R. *v.* Jewitt, [1985] 2 S.C.R. 128

Her Majesty The Queen *Appellant*;

and

Damon Fidel Garfield Jewitt *Respondent*.

File No.: 17693.

1984: October 31; 1985: September 19.

Present: Dickson C.J. and Beetz, McIntyre, Chouinard, Lamer, Wilson and Le Dain JJ.

on appeal from the court of appeal for british columbia

Criminal law -- Courts -- Whether a trial judge has the power to direct a stay of proceedings for abuse of process.

Criminal law -- Appeal -- Crown's right to appeal from "judgment or verdict of acquittal" -- Stay of proceedings -- Whether stay of proceedings constitutes "judgment or verdict of acquittal" -- Criminal Code, s. 605(1)(a).

Respondent was charged with unlawfully trafficking in a narcotic. At trial, he admitted selling marijuana to an undercover police officer but only because he was persuaded to do so by a fellow employee who was a police informer. The jury found

1985 CanLII 47 (SCC)

there had been unlawful entrapment and the court therefore directed "a stay of proceedings". On appeal, a majority of the Court of Appeal dismissed the Attorney General's appeal for want of jurisdiction. This appeal is to determine (1) whether a discretionary power exists at common law to stay proceedings in a criminal case for abuse of process, and if so, (2) whether a judicially entered stay of proceedings is a "judgment or verdict of acquittal of a trial court", from which the Crown may appeal to the Court of Appeal under s. 605(1)(*a*) of the *Criminal Code*.

1985 CanLII 47 (SCC)

Held: The appeal should be allowed.

In a criminal case, a trial court judge has a residual discretion to stay proceedings where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings. Such power, however, can be exercised only in the clearest of cases. In the case at bar, the stay of proceedings was tantamount to a judgment or verdict of acquittal and subject to appeal by the Crown pursuant to s. 605(1)(*a*) of the *Criminal Code*. The decision to stay was not based on procedural considerations, but rather on questions of law, and such decision was final. The accused was in jeopardy and the action taken by the trial judge was in the nature of an acquittal. If the accused were subsequently charged with the offence spelled out in the indictment, a plea of *autrefois acquit* would lie.

Cases Cited

Lattoni and Corbo v. The Queen, [1958] S.C.R. 603; *R. v. Sheets*, [1971] S.C.R. 614; *Cheyenne Realty Ltd. v. Thompson*, [1975] 1 S.C.R. 87, applied; *Amato v. The Queen*, [1982] 2 S.C.R. 418; *Rourke v. The Queen*, [1978] 1 S.C.R. 1021; *Petersen v. The Queen*, [1982] 2 S.C.R. 493; *R. v. Young* (1984), 40 C.R. (3d) 289; *R. v. Perry* (1984), 14 C.C.C. (3d) 5; *R. v. Belton* (1982), 31 C.R. (3d) 223; *R. v. Lebrun* (1978), 7 C.R. (3d) 93; *R. v. Catagas* (1977), 2 C.R. (3d) 328; *Kipp v. Attorney-General of Ontario*, [1965] S.C.R. 57, considered; *R. v. Vermette (No. 5)* (1982), 3 C.C.C. (3d) 36, [1983] C.A. 230; *Re Regina and Beason* (1983), 7 C.C.C. (3d) 20; *R. v. Tonner* (1971), 3 C.C.C. (2d) 132; *R. v. G. & P. International News Ltd. and Judd* (1973), 12 C.C.C. (2d) 169; *R. v. Holmes* (1983), 4 C.C.C. (3d) 440; *R. v. Erickson*, [1984] 5 W.W.R. 557; *R. v. Dennis, Kubin and Frank* (1984), 14 D.L.R. (4th) 205; *Re Regina and Kripps Pharmacy Ltd. and Kripps* (1981), 60 C.C.C. (2d) 332; *R. v. Gee* (1973), 14 C.C.C. (2d) 538; *R. v. Sanver* (1973), 12 C.C.C. (2d) 105; *Sorrells v. United States*, 287 U.S. 435 (1932); *R. v. Osborn*, [1971] S.C.R. 184; *Director of Public Prosecutions v. Humphrys*, [1976] 2 All E.R. 497; *Re Ball and The Queen* (1978), 44 C.C.C. (2d) 532; *Re Abarca and The Queen* (1980), 57 C.C.C. (2d) 410; *Re Abitibi Paper Company Limited and The Queen* (1979), 47 C.C.C. (2d) 487; *R. v. Crneck, Bradley and Shelley* (1980), 30 O.R. (2d) 1; *Re Orysiuk and The Queen* (1977), 37 C.C.C. (2d) 445; *Erven v. The Queen*, [1979] 1 S.C.R. 926; *R. v. Krannenburg*, [1980] 1 S.C.R. 1053; *R. v. Miller* (1984), 12 C.C.C. (3d) 54; *R. v. Boross* (1984), 12 C.C.C. (3d) 480; *R. v. Hamm* (1984), 34 Sask. R. 241; *Re Balderstone and The Queen* (1983), 8 C.C.C. (3d) 532; *Connelly v. Director of Public Prosecutions*, [1964] A.C. 1254; *In re Sproule* (1886), 12 S.C.R. 140, referred to.

Statutes and Regulations Cited

1985 CanLII 47 (SCC)

Canadian Charter of Rights and Freedoms.

Criminal Code, R.S.C. 1970, c. C-34, ss. 605(1)(*a*), 621(1)(*a*).

Authors Cited

Black's Law Dictionary, 5th ed., St. Paul Minn., West Publishing Co., 1979, "stay".

Cohen, S. A. "Observations on the Re-emergence of the Doctrine of Abuse of Process" (1981), 19 C.R. (3d) 310.

APPEAL from a judgment of the British Columbia Court of Appeal (1983), 5 C.C.C. (3d) 234, 34 C.R. (3d) 193, [1983] 4 W.W.R. 481, dismissing the Crown's appeal from a stay of proceedings relating to a charge of trafficking in narcotics. Appeal allowed.

S. David Frankel, for the appellant.

J. M. Brian Coleman, for the respondent.

The judgment of the Court was delivered by

1. THE CHIEF JUSTICE--The principal issue in this appeal is whether a judicially entered stay of proceedings is "a judgment or verdict of acquittal of a trial court" from which the Crown may appeal to the Court of Appeal under s. 605(1)(*a*) of the *Criminal Code*. The point, though narrow, is important and contentious. It has given rise to conflicting opinions in Courts of Appeal of this country.

1985 CanLII 47 (SCC)

2. The respondent, Damon Fidel Garfield Jewitt, was charged with unlawfully trafficking in a narcotic, cannabis (marijuana), contrary to the provisions of the *Narcotic Control Act*, R.S.C. 1970, c. N-1. He pleaded not guilty to the charge. He was tried at Vancouver before Wong Co. Ct. J. sitting with a jury. He admitted selling one pound of marijuana but said he was persuaded to sell to the undercover police officer by a fellow employee who was a police informer. The jury found there had been unlawful entrapment and the Court thereupon directed the Clerk of the Court to make an entry on the record staying the proceedings on the indictment.

3. The Attorney General of Canada appealed the "acquittal" to the British Columbia Court of Appeal upon the following grounds:

> 1. THAT the learned trial Judge erred in law in holding that the defence of entrapment was available to the Respondent.
>
> 2. THAT the learned trial Judge erred in law in instructing the Jury as to what constitutes entrapment.
>
> 3. THAT the learned trial Judge erred in law in instructing the Jury that the onus lay on the Crown to establish beyond a reasonable doubt that there had been no "unlawful entrapment".
>
> 4. THAT the learned trial Judge erred in law in taking from the Jury a special verdict of "unlawful entrapment".
>
> 5. THAT the learned trial Judge erred in law and exceeded his jurisdiction in directing a stay of proceedings with respect to the indictment.

1985 CanLII 47 (SCC)

4. A majority of the Court of Appeal of British Columbia (Seaton and Lambert JJ.A.) dismissed the appeal for want of jurisdiction: see (1983), 5 C.C.C. (3d) 234. Anderson J.A. concluded the matter fell within the jurisdiction of the Court of Appeal, but he would have dismissed the appeal nonetheless.

5. The Crown filed a notice of appeal, as of right, pursuant to the provisions of s. 621(1)(*a*) of the *Criminal Code* on the basis of Anderson J.A.'s dissent on the jurisdictional issue. Leave to appeal was granted on application brought *ex abundante cautela*.

1985 CanLII 47 (SCC)

I

Abuse of Process

6. Before considering whether a stay of proceedings is a judgment or verdict of acquittal or tantamount thereto, it is necessary to determine whether, at common law, a discretionary power to stay proceedings in a criminal case for abuse of process exists, in the words of Laskin C.J. in *Rourke v. The Queen*, [1978] 1 S.C.R. 1021, as a means of "controlling prosecution behaviour which operates prejudicially to accused persons" (p. 1034).

7. The inherent jurisdiction of a superior court to stay proceedings which are an abuse of its process was recognized in Canada as early as 1886, in the case of *In re Sproule* (1886), 12 S.C.R. 140. In recent years, however, uncertainty has clouded the question whether Canadian courts, apart from powers given to the Attorney General under s. 508 of the *Criminal Code*, have a discretion to stay proceedings for abuse of

process. This may, in some measure, stem from several decisions of this Court, in particular, *R. v. Osborn*, [1971] S.C.R. 184; *Rourke v. The Queen*, *supra*; and *Amato v. The Queen*, [1982] 2 S.C.R. 418.

1985 CanLII 47 (SCC)

8. This Court's decision in *Rourke*, *supra*, was seen by some as a death blow to the doctrine of abuse of process. As Stanley A. Cohen stated in "Observations on the Re-emergence of the Doctrine of Abuse of Process" (1981), 19 C.R. (3d) 310, "The strong statements of Pigeon J. in disposing of that appeal led many to believe that any future use of the doctrine had been foreclosed" (p. 310).

9. In *Rourke*, the abuse alleged stemmed from lengthy delay on the part of the police in arresting the accused. Pigeon J., speaking for the majority of the Court, concluded at p. 1043:

> For the reasons I gave in *The Queen v. Osborn*, [1971] S.C.R. 184, I cannot admit of any general discretionary power in courts of criminal jurisdiction to stay proceedings regularly instituted because the prosecution is considered oppressive.

and on the same page:

> I cannot find any rule in our criminal law that prosecutions must be instituted promptly and ought not to be permitted to be proceeded with if a delay in instituting them may have caused prejudice to the accused.

10. The apparent finality with which Pigeon J. appeared to deny discretionary power to stay proceedings was tempered by his adoption, as the "correct view", of what was said by Viscount Dilhorne in *Director of Public Prosecutions v. Humphrys*,

[1976] 2 All E.R. 497 (H.L.) at pp. 510-11. The passage quoted by Pigeon J. at p. 1044 concluded with these words:

> If there is the power which my noble and learned friends think there is to stop a prosecution on indictment in limine, it is in my view a power that should only be exercised in the most exceptional circumstances.

1985 CanLII 47 (SCC)

11. The breadth of the decision in *Rourke* has been the subject of differing views in various provincial appellate courts.

12. The British Columbia Court of Appeal in *R. v. Lebrun* (1978), 7 C.R. (3d) 93, interpreted *Rourke* widely and declared *simpliciter* that the doctrine of abuse of process was not available in criminal proceedings. A similar result was reached by the Manitoba Court of Appeal in *R. v. Catagas* (1977), 2 C.R. (3d) 328.

13. On the other hand, the Ontario and Alberta Courts of Appeal began almost immediately to construe the decision in *Rourke* restrictively and assert the potential for application of the doctrine in exceptional circumstances. See, for example, *Re Ball and The Queen* (1978), 44 C.C.C. (2d) 532 (Ont. C.A.); *Re Abarca and The Queen* (1980), 57 C.C.C. (2d) 410 (Ont. C.A.); *Re Abitibi Paper Company Limited and The Queen* (1979), 47 C.C.C. (2d) 487 (Ont. C.A.); *R. v. Crneck, Bradley and Shelley* (1980), 30 O.R. (2d) 1 (Ont. H.C.); *Re Orysiuk and The Queen* (1977), 37 C.C.C. (2d) 445 (Alta. S.C., A.D.)

14. Several decisions of this Court also contained *obiter dicta* suggesting the doctrine was not entirely moribund.

15. Pratte J., in *Erven v. The Queen*, [1979] 1 S.C.R. 926, referred obliquely to the doctrine of abuse of process, remarking on p. 957:

> The normal procedure for determining the voluntariness of a statement of the accused is through a *voir dire* and, the onus being on the Crown to prove voluntariness, a request for a *voir dire* should not be denied save in rare circumstances, where, for instance, the request would be clearly frivolous or would constitute a demonstrable abuse of process.

(Emphasis added.)

16. The matter was raised again in *R. v. Krannenburg*, [1980] 1 S.C.R. 1053, where, in reasons in which Pigeon J. concurred, I commented on p. 1061:

> Indeed, the laying of another information may amount to nothing less than an abuse of process.

17. Abuse of process was most recently reviewed by this Court in the case of *Amato, supra*. The pivotal issue in *Amato* was the defence of entrapment. Estey J., with Laskin C.J., McIntyre and Lamer JJ. concurring, reviewed the power of the court to stay a prosecution where an abuse of process was found to have occurred. On this matter, Estey J. concluded, on pp. 453-54:

> I come therefore to the conclusion that the decisions of *Osborn* and *Rourke* must be taken as standing on their own facts and limited precisely to the ratio of the judgments disposing of the issues arising on those facts. It follows therefore that the observations of Jessup J.A. in *Osborn* with reference to the origins and breadth of the trial court discretion to protect the processes of the courts from abuse remain substantially unimpaired by succeeding decisons in this Court. Viewed from another perspective the majority in *Rourke* affirms an exceptional jurisdiction to stay proceedings whereas Laskin C.J.C. for the minority takes the view of Lord Devlin in *Connelly* and finds the doctrine of abuse of process a wide-ranging technique for the control by the criminal court of criminal procedure in the

1985 CanLII 47 (SCC)

> protection of the processes of that court; a technique illustrated but not limited by the special pleas of *autrefois acquit* and *convict*, *res judicata* and issue estoppel (p. 287). In my respectful view, much of what was said by both divisions of this Court in *Rourke* is *obiter dicta*, bearing in mind the precise issue of abuse of process in the form of delay by the prosecution which was then the only issue before the Court. There is a distinction to be drawn where the initiating process is valid and the only issue is delay prejudicial to the accused, as in *Rourke*; and the case where the executive action leading to the charge and its prosecution is offensive to the principles on which the administration of justice is conducted by the courts. It is for this further reason that the judgment in *Rourke*, in my view, is not here applicable.

1985 CanLII 47 (SCC)

18. Four members of the Court, of whom I was one, held that the defence of entrapment, assuming it to be available under Canadian law, did not arise on the facts of the case. Ritchie J. was of the view that if Amato had been subjected to a threat of violence against himself if he failed to cooperate with the police plan for procuring the drug, this might well have supported a defence of entrapment. Ritchie J. concluded, however, that the evidence did not disclose any such threat.

19. Although the existence of the power to stay proceedings for abuse of process remained an open question following this Court's decision in *Amato*, a number of courts assumed authority to enter a stay in exceptional circumstances. See for example *R. v. Miller* (1984), 12 C.C.C. (3d) 54 (B.C.C.A.); *R. v. Boross* (1984), 12 C.C.C. (3d) 480 (Alta. C.A.); and *R. v. Hamm* (1984), 34 Sask. R. 241 (C.A.), (leave to appeal to the Supreme Court of Canada denied, Oct. 1, 1984, [1984] 2 S.C.R. vii).

20. The Ontario Court of Appeal recently reviewed the authorities in *R. v. Young* (1984), 40 C.R. (3d) 289, *per* Dubin J.A., (Howland C.J.O. and Martin J.A. concurring) and concluded on p. 329:

> I am satisfied on the basis of the authorities that I have set forth above that there is a residual discretion in a trial court judge to stay proceedings where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings. It is a power, however, of special application which can be exercised only in the clearest of cases.

1985 CanLII 47 (SCC)

21. That the controversy continues, however, can be seen from *R. v. Belton* (1982), 31 C.R. (3d) 223, (leave to appeal to this court refused, [1983] 1 S.C.R. v). Monnin J.A., speaking for the Court, held that the Manitoba Court of Appeal was bound by the majority decision in *Rourke* to hold that there was no power to stay for an abuse of process. He also stated that the Supreme Court of Canada would have "to give clear indication whether a judicial stay is available or not in the matter of abuse of process" (p. 231). In a subsequent decision, *Re Balderstone and The Queen* (1983), 8 C.C.C. (3d) 532 (Man. C.A.), (leave to appeal to this Court refused, [1983] 2 S.C.R. v), Monnin C.J.M., again speaking for the Court, acknowledged that the abuse of process question was "not free from doubt" and sought further direction from this Court (p. 535).

22. The New Brunswick Court of Appeal, in *R. v. Perry* (1984), 14 C.C.C. (3d) 5, also concluded that a trial court judge is without jurisdiction to stay proceedings for an abuse of process.

23. It seems to me desirable and timely to end the uncertainty which surrounds the availability of a stay of proceedings to remedy abuse of process. Clearly, there is a need for this Court to clarify its position on such a fundamental and wide-reaching doctrine.

24. Lord Devlin has expressed the rationale supporting the existence of a judicial discretion to enter a stay of proceedings to control prosecutorial behaviour prejudicial to accused persons in *Connelly v. Director of Public Prosecutions*, [1964] A.C. 1254 (H.L.) at p. 1354:

> Are the courts to rely on the Executive to protect their process from abuse? Have they not themselves an inescapable duty to secure fair treatment for those who come or who are brought before them? To questions of this sort there is only one possible answer. The courts cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the process of law is not abused.

25. I would adopt the conclusion of the Ontario Court of Appeal in *R. v. Young*, *supra*, and affirm that "there is a residual discretion in a trial court judge to stay proceedings where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings". I would also adopt the caveat added by the Court in *Young* that this is a power which can be exercised only in the "clearest of cases".

II

Judgment or Verdict of Acquittal

26. I turn now to the question of whether a judicially-entered "stay of proceedings" is a "judgment or verdict of acquittal" as those words are used in s. 605(1)(*a*) of the *Criminal Code*.

1985 CanLII 47 (SCC)

27. A stay of proceedings is a stopping or arresting of a judicial proceedings by the direction or order of a court. As defined in *Black's Law Dictionary* (5th ed. 1979), it is a kind of injunction with which a court freezes its proceedings at a particular point, stopping the prosecution of the action altogether, or holding up some phase of it. A stay may imply that the proceedings are suspended to await some action required to be taken by one of the parties as, for example, when a non-resident has been ordered to give security for costs. In certain circumstances, however, a stay may mean the total discontinuance or permanent suspension of the proceedings.

28. Any right of appeal by the Crown is purely statutory and must be found in s. 605 of the *Criminal Code*:

> **605.** (1) The Attorney-General or counsel instructed by him for the purpose may appeal to the court of appeal
>
> (*a*) against a judgment or verdict of acquittal of a trial court in proceedings by indictment on any ground of appeal that involves a question of law alone, or
>
> (*b*) with leave of the court of appeal or a judge thereof, against the sentence passed by a trial court in proceedings by indictment, unless that sentence is one fixed by law.
>
> (2) For the purposes of this section a judgment or verdict of acquittal includes an acquittal in respect of an offence specifically charged where the accused has on the trial thereof been convicted of an included or other offence.
>
> (3) The Attorney General or counsel instructed by him for the purpose may appeal to the court of appeal against a verdict that an accused is unfit, on account of insanity, to stand his trial, on any ground of appeal that involves a question of law alone.

1985 CanLII 47 (SCC)

> (4) The Attorney General or counsel instructed by him for the purpose may appeal to the court of appeal in respect of a conviction for second degree murder, against the number of years of imprisonment without eligibility for parole, being less than twenty-five, that has been imposed as a result of that conviction.

1985 CanLII 47 (SCC)

29. There is a line of authority in this Court to the effect that *quashing an indictment* under certain circumstances may be tantamount to a judgment or verdict of acquittal and thereby subject to appeal, notwithstanding the absence of an express statutory right of appeal. A review of these cases may be of assistance in determining whether an appeal is available under s. 605 from a stay of proceedings entered for abuse of process.

A) *Quashing an Indictment*

30. In *Lattoni and Corbo v. The Queen*, [1958] S.C.R. 603, a judgment quashing an indictment on the ground that the counts were nullities, since the offences were prescribed, was considered an acquittal.

31. Kerwin C.J. stated on p. 607:

> ... I agree with the Court of Appeal that the judgment of Judge Proulx was a final judgment quashing the indictment because he considered that all criminal proceedings as a result of the alleged acts of the accused were prescribed. I also agree that it was not a judgment on procedural grounds owing to a defect in the indictment and therefore if the accused were charged subsequently with the same offences as those embodied in the indictment, they could plead *autrefois acquit*. It was a decision on a question of law alone and being a judgment or verdict of acquittal was appealable under s. 584 [now s. 605] of the Code.

32. The decision in *Lattoni and Corbo* was subsequently applied by this Court in *R. v. Sheets*, [1971] S.C.R. 614. In *Sheets*, a municipal officer was charged with a breach of trust under s. 103 of the *Code* of 1953-54 (now R.S.C. 1970 c. C-34, s. 111). Prior to taking the plea, the judge ruled that the accused did not come within the definition of "official" under s. 103. This Court held that since the judge had ruled, as a matter of law, that the accused could not be properly charged with the offence alleged against him, the adjudication was tantamount to an acquittal from which the Crown was entitled to appeal.

1985 CanLII 47 (SCC)

33. Fauteux C.J. stated on p. 619:

> In my view, the judgment of Riley J., is, in essence, tantamount to a judgment rendered in a case tried on the merits and I am clearly of opinion that, were respondent charged subsequently for the same offence as the one embodied in the indictment, a plea of *autrefois acquit* would lie. Being thus a final judgment or verdict of acquittal resting on a question of law alone, the Attorney General could, as he did, appeal to the Appellate Division and, consequential to the dismissal of his appeal, further appeal to this Court.
>
> I would add that the difficulty on this point appears to have arisen because of a loose use of language. On the view taken by Riley J., the accused should have been acquitted or the charge against him should have been dismissed.

34. In *Kipp v. Attorney-General of Ontario*, [1965] S.C.R. 57, however, it was held that the Crown had no right of appeal from an erroneous quashing of the indictment. In *Kipp*, an accused had been charged with a breach of certain regulations under the *Food and Drugs Act*, 1952-53 (Can.), c. 38 (now R.S.C. 1970, c. F-27). At trial, after the indictment was read and before a plea was entered, appellant objected to the form of the indictment as being duplicitous. He then moved to have the

indictment quashed. The County Court judge accepted this objection and quashed the indictment. The Crown sought mandamus to compel the judge to proceed with the trial on the indictment as framed. The order was granted and subsequently affirmed by the Court of Appeal. A further appeal to this Court was dismissed. Judson J. stated at p. 60:

> It is common ground that the Crown has no right of appeal from this erroneous quashing of the indictment.

1985 CanLII 47 (SCC)

See also *R. v. Tonner* (1971), 3 C.C.C. (2d) 132 (Ont. C.A.), and *R. v. G. & P. International News Ltd. and Judd* (1973), 12 C.C.C. (2d) 169 (B.C.C.A.)

35. The most recent decision of this Court to address the issue is *Cheyenne Realty Ltd. v. Thompson*, [1975] 1 S.C.R. 87. A judgment quashing an information on the basis of the nullity of the regulations underlying the complaint was held to amount to a verdict of acquittal. Spence J., speaking for the Court, reviewed, *inter alia*, all the decisions discussed above and held, at p. 96:

> In the present appeal, the accused pleaded not guilty. His counsel then moved to quash the information. Unlike the situation in *Kipp*, in *Tonner* and in *G. & P. International News*, counsel did not object to the form of the information but his objection was an objection that the offence was not known to the law because the by-law upon which it was based was invalid.

> I am therefore of the opinion that unlike the situation in *Kipp*, in *Tonner* and in *G. & P. International News*, the disposition by the learned provincial court judge was what amounted to a verdict of acquittal and that an appeal did lie and, therefore, proceedings by way of mandamus were not proper. In order to arrive at what I have said amounted to a verdict of acquittal, it was quite unnecessary that the learned provincial court judge should hear evidence. All that was needed was to consider the provisions of the by-law which was before him and apply thereto what the learned

provincial court judge thought was the proper decision in law as to the power of a municipality to delegate discretionary function.

1985 CanLII 47 (SCC)

36. See also *R. v. Holmes* (1983), 4 C.C.C. (3d) 440 (Ont. C.A.), where the trial judge had quashed the indictment on the basis that s. 309(1) of the *Criminal Code* violated the presumption of innocence guaranteed by s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*. The Court of Appeal held that the order appealed from was tantamount to a judgment or verdict of acquittal and could thus be appealed by the Attorney General. A similar case is *R. v. Erickson*, [1984] 5 W.W.R. 577 (B.C.C.A.) The judge quashed an indictment on the basis that it was an appropriate and just remedy under s. 24(1) of the *Charter*. The Court held that an appeal did lie because such an order made after plea is an acquittal. See also *R. v. Dennis, Kubin and Frank* (1984), 14 D.L.R. (4th) 205 (N.W.T.C.A.)

37. Other cases cited by the Crown appellant in support of its position that s. 605(1)(*a*) encompasses more than a formal finding of "not guilty" are: *Re Regina and Kripps Pharmacy Ltd. and Kripps* (1981), 60 C.C.C. (2d) 332 (B.C.C.A.), (leave to appeal refused *R. v. Wetmore*, [1981] 1 S.C.R. xiii); *R. v. Gee* (1973), 14 C.C.C. (2d) 538 (Ont. C.A.); *R. v. Sanver* (1973), 12 C.C.C. (2d) 105 (N.B.S.C., A.D.)

38. From this review, it can be concluded that quashing an indictment is tantamount to an acquittal where (a) the decision to quash is not based on defects in the indictment or technical procedural irregularities, and (b) the decision is a final decision resting on a question of law alone, such that if the accused were charged subsequently with the same offence he or she could plead *autrefois acquit*.

B) *Stay of Proceedings*

39. As I have earlier indicated, the question whether a stay of proceedings is tantamount to a verdict of acquittal has generated considerable controversy in provincial appellate courts. To date, five such courts have considered the point, three finding in the affirmative and two in the negative. See *R. v. Vermette (No. 5)* (1982), 3 C.C.C. (3d) 36 (Que. C.A.); *R. v. Belton, supra*; *Re Regina and Beason* (1983), 7 C.C.C. (3d) 20 (Ont. C.A.); *R. v. Young, supra*. See *contra*, *R. v. Perry*, *supra*, and the judgment of the Court of Appeal of British Columbia in the case at bar.

40. In the Court of Appeal, Seaton J.A. held that a stay of proceedings was not an acquittal within the meaning of s. 605 and accordingly the Crown had no right of appeal. A judicial stay of proceedings, in his view, was different from an acquittal and was, in fact, entered in circumstances where an acquittal would not be justified. In his opinion, a stay of proceedings could not be tantamount to an acquittal for the effect of a stay is that proceedings are only suspended, albeit permanently.

41. Seaton J.A. based his reasoning on the decision of Estey J. in *Amato, supra,* where the difference between an acquittal and a judicial stay is discussed at p. 445:

> While it is frequently referred to in legal writings and sometimes in the courts as the "defence of entrapment" it is not a defence in the traditional sense of that term. A successful defence leads to an acquittal on the charge, a determination that the offence has not been committed by the accused. Here, axiomatically, the crime from a physical point of view at least has been committed. Indeed, it may be that the necessary intent and act have combined to form a complete crime. The successful application of the doctrine of entrapment, if it be a defence in the ordinary sense, would support an acquittal. The *Criminal Code* authorizes acquittals in somewhat similar circumstances as in the case of the defence of duress. However, as will be seen later, the successful application of the concept of entrapment leads to a stay of prosecution, the court withholding its processes from the prosecution on the basis that such would bring the administration of justice into disrepute.

1985 CanLII 47 (SCC)

and at pp. 456-57:

> There are of course but three available dispositions on a successful application of the defence of entrapment:
>
> (a) a dismissal of the accused on the charge;
>
> (b) an order quashing the charge;
>
> (c) a stay of prosecution.
>
> Alternative (a) is inappropriate in that both essential elements of the charge, the wrongful act and the criminal intent, are present in the proof before the court. As to (b) there is no authority in the *Criminal Code* for a court in this circumstance to quash a charge that is complete in form and properly issued under the *Code*. The last alternative (c) has a technical infirmity in that the charge remains extant and in the records of the court. The case before the Court in this appeal was founded on an information about which there is no suggestion of irregularity. However, the defect in course (c) is wholly technical. While the charge may be said to hang over the head of the accused, this is a wholly theoretical observation because there is no forum for its further processing. The courts in both the United States and the United Kingdom have in such circumstances, as shown in the authorities already reviewed, followed all three routes without apparent concern for technical considerations. I would prefer alternative (c) and would apply a stay of prosecution where the defence of entrapment is operative.

(Emphasis added.)

42. Lambert J.A. agreed with the reasoning of Seaton J.A. He added at p. 240:

> I do not think that a purposive approach [to statutory construction] can be used in favour of the Crown and against the accused to fill a perceived gap in the appeal provisions in the *Criminal Code*. If there is a gap then it must be filled by Parliament.

1985 CanLII 47 (SCC)

He further remarked on p. 241:

> ... I think it is significant that the phrase is '*judgment* or *verdict* of acquittal' and not merely the single word 'acquittal'. I presume that 'judgment' is used to describe the decision of a judge and 'verdict' the decision of a jury. But both words indicate a final disposition, and when coupled with the words 'of acquittal' they indicate what the final disposition must be. I do not think an order or direction that lacks the element of finality, either in form or substance, would meet the words of the section.

1985 CanLII 47 (SCC)

43. Lambert J.A. did not consider that the decision in *R. v. Sheets*, *supra*, supported the reasoning in *R. v. Belton*, *supra*, or *R. v. Vermette (No. 5)*, *supra*. On Lambert J.A.'s reading of the case, Fauteux C.J. did not say in *Sheets* that the decision was tantamount to a judgment or verdict of acquittal, but rather, that it is tantamount to a decision on the merits and as such, it was a final judgment or verdict of acquittal.

44. Anderson J.A., dissenting, found that the stay of proceedings was tantamount to an acquittal since the difference between the two was merely technical.

45. The appellate courts which have held a stay of proceedings tantamount to a judgment or verdict of acquittal, would appear to have based this conclusion on three considerations:

1. Although the charge remains extant following a stay of proceedings, there is no forum for its further processing and hence a stay is, in reality, a final decision.

2. Abuse of process is an issue which goes to the merits of the case. A stay of proceedings releases the accused from all further proceedings. It is therefore a substantive, rather than a merely procedural, decision.

3. The reasoning expressed in the cases on quashing an indictment. As Martin J.A. stated in *Beason*, *supra*, at pp. 31-32:

> The law has been settled by a series of decisions by the Supreme Court of Canada that where an indictment has been quashed, not on the basis of the defects in the indictment or technical procedural irregularities, but on grounds going to the substance or merits of the charge so as to give rise to the plea of *autrefois acquit* if the accused were subsequently charged, the order quashing the indictment is tantamount to an acquittal and an appeal lies from the order quashing the indictment: see *R. v. Sheets*, [1971] S.C.R. 614, 1 C.C.C. (2d) 508, 16 D.L.R. (3d) 221; *Lattoni and Corbo v. The Queen*, [1958] S.C.R. 603, 121 C.C.C. 317. The principle enunciated in these cases has been applied, correctly I think, to cases where proceedings have been stayed or indictments quashed because of contraventions of rights secured by the *Canadian Charter of Rights and Freedoms* and in which the disposition made by the trial judge constitutes a final disposition of the prosecution which precludes its subsequent revival:...

46. Appellate courts opposing this conclusion based their decisions on the following considerations:

1. A judicial stay is entered in circumstances where an acquittal is not justified.

2. Although proceedings are suspended permanently, technically the charge remains.

3. Any gap in the appeal procedure created under s. 605 of the *Code* must be filled by Parliament, not the courts.

47. In my opinion, the criteria considered in the line of cases, *Lattoni and Corbo*, *Sheets* and *Cheyenne Realty Ltd.*, which hold that the quashing of an indictment is tantamount to a judgment or verdict of acquittal, may usefully be applied to this case. Can it be said that (a) the decision to stay was not based on procedural

1985 CanLII 47 (SCC)

considerations, but rather on questions of law; and (b) the decision was a final decision, that is to say, a judgment rendered on a question of law after the accused was placed in jeopardy, such that if the accused were charged subsequently with the same offence he could plead *autrefois acquit*?

48. Staying proceedings on the basis of abuse of process, and in particular, on the basis of the defence of entrapment, in my view, amounts to a decision on a complex question of law and fact. Entrapment has been defined as the conception and planning of an offence by a law enforcement officer and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion or fraud of the officer: see *Sorrells v. United States*, 287 U.S. 435 (1932) at p. 454. This is more than a mere procedural defect.

49. Furthermore, *Petersen v. The Queen*, [1982] 2 S.C.R. 493, is authority for the proposition that a formal "acquittal" is not required in order for the accused to plead *autrefois acquit*. In that case McIntyre J. said, at p. 501:

> I am also of the opinion that the appellant was placed in jeopardy and that his trial commenced upon the informations. He had pleaded not guilty and he stood prepared to meet the Crown's case. In *Riddle*, the Crown's case was dismissed because the Crown, despite the refusal of an adjournment and the Court's direction that the trial proceed, declined to call evidence. There was accordingly no case for the accused to meet and the acquittal resulted. In that case Dickson J., said at p. 398:
>
> In my view, a criminal trial commences and an accused is normally in jeopardy from the moment issue is joined before a judge having jurisdiction and the prosecution is called upon to present its case in court. The person accused continues in jeopardy until final determination of the matter by rendering of the verdict.

1985 CanLII 47 (SCC)

> I do not consider that Dickson J., imposed by those words a requirement that some direct invitation must be issued to the Crown to call evidence before it could be said that the issue had been joined and the accused placed in jeopardy. The authorities he relied upon in his reasons support the proposition that once a plea is entered before a court of competent jurisdiction the accused is in jeopardy. Where the court proceeds to a determination, in the nature of an acquittal or dismissal, proceedings on new informations raising the same allegations will be barred: *Haynes v. Davis*, [1915] 1 K.B. 332; *R. v. Hatherley* (1971), 4 C.C.C. (2d) 242; *R. v. Blair and Karashowsky* (1975), 25 C.C.C. (2d) 47; *R. v. Day* (1980), 37 N.S.R. (2d) 193, and other authorities referred to in *Riddle*, *supra*.

1985 CanLII 47 (SCC)

(Emphasis added.)

50. At the respondent's trial, the following occurred: (i) the respondent was arraigned and entered a plea of not guilty to the indictment; (ii) a jury was empanelled and the accused placed "in charge"; (iii) the Crown presented its case; (iv) the respondent testified on his own behalf; (v) counsel addressed the jury; (vi) Wong Co. Ct. J. charged the jury; (vii) the jury returned a verdict of "unlawful entrapment"; and (viii) Wong Co. Ct. J. gave effect to that verdict by directing a "stay of proceedings". Given this sequence of events, in my opinion, the respondent was in jeopardy and the action taken by the judge was in the nature of an acquittal. If the respondent were subsequently charged with the offence spelled out in the indictment, a plea of *autrefois acquit* would lie.

51. I see no logical reason why a decision to quash an indictment on a question of law should be considered a judgment or verdict of acquittal whereas a decision to enter a stay on a question of law should not. Anderson J.A. pointed out it would be an anomolous and absurd result if dismissal of the charges on the basis that the proceedings constituted an abuse of process would permit an appeal but a stay of the proceedings on the basis that they constituted an abuse of process would not. Hence,

I would conclude that the administration of criminal justice would be better served by a determination that a stay of proceedings is tantamount to a judgment or verdict of acquittal and subject to appeal by the Crown pursuant to s. 605(1)(*a*).

1985 CanLII 47 (SCC)

52. There are further policy considerations that should also be taken into account. In *Re Regina and Beason*, *supra*, Martin J.A. concluded, on p. 34, that in the circumstances of that case, "*mandamus* is available to the Crown, although I consider that in the future an appeal is the preferable remedy to be followed in like circumstances". I am in respectful agreement with this conclusion.

53. A failure to acknowledge a right of appeal in circumstances where the order finally terminates the proceedings, in particular a stay, would seriously impede a rational and consistent development of *Charter* remedies through the appeal process and this, at a very critical time in their development. This is particularly true in the case of a stay of proceedings, which is being used increasingly as a *Charter* remedy.

54. I do not believe it would further the judicial process to permit appeals from a decision to stay proceedings because of a *Charter* violation, and not permit an appeal from a decision to stay reached because of an abuse of process such as entrapment. Such a course of action would lead to strained and artificial distinctions.

55. On a true reading of s. 605(1)(*a*) of the *Code*, to determine whether a stay of proceedings is a judgment or verdict of acquittal, we must look to the substance of the action of the trial judge and not the label he used in disposing of the case. Substance and not form should govern. Whatever the words used, the judge intended to make a final order disposing of the charge against the respondent. If the order of the

Court effectively brings the proceedings to a final conclusion in favour of an accused then I am of opinion that, irrespective of the terminology used, it is tantamount to a judgment or verdict of acquittal and therefore appealable by the Crown.

1985 CanLII 47 (SCC)

56. We are concerned here with a stay of proceedings because of an abuse of process by the Crown. While a stay of proceedings of this nature will have the same result as an acquittal and will be such a final determination of the issue that it will sustain a plea of *autrefois acquit*, its assimilation to an acquittal should only be for purposes of enabling an appeal by the Crown. Otherwise, the two concepts are not equated. The stay of proceedings for abuse of process is given as a substitute for an acquittal because, while on the merits the accused may not deserve an acquittal, the Crown by its abuse of process is disentitled to a conviction. No consideration of the merits--that is whether the accused is guilty independently of a consideration of the conduct of the Crown--is required to justify a stay. In the case at bar the accused admitted that he had sold a pound of marijuana to an undercover officer. A consideration of the merits would necessarily have led to his conviction. The stay in this case intervenes to prevent consideration of the merits lest a conviction occur in circumstances which would bring the administration of justice into disrepute.

57. The respondent requested this Court to decide the following issues which were raised in the British Columbia Court of Appeal:

> Did the learned trial Judge err in law in holding that the defence of entrapment was available to the Respondent?
>
> Did the learned trial Judge err in law in instructing the Jury as to what constitutes entrapment?

Did the learned trial Judge err in law in instructing the Jury that the onus lay on the Crown to establish beyond a reasonable doubt that there had been no "unlawful entrapment"?

Did the learned trial Judge err in law in taking from the Jury a special verdict of "unlawful entrapment"?

Did the learned trial Judge err in law and exceed his jurisdiction in directing a stay of proceedings with respect to the Indictment?

58. I would refer all of the above questions to the Court of Appeal of British Columbia for hearing and determination.

59. The appeal should be allowed, the judgment below set aside and an order go directing the Court of Appeal of British Columbia to hear and determine the Crown's appeal on the merits.

Appeal allowed.

Solicitor for the appellant: R. Tassé, Ottawa.

Solicitor for the respondent: J. M. Brian Coleman, Vancouver.

1985 CanLII 47 (SCC)