had taken part in an ABC programme, *Australian Story*. The executive producer of the programme provided to the respondent's solicitors a list of what were considered to be possible imputations arising from the programme. There is no doubt that they were defamatory. In the programme the applicant recounted her allegations of assault and, it seems, for the first time was identified as one of the complainants against the respondent.

[33] There was then a period during which the matter underwent further police investigation, and the New South Wales Director of Public Prosecutions considered the evidence and provided his report. On 11 May 2004, the applicant was advised of the content of the report and of the affirmation of the decision not to prosecute. On 5 July 2004, another ABC programme focussing on the case, *Four Corners*, went to air. The respondent's solicitors, who undertook an internet search to find material relevant to the case, have obtained a transcript of the programme from the ABC website.

[34] A number of complainants took part in the programme. A gave an account of the alleged assaults on her, and a tape of a telephone conversation between her and the respondent was played. B broke down in tears and would not or could not answer questions; her account was given by a reading of her statement to police. Both A and B spoke about the effects of their experiences on them as children and as adults. The applicant gave a description of the four incidents contained in her statement. A fourth swimmer who had trained with the respondent recounted some lewd remarks said to have been made by the respondent to her. Extracts from the police statements of two other, unidentified women who had also been coached by the respondent were read out. One gave an account of being massaged by the respondent and then his lying on top of her; the other said that when she was 12 the respondent had touched her breasts in the course of massaging her. The programme also put to air extracts from a statement by the respondent's stepbrother who

claimed that when he had visited the respondent's house he had seen girls aged fourteen or fifteen walking out of the respondent's bedroom and had seen the respondent massage the breasts of young girls.

[35] Dr Middleton was interviewed on the programme about the effects of child sexual abuse on victims. Dr Brennan was also interviewed, expressing the view that the fact that the applicant had disclosed having experienced an orgasm made her more credible. A description of the respondent as a "thoroughly disreputable man given to inappropriate touching and comments towards young swimmers in his charge", taken from the New South Wales Director of Public Prosecutions' report, was read out. At the end of the programme the audience was able to discuss the programme online with the applicant and B. About 75 people seem to have responded, almost all expressing sympathy for the applicant and the other complainants.

[36] Linked to the *Four Corners* website was an advice given by the applicant's counsel, Mr Hanson QC, in May 2004. In that opinion, Mr Hanson, with the reservation that he had not seen most of the evidence, and was thus not well equipped to comment on suggested discrepancies and inconsistencies in the prosecution evidence, expressed himself unconvinced that the matter should have been taken out of the hands of a jury. He specifically addressed the arguments mounted in the advice from the New South Wales Director of Public Prosecutions, describing the reasons as "irrelevant, unprofessional and just plain silly".

[37] The internet search conducted by the respondent's solicitors also located a website for an organisation, the Victorian Women's Trust, which had as a link a letter from the applicant's solicitors. That letter is exhibited to an affidavit. It is an appeal for funds to enable the applicant to provide security for any costs order should the respondent go to trial and be acquitted. The letter sets out the applicant's allegations, and refers to the discontinuance of the prosecution and criticism made of that decision in the Crime and Misconduct Commission report. It goes on to say that Taskforce Argos, a police unit specialising in the investigation of paedophilia has interviewed new witnesses. Among the new evidence resulting, the letter says, is the statement by the respondent's stepbrother. Its contents are summarised: they are to the same effect as that given in the *Four Corners* programme. The New South Wales Director of Public Prosecutions' opinion is set out, together with Mr Hanson's description of its findings. The letter directs the reader to the *Four Corners* website for the content of that programme. It goes on to set out arguments as to why the case ought to proceed and gives details of a trust fund for that purpose. It ends with these words: "As at the time of writing, Scott Volkers remains the head swim coach at the Queensland Academy of Sport".

[38] I will consider the impact of the public ventilation of the complainants' accounts later. Returning the applicant's perspective, for the purposes of the argument as to her motives, she explains that she was deeply upset by the further decision of the Director of Public Prosecutions, after the receipt of the New South Wales report, not to proceed with charges. She was not satisfied with the reasons given, particularly in the absence of any supporting medical evidence, was annoyed that decisions about her credibility could be made without reference to her, and thought that too much

weight had been placed by those considering the matter on their own various experiences in deciding what was and was not probable.

[39] The applicant's reactions seem perfectly reasonable; although it should also be recognised that in any case of this kind, because the prosecutor has an onerous responsibility of objective decision making, it can prove difficult to avoid causing some feelings of exclusion in those who, as complainants, feel most involved. However that may be, I do not think there is any basis for supposing that the applicant is motivated by any malice, as opposed to the desire to vindicate her own account; and that is neither surprising nor blameworthy. Nor do I think that there is anything discreditable about the applicant's conduct in making her situation public. One can understand her perception that in order to bring a private prosecution it was necessary for her to gain public support and funding. I do not think her position can be equated with that of a statutory prosecutor, upon whom it is incumbent to maintain objectivity and distance. That is not to say, though, that the resulting airing of the various allegations is without consequence.

Criticism of the criminal justice system

[40] Mr Hanson QC, for the applicant, took rather a different line on the media attention given to the case. He argued that the criticism made of the Director's decision in the Crime and Misconduct Commission report, and the publicity given to that criticism, reflected poorly on the criminal justice system so as to require that the matter be resolved by a court. I am inclined to think that the criminal justice system may be more robust than the submission allows. Prosecutorial decisions of this kind will seldom receive unanimous approval; and although criticism was made in the Crime and Misconduct Commission report, it was devoid of any suggestion of wrongdoing by anyone involved. And, I think, there is a real risk that rather than the public seeing a trial as the criminal justice system satisfactorily at work, it may perceive it as an extension of the media contest between the parties; a problem which I will explore more fully later.

Injustice to the applicant

[41] Mr Hanson also submitted that what he called the applicant's "public humiliation" by Mr Shields' comments entitled her to have her complaints resolved by a court. While I would not go so far as to describe what occurred in that way, some of Mr Shields' remarks were, in my view, ill-considered and unnecessary, and the applicant is justified in feeling aggrieved by them. Counsel for the respondent, however, suggested that the applicant had other options of civil proceedings which she had not pursued.

[42] I do not think there is much force in that suggestion. In June 2004, the applicant's solicitors wrote to the respondent's solicitors asking whether the respondent would rely on the *Limitation of Actions Act* 1974 as a bar to any civil action by the applicant. The answer received was that the respondent would "avail himself of all defences available to him at law". There is nothing in the material which suggests that the applicant could point to any material fact of a decisive character not known

to her in the time frame relevant to s 31 of the *Limitation of Actions Act*, and indeed there is nothing to suggest that she has suffered damage of the nature and extent which would warrant the bringing of a personal injuries action. It was also suggested that the applicant could proceed with a defamation action against Mr Shields (none of the contentious statements having been made by the respondent himself), but that seems an unlikely source of satisfaction. The respondent would not be a party to such a proceeding, and if he chose to claim privilege would not even be a witness. There could be no assurance that the applicant's complaint would be fully ventilated, let alone resolved. On the other hand, I consider it of some significance that the applicant has not been left without a voice. She has had opportunities to respond to Mr Shields' comments in the media, and has taken them.

Factors in favour of a grant of leave

[43] Starting from the premise that there is a prima facie case, the factors which, in summary, I consider point to a grant of leave are these: from the applicant's point of view, she has now been left without the opportunity of giving her account in a trial or seeing the issues resolved by a jury. Although she did not initiate the prosecution, but rather co-operated by giving an account of the offences she says were committed against her, she has, as a result, had to endure unnecessary aspersions on her credibility, although not at the time identified by name, and a decision-making process which was protracted and ultimately unsatisfactory to her. From a wider perspective, the charges themselves are serious, in that if made out they involve egregious breaches of trust, in both the literal and legal senses; although the allegations are not, in physical terms, at the grosser end of the spectrum of child sexual abuse.

Factors militating against leave

[44] The interests of justice require expeditious resolution of charges against any individual; although of course the delay in proceeding here can hardly be laid at the door of the applicant. Nevertheless it is likely that it would be at least three and a half years between the respondent's arrest and any trial, an unsatisfactory state of affairs. The charges involve events between 19 and 20 years ago, and carry all the attendant difficulties of proof on both sides. Those factors, together with the deference to be paid to the Director's decision not to proceed, militate to some extent against the granting of leave.

[45] The factor which convinces me that leave ought not to be given is the publicity given to the case and the way it has been presented. That publicity includes the dissemination of information strongly adverse to the respondent which would not be admissible in any trial: particularly the statements attributed to the respondent's stepbrother and other unidentified complainants on the *Four Corners* programme and website. The existence of prejudicial material in the public forum would not of itself dissuade me from granting leave: courts seldom stay trials because of adverse publicity, considering that appropriate directions can largely obviate the prejudice caused. But this case is, I think, in rather a different category.

[46] The ordinary trial is conducted by an independent prosecutor with the distance and authority of the Crown. In this case, that will not occur. The effect of the media coverage, beginning with Mr Shield's remarks and reinforced particularly by the *Four Corners* programme, has been to characterise the allegations of sexual misconduct as a contest between the applicant and the respondent, both seeking public support, with the applicant, apparently, considerably more successful in that endeavour. The positioning of applicant and respondent as protagonists is exacerbated by the fact that the applicant's case is to be funded by public campaign; from the website one gets the impression of the applicant and her supporters bringing the charges, with a strong note of grievance that the respondent remains in an important position.

[47] On a criminal trial, the prosecution should be, and should appear to be, conducted on behalf of society as a whole, without the distracting winds of personal indignation or outrage. There is, I think, an overwhelming risk that if this trial were to be conducted on the basis that it was the applicant who was the prosecutor of the respondent, the perception of a personal contest between applicant and respondent would continue, with an attendant risk that the jury would perceive the process as one involving either the affirmation of the applicant's account and denunciation of the respondent on the one hand, or a rebuffing of the applicant and preferring of the respondent on the other. The impact of any attempt to cure that perception by direction would be considerably diminished by the very appearance of applicant and respondent as opposing parties.

Conclusion

[48] Weighing the public interest in a resolution of the applicant's allegations by jury trial against the public interest in not permitting a trial flawed by delay, publicity and the risk of misperception of its purpose, I consider, on balance, that I ought not give leave for the prosecution to proceed. I dismiss the application.