** Unedited **

Indexed as:

R. v. Breeze

Between
Her Majesty The Queen, and
Bonnie Breeze

[1993] O.J. No. 850

Ontario Court of Justice - Provincial Division
Hamilton, Ontario
Zabel Prov. Div. J.

March 4, 1993.
(7 pp.)

Criminal law — Practice — Stay of proceedings — Abuse of Process.

Motion for a stay of proceedings on two charges of theft under $1000 on the grounds that the prosecution's conduct constituted an abuse of process or, alternatively, a breach of the accused's constitutional rights. The accused had already attended for trial on the same charges at an earlier date. The Crown then withdrew the charges because they had failed to provide the notice required to introduce business records as evidence. A new summons was prepared and served with the proper notice.

HELD: Stay granted. On the original trial date the Crown had the options of seeking leave to introduce the records or of requesting an adjournment. It did neither. Its conduct was calculated to circumvent an adverse ruling and was, therefore, vexatious and oppressive and constituted an abuse of process.

STATUTES, REGULATIONS AND RULES CITED:

Canada Evidence Act, R.S.C. 1985, c. C-5, s. 30(7). Canadian Charter of Rights and Freedoms, 1982, ss. 7, 24(1). Criminal Code, R.S.O. 1985, c. C-46, s. 334(b).
A. Skarica, on behalf of the Crown.
M. O'Brien, on behalf of Bonnie Breeze.

ZABEL PROV. DIV. J. (orally):—

CHARGE:

¶ 1 On the last occasion you were arraigned on the follow charges: That on or about the 15th day of January, 1992 at the City of Hamilton you did unlawfully steal cash valued under $1,000.00, the property of

La Cache, contrary to provisions of section 334(b) of the Criminal Code; and further, on or about the 17th day of February, 1992 at the City of Hamilton in the said region you did unlawfully steal cash valued under $1,000.00, the property of La Cache, contrary to provisions of section 334(b) of the Criminal Code. The information was sworn November 4, 1992.

ISSUES:

¶ 2 You plead not guilty to both charges and your counsel has brought a motion for the following relief which is set out in the motion record which has been filed with the court. Counsel asked for an order staying the proceedings in this matter on the following grounds. Firstly, that the conduct of the prosecution in this matter constitutes an abuse of process. Secondly, in the alternative, that the conduct of the prosecution in this matter constitutes a breach of the appellant's constitutional rights pursuant to section 7 of the Canadian Charter of Rights and Freedoms and that the appropriate remedy is to stay the proceedings pursuant to section 24(1). The motion was opposed by the Crown.

FACTS:

¶ 3 In arriving at my judgment on this motion I have reviewed the motion record, considered the oral arguments of counsel and the case law filed. The factual basis for this motion, which is not disputed by the Crown, is set out in the affidavit of David W. Festeryga, student at law, with your counsel's law firm.

¶ 4 On the 4th day of November, 1992 he attended at this court with your counsel, Michael O'Brien, in regard to the trial on these charges. Mr. O'Brien advised, as pointed out in the affidavit, that the Crown had difficulty with their case in that they failed to provide notice pursuant to section 30(7) of the Canada Evidence Act of their intent to introduce business records as evidence. It is pointed out in the affidavit as well that the Crown could seek leave of the court to introduce these documents as evidence. As well, that the Crown had the option of requesting an adjournment of the trial.

¶ 5 Your counsel then spoke with the assistant Crown Attorney, who is not named in the materials, on the morning of trial and advised him of his concerns. The assistant Crown then conferred with the investigating police officer and informed your counsel that they would be withdrawing the charges against you and would likely be laying a new charge. The assistant Crown Attorney then delayed the matter sufficiently so that the police officer could prepare a new summons as against you. The matter was then called and the charges were withdrawn without you being arraigned. At no time did the Crown request of the court an adjournment, nor did the Crown request that documents be admitted pursuant to section 30(7) of the Canada Evidence Act.

¶ 6 Following the withdrawal of the charges you left the courtroom and were given a new summons with respect to the same offence as well as a notice pursuant to section 30(7) of the Canada Evidence Act with respect to business records. Because of a limitation period problem the Crown had to proceed by indictment on the charges presently before the court which is the same set of charges that were withdrawn by the Crown on the previous occasion.

LAW:

¶ 7 This court clearly has the jurisdiction to stay the proceedings where it is of the opinion that the conduct complained of is vexatious or oppressive. The court's discretion must be exercised properly and judicially and only in the clearest case.

¶ 8 The Crown has the right to withdraw a charge if it intends to discontinue a proceeding. The Crown's right to withdraw is not unlimited when the reason for the withdrawal is other than to discontinue proceedings or the reason is to circumvent an adverse judicial ruling.

¶ 9 It is apparent to me, considering everything that has been placed before me, that the reason for the Crown's withdrawal in this case was because they were not prepared for trial and was to avoid two potential judicial rulings on November 4, 1992; the first ruling was a refusal of a request for an adjournment and the second ruling, if the adjournment was refused, was that the court would refuse to allow the Crown to rely on documentary evidence because of its failure to give notice of production as required by the Canada Evidence Act.

¶ 10 I would like to make reference to the following case, R. v. William Bedford Stanley Brown; it is a decision of the Ontario County Court, as it then was, of His Honour Judge Hogg, July 16, 1979 reported at (1979) 3 W.C.B. 438. The outline of the case in the Weekly Criminal Bulletin is asfollows:

> "Ruling on motion by accused to have proceedings stayed as an abuse of process - When accused originally appeared for trial in Provincial Court the Crown did not have its witnesses present and withdrew the trial. The charge was subsequently relaid and accused was committed for trial. Held: Motion granted, proceedings stayed. The court has jurisdiction over matters before it. To allow the Crown to withdraw a charge in anticipation of the trial Judge refusing to allow an adjournment would make a mockery of the practice direction by the Chief Justice of Ontario that when a case has been set for trial it should proceed unless there are valid reasons to the contrary. The Crown has the right to appeal if it feels that injustice is done by the refusal of an adjournment."

JUDGMENT:

¶ 11 Considering the totality of the evidence presented to me I find that the Crown's conduct in this case was calculated to circumvent any adverse rulings by the trial Judge on November 4, 1992. This is clearly demonstrated by the fact that the case was not called in court to be withdrawn until the Crown had sufficient time to prepare a new summons and notice of documentary evidence which was served upon you outside of the courtroom by the investigating officer. I find that the Crown's conduct in this case is an affront to the dignity of this court. I quote, with approval, the following statement made by Judge Vanek in the case of R. v. Weightman and Cunningham 37 C.C.C. (2d) 303. The following comment was made in that case.

> "It was an affront to the dignity both of the Provincial Court Judge and the relevant appellate authorities. More important, it constituted an attack upon the judicial system itself by an endeavour to bypass or disregard judicial authority in an endeavour to take the control of a criminal proceeding out of the hands of the appropriate judicial officer."

¶ 12 I find that is what occurred in this case. I further find that the Crown's conduct was vexatious and oppressive. To prevent an abuse of the court process an order will go permanently staying these proceedings. Because of my ruling I find it will not be necessary to rule on the defence request for a stay under section 7 and 24(1) of the Canadian Charter of Rights and Freedoms.

¶ 13 MR. O'BRIEN: Thank you, Your Honour.

¶ 14 MR. SKARICA: Thank you, Your Honour.

¶ 15 HIS HONOUR: Thank you.

DRS/qp/mjb/DRS/DRS