
CANADA / JUDGMENT

Rourke v. The Queen

[1978] 1 SCR 1021

COURT

Supreme Court of Canada

DECIDED

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Rourke v. The Queen

Collection

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Report

[1978] 1 SCR 1021

Judges

Laskin, Bora; Martland, Ronald; Judson, Wilfred; Ritchie, Roland Almon; Spence, Wishart Flett; Pigeon, Louis-Philippe; Dickson, Robert George Brian; Beetz, Jean; de Grandpré, Louis-Philippe

On appeal from

British Columbia

Subjects

Criminal law

Decision Content

Supreme Court of Canada

Rourke v. The Queen, [1978] 1 S.C.R. 1021

Date: 1977-06-24

David Daniel Rourke Appellant;

and

Her Majesty The Queen Respondent.

1976: December 8; 1977: June 24.

Present: Laskin C.J. and Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz and de Grandpré JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Abuse of process—Delay in instituting prosecution—Witness deceased—Prejudice to accused—Stay of proceedings—Jurisdiction of the Courts—Criminal Code, R.S.C. 1970, c. C-34, ss. 7(3), 602, 605(1).

On February 26, 1973, an information was sworn against the appellant alleging a kidnapping and robbery committed on October 5, 1971. A warrant was issued and the appellant was later arrested on April 3, 1973. At the opening of the trial, the County Court judge granted a stay of the proceedings on the ground that the accused was prejudiced because of the delay in commencing the prosecution, a person who would have been a key witness having died in the interval. An application for mandamus was dismissed by a judge of the Supreme Court of British Columbia on the basis that the trial judge had jurisdiction to do what he had done and, having exercised his discretion bona fide, his decision could not be revised. The Court of Appeal unanimously held that inordinate delay was not a fact which would give discretion to the County Court judge to stay the proceedings, reversed the judgment of the Supreme Court and granted the mandamus.

Held: The appeal should be dismissed.

Per Martland, Ritchie, Pigeon, Beetz and de Grandpré JJ.: There is no 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. Nor is there any general discretionary power in courts of criminal jurisdiction to stay proceedings regularly instituted because the prosecution is considered oppressive.

The absence of any provision in the Criminal Code contemplating the staying of an indictment by a trial judge or an appeal from such decision is a strong indication against the existence of any power to grant such stay. Section 7(3) of the Criminal Code which preserves common law defences does not apply to a discretionary stay of proceedings.

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Per Laskin C.J. and Judson, Spence and Dickson JJ.: The principle that a criminal court, like a civil court, is entitled to protect its process from abuse, being recognized, the question of discretion becomes a matter of discipline, keyed to particular situations which, as an outgrowth of case law, commend themselves as of a kind in which the principle may be raised. Every court having criminal jurisdiction has the power to stay proceedings which are an abuse of process or oppressive and vexatious.

However, the power to prevent abuses of process is one of special application and its exercise cannot be a random one. In this case, there is no basis, despite the allegations of prejudice, upon which abuse of process could be invoked. Prosecutions initiated a lengthy period after the alleged commission of an offence must be left to take their course and to be dealt with by the court on the evidence, which judges are entitled to weigh for cogency as well as credibility.

R. v. Osborn, [1971] S.C.R. 184, rev'g. [1969] 1 O.R. 152; Director of Public Prosecutions v. Humphrys, [1976] 2 All E.R. 497; Connelly v. Director of Public Prosecutions, [1964] 2 All E.R. 401; Kienapple v. The Queen, [1975] 1 S.C.R. 729; Doré v. Attorney General of Canada, [1975] 1 S.C.R. 756; Kipp v. Attorney General of Ontario, [1965] S.C.R. 57; R. v. Sheets, [1971] S.C.R. 614; R. v. Koski, [1972] 1 W.W.R. 398; Wright, McDermott and Feeley v. The Queen, [1963] S.C.R. 539; R. v. Leroux (1928), 50 C.C.C. 52; R. v. Bell (1929), 51 C.C.C. 388; R. v. Leclair (1956), 23 C.R. 216; Re State of Nebraska and Morris (1970), 2 C.C.C. (2d) 282; R. v. Heric (1975), 23 C.C.C. (2d) 410; Re Davis and The Queen (1976), 24 C.C.C. (2d) 218; Attorney General for Saskatchewan v. McDougall, [1972] 2 W.W.R. 66; R. v. Kowerchuk, [1972] 5 W.W.R. 255; R. v. Del Puppo, [1974] 3 W.W.R. 621; Re Sheehan and The Queen (1975), 14 C.C.C. (2d) 23; R. v. Falls and Nobes (1976), 26 C.C.C. (2d) 540; R. v. Burns, Fairchild and Donnelly (1975), 30 C.R.N.S. 387; R. v. Thorpe (1973), 11 C.C.C. (2d) 502; Re Vroom and Lacey v. The Queen (1975), 14 C.C.C. (2d) 10; R. v. Ittoshat (1970), 10 C.R.N.S. 385; R. v. Shipley, [1970] 3 C.C.C. 398; Lemieux v. The Queen, [1967] S.C.R. 492, referred to.

APPEAL from a judgment of the British Columbia Court of Appeal[1], reversing a judgment

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of the British Columbia Supreme Court[2], dismissing an application for mandamus against a County Court judge who had granted a stay of proceedings. Appeal dismissed and stay of proceedings set aside.

Sidney B. Simons and Peter Jensen, for the appellant.

John E. Hall, for the respondent.

The judgment of Laskin C.J. and Judson, Spence and Dickson JJ. was delivered by

THE CHIEF JUSTICE—This appeal, which is here by leave of this Court, raises five related questions. They are (1) whether there is a principle of abuse of process which a trial judge may invoke to stay proceedings against an accused on a criminal charge; (2) if so, whether that principle could properly be invoked in the present case; (3) if so, whether a County Court judge presiding at the trial of the accused has the power to order a stay or whether prohibition must be resorted to in a superior Court; and (4) if there is such power in the County Court judge, whether its exercise is reviewable by way of mandamus; and (5) if so, whether the British Columbia Court of Appeal erred in this case in reversing the judgment of Rae J. who refused an order of mandamus to Ladner Co. Ct. J. to proceed with the trial of the accused.

The abuse of process alleged in this case relates to the delay of the police over a time period of not quite twenty months to arrest the accused on charges of offences committed on October 5, 1971, with the result that by the time he was arrested on April 3, 1973, pursuant to a warrant issued on February 26, 1973, and by the time his preliminary inquiry was held in June, 1973, certain persons, who would have been available as witnesses, if the police had acted more promptly, had either died or had left the vicinity, their whereabouts unknown. The accused contended, and the County Court judge agreed, that the police knew as much about the alleged offences shortly after October 5,

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1971 as they knew at the time they moved to arrest the accused about twenty months later and, in the meantime, a bottle allegedly containing some fingerprints had been destroyed and two persons who would have been material witnesses for the accused had become unavailable, one having died and the other having disappeared.

It appears from the record that, on investigating the offences later charged against the accused, the Vancouver police issued a pick-up request for his arrest but no warrant was issued until February 26, 1973, the date on which an information was sworn in respect of the offences. The accused was known to the Vancouver police, having been arrested under a bench warrant on October 4, 1971, at Vancouver with respect to a traffic charge. He was released the next day (the day on which the offences involved herein were allegedly committed) under a direction to appear on October 29 to answer the traffic charge. He failed to appear and a bench warrant was issued to arrest him in respect of this matter but nothing was done at that time about seeking his arrest on the charges involved in this case. The accused alleged that he was working in the Creston area of British Columbia during the period between the date of the offences and his arrest, there being no attempt to conceal his whereabouts, and that he was known in that area.

When the accused appeared for trial on November 21, 1973, and the indictment against him was preferred, his counsel moved before plea that the presiding County Court judge stay the proceedings as an abuse of process. This the trial judge did, saying in his reasons that he was moved to do so not because of unconscionable delay alone—and he found that there was such delay—but because associated therewith were facts which were prejudicial to the accused, namely, the destruction of evidence and the unavailability of witnesses. The trial judge concluded that to refuse a stay would be to deny to the accused his right to a fair hearing in accordance with the principles of fundamental justice. He thus invoked, without express reference however, s. 2(e) of the Canadian Bill of Rights. I am unable to appreciate the application of this

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provision to the issue of abuse of process as it arises on the facts in this case, and so I propose to deal with that issue as one not dependent on the Canadian Bill of Rights.

The present case, so far as I am aware, and so far as the researches of counsel have disclosed, is the first in which abuse of process is raised in connection with a delay of the police authorities to bring charges against an accused and thus (as he alleges) to prejudice him in his ability to meet them. There is no suggestion that the delay in taking steps to apprehend the accused was deliberate, or the result of some design to make it more difficult for him to offer a defence. Since there is no statute of limitations in respect of the offences (kidnapping and robbery) with which the accused was charged, the question arises whether there can be, perhaps by analogy to laches in equity, any principle of foreclosure of prosecution by reason of delay in laying of charges after police investigation has run its course.

The Crown moved against the trial judge's stay by mandamus but it was refused by Rae J. who held on the authority of *Regina v. Koski*[3], a decision of Munroe J., a brother judge in the same Court, that the County Court judge had jurisdiction in appropriate circumstances to order the stay, and that since he had made the order in the bona fide exercise of his discretion and on evidence adduced before him, there was no reviewable issue on mandamus. The British Columbia Court of Appeal agreed that there was jurisdiction, not confined to superior courts, to order a stay of criminal proceedings in the exercise of discretion for abuse of process on the part of the prosecution (adopting in this connection the views of the Ontario Court of Appeal in *The Queen v. Osborn*[4]), but it did not agree that the facts of the present case warranted the exercise of that discretion in favour of a stay. The pivotal question, however, was whether the Crown could successfully invoke mandamus to set aside the stay, and on this point the British Columbia Court of Appeal concluded that mandamus lay and should be

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directed to the trial judge to require him to proceed with the trial.

The British Columbia Court of Appeal ordered mandamus on the ground that "the County Court judge declined to exercise his jurisdiction to hear and determine the case upon a point clearly preliminary to the proceeding and upon matters which preceded the preferring of the indictment". I take this to mean that it was not open to the trial judge to base his stay of proceedings on the fact of the dilatory investigation into the offences with which the accused was later charged. Speaking for the British Columbia Court of Appeal, McIntyre J.A. noted in the course of his reasons that

...The complaint is made not of the manner in which the prosecution itself has been conducted nor of the form or nature of the indictment but solely of matters which arose in the investigatory stages and before the indictment was preferred...

An issue was raised by the accused at the opening of this appeal as to the power and scope of power of the British Columbia Court of Appeal to entertain an appeal from the refusal of Rae J. to give an order of mandamus. The power is expressly set out in s. 719(1) of the Criminal Code, and s. 719(2) makes applicable *mutatis mutandis* Part XVIII of the Code which embraces rights of appeal to the Supreme Court of Canada. Leave having been granted, the appeal is properly here and must be governed by the scope of review open in mandamus proceedings.

Mandamus will lie, of course, to compel an inferior Court to exercise its jurisdiction but it will not go if the only issue is that such a Court has, in the course of its jurisdiction exercised a discretion in a particular way. The burden of the reasons given by Rae J. in refusing to order mandamus is that the County Court judge had power to stay proceedings for abuse of process, and that in granting the stay he had exercised his discretion in the matter on evidence which he assessed and that his determination was, accordingly, not challengeable by mandamus. The British Columbia Court of Appeal accepted that the County Court judge

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had the power to order a stay for abuse of process but, as I understand its reasons, the power was incidental to his jurisdiction over the accused and over the offences charged against the accused which were before him for trial; the order for a stay was a determination of an issue preliminary or collateral to trial, resulting in a refusal to exercise jurisdiction and was hence reviewable on mandamus.

If I have correctly assessed the reasons of the British Columbia Court of Appeal, I cannot agree with them. What the trial judge did was done in the course of a jurisdiction which he admittedly possessed, that is jurisdiction to try the accused for the offences charged against him. I do not think that the matter involved calls for a refined determination of whether the trial had begun at the time the application for a stay was made. It may be that for some purposes it had not yet begun, but we are concerned here with an issue of jurisdiction and the questioning of an exercise thereof by a prerogative writ. The relevant question, in my opinion, is whether the County Court judge committed an error of law in purporting to exercise a discretion on grounds that did not call for it or, to put the matter another way, on a basis which did not raise the issue on which discretion was exercised. If that be so, mandamus would lie to compel him to proceed with the trial of the charges preferred against the accused. We are not concerned here with a statutory discretion but with one alleged to reside in the judge as an aspect of his control over the process of the Court in which he presides, involving a power to prevent its abuse by directing a stay of proceedings.

I come then to the two central questions in this case, namely, first, whether abuse of process is a ground upon which a Court may direct a stay of criminal proceedings and, second, whether if there is such a doctrine it extends to delay in charging an accused where that delay is associated with likely prejudice to his defence.

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The seminal Canadian case on abuse of process as a ground for a judicial stay of criminal proceedings is *The Queen v. Osborn*, supra, reversed on appeal to this Court. In that case, the accused was indicted on a charge of conspiracy to utter forged documents some eight months after he had been acquitted on a directed verdict of a substantive forgery offence, the same facts being involved in the conspiracy charge. The Crown had appealed unsuccessfully against the directed acquittal before laying the new charge which came on for trial eight months after it was laid. At this second trial, the trial judge rejected the plea of *autrefois acquit* and incident thereto rejected an assertion of *res judicata*; and, although urged to exercise a discretion to stay the indictment as oppressive and an abuse of process, he proceeded with the trial without ruling on whether he had such a discretionary power. The accused was convicted and the sole ground of appeal was that the trial judge had a discretion to stay proceedings as oppressive and vexatious, amounting to an abuse of process, and should have done so.

The Ontario Court of Appeal (and I point out that I was then a member of the Court assigned to the appeal) did not go beyond the ground raised, namely abuse of process, in dealing with the appeal, and hence gave no consideration to *res judicata* which was considered and applied by this Court in the later case of *Kienapple v. The Queen*[5]. Two propositions were enunciated by the Ontario Court of Appeal in the *Osborn* case; first, the inherent jurisdiction of a Court in civil cases to prevent abuse of process through oppressive or vexatious proceedings was also exercisable in criminal proceedings and the policy considerations expressed by Lord Devlin in *Connelly v. Director of Public Prosecutions*[6], at p. 442 were apt; and second, it was a discretionary jurisdiction or, as I prefer to call it, a discretionary power, the exercise of which ought to have been considered on the facts of the *Osborn* case. Since the trial judge had not addressed himself to the issue, the Court of Appeal must do so.

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The Court declared that it was not prepared to say that the laying of a second charge on the same facts was *ipso facto* a ground for exercising the power to stay. To use the words of Jessup J.A., speaking for the Court (at p. 157):

The discretion is to be exercised in favour of an accused only where a real injustice will otherwise result, but such a case should be rare. It should always be invoked before arraignment on the indictment alleged to be oppressive and cannot be raised after trial on such an indictment.

In the particular case, the Court of Appeal concluded that “the long delay coupled with the Crown’s intervening appeal results in unjust oppressiveness from the second indictment;” and, being of the opinion that the trial judge should accordingly have stayed proceedings on that indictment, the Court quashed the conviction thereon and directed an acquittal.

On further appeal to this Court the conviction was restored, but no majority view emerged as to whether a Court could stay or dismiss criminal proceedings by reason of abuse of process or whether a Court’s power to prevent abuse of process extended to staying a second charge arising out of the same facts on which an accused was previously acquitted or convicted where a plea of *autrefois* or of issue estoppel was inapplicable. Although the seven-Judge Court was unanimous

in result, six of the members of the Court had divided opinions and the seventh, Fauteux C.J.C., merely agreed that the appeal should be allowed and the conviction restored, giving no indication of any view on the issues in the appeal.

Hall J., speaking also for Ritchie and Spence JJ., declared that the question of the Court's jurisdiction to intervene to prevent an abuse of process did not arise because, on the record, there was no evidence of oppression. An examination of the course of proceedings persuaded him that such delays as may have occurred were attributable in the main to the accused and not to the Crown, nor could anything be made of the fact that the Crown

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appealed the acquittal on the first charge, its right to do so being statutory. Pigeon J., with whom Martland and Judson JJ. concurred, expressed the view that there was no rule in Canada that a trial judge had a discretion to stay proceedings on a second indictment because of injustice amounting to oppression, when successive charges are brought against an accused on the same facts. He rejected any reliance on the opinion in the Connelly case because in England at that time the Court of Appeal had no such power, as appellate Courts in Canada have long had, to order a new trial when quashing a conviction, and hence it could be said to be unfair to allow a second trial on the same facts under a new charge when there could not be a retrial of the offence first charged. Moreover, although the House of Lords suggested that it would be a desirable rule of practice to include in one indictment all charges arising out of the same facts, the proposed rule was not applied in the particular case and there was unanimity that no unfairness arose in charging and convicting the accused of robbery after his conviction of murder in the course of the robbery was quashed for misdirection. Pigeon J. concluded that there was no unfairness or oppression under Canadian criminal law in obliging an accused to stand trial on the same charge if a conviction thereon is quashed because of an error in the course of his trial; and he held that no different view should be taken if, after an incorrect charge is laid and an acquittal results, the accused is correctly charged with a different offence on the same facts.

There is no assertion by Pigeon J. in the Osborn case that a Court may not in any circumstances stay or dismiss criminal proceedings for abuse of process, and this question was more explicitly left open by Hall J. in that case. What my brother Pigeon made clear was that abuse of process could

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not be invoked to warrant a stay of proceedings against a prosecution on a second charge on the same facts on which a directed verdict of acquittal was entered on a different earlier charge. This Court in Osborn did not consider whether *res judicata* or issue estoppel applied. That was a matter with which it had been concerned in the earlier case of *Wright, McDermott and Feeley v. The Queen*[7], and it later applied the doctrine in *Kienapple*, both Judson and Pigeon JJ. joining in the majority judgment and the entire Court accepting it as applicable in criminal proceedings but being divided on whether it should be applied on the facts of the *Kienapple* case. The issue that

was raised in Osborn was a more generalized one but, as happens with general propositions, their scope must be tested by concrete situations through which a measure or measures of their ambit may be formulated.

So it is here. In a broad sense, pleas of autrefois convict and acquit, and of res judicata and issue estoppel may be said to be aspects of abuse of process; they may be regarded as crystallized means of control, having a particular ambit of operation but not exhaustive of the scope of abuse of process. To recognize it as a desirable general notion for judicial control of the criminal process does not mean that its only bounds are the discretion of a trial judge which must inevitably be respected. That discretion must itself be addressed to situations capable of being embraced in the general notion and cannot itself be the touchstone of abuse of process.

One such situation, recognized long ago in case law, arises where use is sought to be made of the criminal courts to collect a debt or to realize on some civil claim: see *Rex v. Leroux*[8]; *Rex v. Bell*[9];

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Regina v. Leclair[10]; *Re State of Nebraska and Morris*[11]. Another situation, in which there is a spectrum of cases and where their disparate facts do not admit of common treatment, is that which arises when a charge is withdrawn or dismissed for want of prosecution and then re-laid: see *Regina v. Koski*, supra, (where there were numerous delays in proceeding against a juvenile, none of them caused by the accused, and where after accused appeared for trial with a number of witnesses for the second time, an adjournment was sought by the Crown and was refused by the Court which dismissed the charges for want of prosecution and subsequently ordered a stay of proceedings when a new information was sworn containing the same charges); *Regina v. Heric*[12] (where adjournment refused to Crown and charge dismissed when no evidence presented, and where new charge, laid on same facts, held to be abuse of process but res judicata also held to be available to accused); *Re Davis and The Queen*[13] (stay of proceedings to cure procedural error and re-laying of information not an abuse of process); *Attorney-General for Saskatchewan v. McDougall*[14] (charge withdrawn after plea of not guilty and several adjournments and then re-laid and after further adjournments accused acquitted after trial; Crown on appeal by way of trial de novo proposing to lead evidence not presented to Court of first instance; held to be abuse of process); *Regina v. Kowerchuk*[15] (not an abuse of process where Crown at time of trial withdrew charge and laid new information for virtually same drug offence because unable to produce analyst as required witness on charge as originally laid); *Regina v. Del Puppo*[16] (abuse of process where, inter alia, after charge dismissed for want of prosecution following delays and adjournment new information sworn on same

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charge to get around Court's refusal to grant another adjournment).

A variation on this situation is the attempt to proceed on a second identical information after the accused has been discharged following a preliminary inquiry: see *Re Sheehan and the Queen*[17] (prohibition granted but Court recognized indictment could be preferred with consent of Judge or of Attorney-General pursuant to Cr. Code, s. 505(4)).

Abuse of process has been put forward in a number of Canadian cases as a ground for staying or prohibiting criminal proceedings where there has been excessive and unexplained delay in bringing the accused to trial after the charge or after committal for trial: see *Regina v. Falls and Nobes*[18] (frequent delays because of non-appearance of complainant and accused appearing 16 and 17 times respectively over a period of about two years during which time charge withdrawn and re-laid; delay oppressive and prejudicial to accused and proceedings stayed); *Regina v. Burns, Fairchild and Donnelly*[19] (no abuse of process where delay between preliminary hearing and trial not occasioned by Crown); *Regina v. Thorpe*[20] (two-year unexplained delay of Crown after committal for trial before trial date fixed held to be prejudicial to fair trial and abuse of process); *Re Vroom and Lacey v. The Queen*[21] (no abuse of process by mere fact of repeated delays, although none attributable to the accused, or by reason of the swearing of three successive informations where they all concerned the same charge).

Abuse of process as a ground for staying proceedings was invoked where an accused was removed for trial to a place remote from that

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where the offences were allegedly committed and was prejudiced in his ability, by reason, for example, of prohibitive cost, to bring witnesses, and thus denied his right to make full answer and defence: see *Regina v. Ittoshat*[22]. Again, abuse of process was made the ground of a stay of proceedings in a case where the accused committed the alleged offence at the instigation of a police officer who instilled the idea and actively persuaded and encouraged the accused to carry it out: see *Regina v. Shipley*[23]. This Court dealt with a similar situation, one going beyond the involvement of an agent provocateur, in *Lemieux v. The Queen*[24], where Judson J. for the Court held that an accused could not be found guilty of breaking and entering a dwelling house where the scheme to entrap the accused had been set up by the police with an informer and the owner of the dwelling house had cooperated, giving possession of the house to the police who had urged the informer to break in with the assistance of others including the accused.

I have paraded this long list of cases to show how varied are the fact situations in which judges of different levels and of different Provinces have used abuse of process as a way of controlling prosecution behaviour which operates prejudicially to accused persons. I pass no judgment on the correctness of any of the decisions, but they do indicate by their very diversity the utility of a general principle of abuse of process which judges should be able to invoke in appropriate circumstances to mark their control of the process of their Courts and to require fair behaviour of the Crown towards accused persons. It will not escape notice that the decisions I have cited are almost all quite recent, and a perusal of them would reveal how much they have been influenced by *Connelly v. Director of Public Prosecutions*, *supra*, and particularly by the reasons of Lord

Devlin in that case.

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Although the members of the House of Lords in *Connelly* were unanimous in sustaining the conviction of robbery (charged in a separate indictment and arising out of the same facts which supported an indictment for murder tried previously and on which a conviction was recorded which was quashed on appeal for misdirection), they were also unanimous that, as Lord Reid put it, “there must always be a residual discretion to prevent anything that savours of abuse of process”: [1964] 2 All E.R. 401, at p. 406. The leading judgment on this question was that of Lord Devlin who was supported in his views thereon by concurring reasons of Lord Reid and Lord Pearce. The disagreement of Lord Morris and Lord Hodson related to their apprehension of allowing mere judicial discretion, as, for example discretion to stay an indictment, to determine the limits of abuse of process as a means of controlling criminal proceedings, a point to which I adverted earlier in these reasons. Thus, Lord Hodson said in his reasons (at p. 432):

...I cannot concede that there ought to be given to the judge a discretion, which in my opinion he has not hitherto been allowed, to interfere with anything that he personally thinks is unfair. If one disclaims such a proposal but seeks to substitute a discretion to determine, in accordance with principle, whether or not a prosecution should be stopped, I do not know what principle can be applied. In the case now under consideration different judges will as the history of the case shows, have different views as to what is unfair and I should find the discretion, if there is one, immensely difficult to exercise at all, nor should I know how to exercise it judicially. If there were such a discretion I do not understand why so many cases have been decided and so much learning has been expended in considering the doctrine of *autrefois* convict and *autrefois* acquit. Has all this been a waste of judicial time? It would seem so if all the judge had to do was to exercise his discretion whether or not a second indictment in such a case as this should be allowed to proceed. After all, the cases, although they may not all be consistent and may be difficult to justify on the basis of *autrefois* acquit or *autrefois* convict, seem to me to cling at least to the central principle that a second trial is permissible on a charge, other than that dealt with at the first trial,

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arising out of the same facts and involving an issue not disposed of at the first trial;...

Lord Morris expressed himself in two passages of his extensive reasons as follows:

The power (which is inherent in a court’s jurisdiction) to prevent abuses of its process and to control its own procedure must in a criminal court include a power to safeguard an accused person from oppression or prejudice. That power, as is demonstrated by a stream of authority to which I will refer, has, however, never been regarded as endowing a court with a power to say that evidence given in reference to one charge may not be repeated in reference to another and different charge. Nor does it enable a court to order that a prosecution be dropped merely because of some rather imprecise regret that an accused should have to face another charge.

...

...It would, in my judgment, be an unfortunate innovation if it were held that the power of a court to prevent any abuse of its process or to ensure compliance with correct procedure enabled a judge to suppress a prosecution merely because he regretted that it was taking place. There is no abuse of process if to a charge which is properly brought before the court and which is framed in an indictment to which no objection can in any way be taken there is no plea such as that of *autrefois acquit* or *convict* which can successfully be made.

Although Lord Devlin viewed abuse of process in a wider compass, he too did not regard it as coincident with any discretion which a trial judge might exercise. His exposition of abuse of process as a means of judicial control of the criminal process was related mainly to a contention by the Crown that “[it] has a right to bring forward its case in as many indictments as it chooses and that the court is bound to proceed on each of them, whether or not it considers that the Crown is behaving oppressively” (at p. 438). Lord Devlin rejected the submission that the danger of abuse is a matter for the Crown, which should be trusted not to abuse its powers. Considering the point to be one of great constitutional importance he said that “The courts cannot contemplate for a moment the transference to the executive of the responsibil-

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ity for seeing that the process of law is not abused” (at p. 442). He developed his approach to the contention of the Crown on three bases, as follows (at p. 438):

...First, a general power, taking various specific forms, to prevent unfairness to the accused has always been a part of the English criminal law and I shall illustrate this with special reference to the framing of indictments. Secondly, if the power of the prosecutor to spread his case over any number of indictments was unrestrained, there could be grave injustice to defendants. Thirdly, a controlling power of this character is well established in the civil law.

His conclusion from his examination of those three matters was stated in these words (at p. 446):

The result of this will, I think, be as follows. As a general rule a judge should stay an indictment (that is, order that it remain on the file not to be proceeded with) when he is satisfied that the charges therein are founded on the same facts as the charges in a previous indictment on which the accused has been tried, or form or are a part of a series of offences of the same or a similar character as the offences charged in the previous indictment. He will do this because as a general rule it is oppressive to an accused for the prosecution not to use r.3 [of Sch. 1 to the Indictments Act, 1915, permitting joinder of charges in one indictment if they are founded on the same facts or are part of a series of offences of the same or a similar character] where it can properly be used, but a second trial on the same or similar facts is not always and necessarily oppressive, and there may in a particular case be special circumstances which make it just and convenient in that case. The judge must then, in all the circumstances of the particular case, exercise his discretion as to whether or not he applies the general rule. Without attempting a comprehensive definition, it may be useful to indicate the sort of thing that would, I think, clearly amount to a special

circumstance. Under s. 5(3) of the Act of 1915 a judge has a complete discretion to order separate trials of offences charged in one indictment. It must, therefore, follow that where the case is one in which, if the offences in the second indictment had been included in the first, the judge would have ordered a separate trial of them, he will in his discretion allow the second indictment to be proceeded with. A fortiori, where the accused has himself obtained an order for a separate trial under s. 5(3).

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Moreover, I do not think that it is obligatory on the prosecution, in order to be on the safe side, to put into an indictment all the charges that might conceivably come within r.3, leaving it to the defence to apply for separation. If the prosecution considers that there ought to be two or more trials, it can make its choice plain by preferring two or more indictments. In many cases this may be to the advantage of the defence. If the defence accepts the choice without complaint and avails itself of any advantage that may flow from it, I should regard that as a special circumstance; for where the defence considers that a single trial of two indictments is desirable, it can apply to the judge for an order in the form made by GLYN-JONES, J., in *R. v. Smith* (170).

It remains to determine what rule of practice should be applied in this particular case. Should it be the rule which your lordships, if you are of my opinion, will declare as the right rule to govern future cases; or should it be the rule of practice in force at the time of the first trial? If the decision in *R. v. Jones* (168) had embodied a rule of law, it might well be said that the prosecution would simply be in the unfortunate position of a party who has good grounds for thinking that he is acting as the law requires him to do and then finds that the decision of which he is relying is upset. A rule of practice is in my opinion different. When declared by a court of competent jurisdiction, the rule must be followed until that court or a higher court declares it to be obsolete or bad or until it is altered by statute. The rule in *R. v. Jones* (168) was accepted by both sides without challenge as governing the position at the first trial; and in his address to the jury in the passage which my noble and learned friend LORD MORRIS OF BORTH-Y-GEST has quoted (171), counsel for the defence referred to the possibility of a second trial in the event of an acquittal. The rule must be applied in the present case though not in the future, and on that ground I would dismiss this appeal.

If, as I think, and as all members of the House of Lords in *Connelly* recognized, there is merit in the principle that a criminal Court, like a civil Court, is entitled to protect its process from abuse, the question of discretion becomes a matter of discipline, keyed to particular situations which, as

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an outgrowth of case law, commend themselves as of a kind in which the principle may be raised.

Connelly was considered in *Director of Public Prosecutions v. Humphrys*[25], where a differently constituted House of Lords was concerned with whether issue estoppel, which was also considered in *Connelly* (and considered favourably by a majority there) applied in English criminal law, particularly in relation to jury verdicts, and whether, if it did apply generally, it

could be invoked in a prosecution for perjury referable to testimony of the accused in the earlier proceedings. The House of Lords in *Humphrys*, after canvassing English, Australian and some American case law and some writings on the subject—counsel apparently did not direct its attention to Canadian case law—concluded unanimously that issue estoppel did not apply in England, but that if it did apply it could not (subject to a reservation by Lord Salmon) be invoked in a prosecution for perjury. Although, according to the reasons of Lord Fraser of Tullybelton, “the question whether a Court in England can decline to allow a prosecution to proceed, on the ground that it is oppressive, was not argued”, three members of the Court in *Humphrys* expressed an opinion on the question. All three, Viscount Dilhorne and Lords Salmon and Edmund-Davies, supported the power of a superior court to prevent unfairness to an accused, but Viscount Dilhorne was of the view that this power did not extend to preventing an indictment properly preferred from being proceeded with, and he also doubted whether the power to prevent abuse of process extended to magistrates’ courts, being troubled by a possible lack of uniformity among different benches, a result that I should have thought was equally possible among superior court judges and curable as to both by the Court of Appeal and the House of Lords. Lord Salmon and Lord Edmund-Davies took a contrary view on the question whether a judge has power to intervene to decline to allow a prosecution to proceed if it amounts to an abuse of process, holding that there

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was such a power which Lord Salmon characterized, as did Lord Devlin in *Connelly*, as one of great constitutional importance that should be jealously preserved. Lord Edmund-Davies was of the view that the power resided in every court, and although Lord Salmon had no concluded view on whether inferior courts had such power he did say that if they did and exercised it mistakenly their error could be corrected by mandamus, the procedure that was resorted to in the present case.

Apart from the generality of support for the proposition that a criminal court may stay proceedings which are an abuse of process or oppressive and vexatious and that, in the view at least of Lord Edmund-Davies which is the view I hold, the power may be invoked by every court having criminal jurisdiction (such courts being presided over in Canada generally by persons qualified as lawyers), neither *Connelly* nor *Humphrys* are of direct assistance in the present case. They do, however, underline, as I would myself, that the power to prevent abuse of process is one of special application and its exercise cannot be a random one.

The facts and indeed the situation now before us do not, in my view, provide any basis for considering the invocation of the court’s power to stay the proceedings against the accused. The appellant is in effect asking the courts to undertake the supervision, through their power to control prosecutions before them, of the operation and efficiency of police departments, departments which vary in organization and in size and in the demands that are made upon them. Absent any contention that the delay in apprehending the accused had some ulterior purpose, courts are in no position to tell the police that they did not proceed expeditiously enough with their investigation, and then impose a sanction of a stay when prosecution is

initiated. The time lapse between the commission of an offence and the laying of a charge following appre-

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hension of an accused cannot be monitored by Courts by fitting investigations into a standard mould or moulds. Witnesses and evidence may disappear in the short run as well as in the long, and the accused too may have to be sought for a long or short period of time. Subject to such controls as are prescribed by the Criminal Code, prosecutions initiated a lengthy period after the alleged commission of an offence must be left to take their course and to be dealt with by the Court on the evidence, which judges are entitled to weigh for cogency as well as credibility. The Court can call for an explanation of any untoward delay in prosecution and may be in a position, accordingly, to assess the weight of some of the evidence.

In the result, I see no basis, despite the allegations of prejudice, upon which abuse of process could be invoked in this case and hence it did not provide an occasion for the exercise of discretion. *Regina v. Koski*, supra, if it be correctly decided (and, as I said, I pass no judgment on it), is a far different case from the present one. Its invocation by Rae J. shows the danger of generalizing the application of the doctrine of abuse of process.

For the reasons aforesaid, differing in part from those of the British Columbia Court of Appeal with whose conclusion, however, I agree, I would dismiss the appeal.

The judgment of Martland, Ritchie, Pigeon, Beetz and de Grandpré J.J. was delivered by

PIGEON J.—On February 26, 1973 an information was sworn against the appellant alleging a kidnapping and robbery committed on October 5, 1971. A warrant was issued and the appellant was later arrested on April 3, 1973. A preliminary enquiry was held in June 1973 and the appellant was committed to trial. When he appeared for trial before a County Court judge on November 21, 1973, on an indictment preferred by an agent of the Attorney General of British Columbia, he moved for a stay of the proceedings as an abuse of process. His contention was that the delay in bringing him before the Court was prejudicial to his defence, that a person who would have been a

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key witness had died in the interval. It was also asserted that the appellant had not been in hiding and could readily have been arrested sooner if the police had acted with reasonable diligence. The County Court judge accepted those submissions and stayed the proceedings.

An application for mandamus heard by a judge of the Supreme Court of British Columbia was dismissed on the basis that the County Court judge had jurisdiction to do what he had done and, having exercised his discretion bona fide and on evidence before him, his decision could not be revised. This judgment was unanimously reversed on appeal, W.R. McIntyre J.A. saying for the Court:

I do not treat lightly the argument that an accused may suffer prejudice by delay even before criminal proceedings commence. It may well be that a case could arise where real prejudice could result from such delay. It is my view, however, that such delay would ordinarily raise a substantive defence. The provisions of the Criminal Code above referred to (s. 577.3 and s. 737) would give the Trial Judge ample power to see the accused received what he is entitled to, that is, a fair trial according to law and in a proper case, where delay has denied the right to make full answer and defence, an acquittal might well result. In my view, however, facts which would give the discretion to the County Court Judge to stay the proceedings had not arisen in the case at bar. Matters should have proceeded and the respondent could have raised had he been so disposed the matters complained of at his trial.

I now turn to the final question. Is mandamus available to the Crown in this case? With the utmost deference I am unable to share the view of the Judge appealed from that the remedy of mandamus may not be given here. It is well settled in my opinion that where a Judge having a jurisdiction to exercise declines to do so because of a decision on a preliminary question which does not go to the merits as regards either fact or law mandamus will lie. I refer to such cases as *Rex v. Pochrebny*, [1930] 1 W.W.R. 139 and on appeal [1930] 1 W.W.R. 688 where a reference is made to leading authorities on the subject and to *Regina v. Smith* (1974), 16 C.C.C. (2d) 11 and to *Regina v. Taylor ex parte Stunden*, [1964] 3 C.C.C. 363.

In the case at bar it is clear that the County Court Judge declined to exercise his jurisdiction to hear and to determine the case upon a point clearly preliminary to the proceeding and upon matters which preceded the

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preferring of the indictment. In my view the preliminary objection was unfounded and mandamus should go.

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. In fact, no authority was cited to establish the existence of such a principle which is at variance with the rule that criminal offences generally are not subject to prescription except in the case of specific offences for which a prescription time has been established by statute. I have to disagree with the view expressed by McIntyre J.A. that there could be factual situations giving to a trial judge discretion to stay proceedings for delay. For the reasons I gave in *The Queen v. Osborn*[26], I cannot admit of any general discretionary power in courts of criminal jurisdiction to stay proceedings regularly instituted because the prosecution is considered oppressive. In fact, I think the correct view is that which was expressed as follows by

Viscount Dilhorne in *Director of Public Prosecutions v. Humphrys*[27] (at pp. 510-511):

In *Mills v. Cooper*, [1967] 2 Q.B. 459, where justices had dismissed a summons on the ground that it was oppressive and an abuse of the process of the court, Lord Parker CJ (at p. 467), while holding that it was not, said: ‘...every court has undoubtedly a right in its discretion to decline to hear proceedings on the ground that they are oppressive and an abuse of the process of the court.’

I must confess to some doubt whether this is a correct statement of the law in relation to magistrates’ courts. If it is, it appears to me to be fraught with considerable dangers. One bench, thinking a prosecution should not have been brought, will dismiss it as oppressive and vexatious. Other benches on precisely the same facts may take a completely different view, with the result that there is a lack of uniformity in the administration of justice.

Nor is the existence of the power my noble and learned friends, Lord Salmon and Lord Edmund-Davies, think the judge has and its exercise without considerable dangers.

A judge must keep out of the arena. He should not have or appear to have any responsibility for the institu-

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tion of a prosecution. The functions of prosecutors and of judges must not be blurred. If a judge has power to decline to hear a case because he does not think it should be brought, then it soon may be thought that the cases he allows to proceed are cases brought with his consent or approval.

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.

In considering the situation in the courts of Canada, due weight should be given to the effect of the codification of our criminal law. Here is in what terms s. 7(3) preserves common law defences:

7. (3) Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this Act or any other Act of the Parliament of Canada, except in so far as they are altered by or are inconsistent with this Act or any other Act of the Parliament of Canada.

This provision refers to a “defence”, not to a discretionary stay of proceedings. In this connection, I would point out that in *Kienapple v. The Queen*[28] as in *Doré v. Attorney General of Canada*[29], *res judicata* (rather than issue estoppel), was accepted as a defence on the merits, not as a preliminary plea. This distinction is important. It happens here, that the case was not tried before a superior court judge and, therefore, *mandamus* lay to revise a decision on a preliminary question which did not go to the merits, (*Kipp v. Attorney General of Ontario*[30]). However, if the

same decision had been made by a superior court judge, such remedy would clearly not be available and it does not seem that an appeal would lie.

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By virtue of ss. 602 and 605(1) there is a right of appeal only if the decision is “a judgment or verdict of acquittal”. What is an “acquittal” was considered in *The Queen v. Sheets*[31]. It was there held that a judgment quashing an indictment, not on account of “procedural or technical defects” but on the interpretation of the section under which the accused was charged, was in effect an “acquittal”. The reasons given for the full Court by Fauteux C.J. do not seem to contemplate any disposition which would be neither a dismissal of the charge on the merits, nor a quashing on procedural grounds, although it is expressly stated that a quashing on the ground of prescription is an “acquittal”. It is obvious that the dismissal of a charge upon one of the special pleas mentioned in s. 535, is a disposition on the merits and, therefore, an “acquittal”.

In my view, the absence of any provision in the Criminal Code contemplating the staying of an indictment by a trial judge or an appeal from such decision, is a strong indication against the existence of any power to grant such stay. The present legislative policy is clearly in the direction of allowing a right of appeal from final trial court judgments on indictable offences in all cases. Section 9 of the Criminal Code gives a right of appeal against conviction for contempt of court and this was extended in 1972 to a conviction for contempt in the face of the court. Section 719(5) enacted in 1965, gives a right of appeal in habeas corpus matters. It would hardly be consistent with such policy to have a discretionary jurisdiction that could be exercised by superior court judges in criminal matters where the only possible appeal would be a direct appeal to this Court under s. 41(1) of the Supreme Court Act. Considerations of policy may not be of much importance in the application of explicit statutory provisions because policy decisions are essentially for Parliament. It is quite another matter when we are dealing with unwritten principles.

I would dismiss the appeal.

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Appeal dismissed.

Solicitor for the appellant: Sidney B. Simons, Vancouver.

Solicitor for the respondent: John E. Hall, Vancouver.

[1] [1975] 6 W.W.R. 591.

[2] (1974), 16 C.C.C. (2d) 133.

[3] [1972] 1 W.W.R. 398.

[4] [1969] 1 O.R. 152, rev'd. [1971] S.C.R. 184.

[5] [1975] 1 S.C.R. 729.

- [6] [1964] 2 All E.R. 401.
- [7] [1963] S.C.R. 539.
- [8] (1928), 50 C.C.C. 52 (Ont. C.A.).
- [9] (1929), 51 C.C.C. 388 (B.C.C.A.).
- [10] (1956), 23 C.R. 216 (Ont. C.A.).
- [11] (1970), 2 C.C.C. (2d) 282.
- [12] (1975), 23 C.C.C. (2d) 410 (B.C.).
- [13] (1976), 24 C.C.C. (2d) 218 (B.C.).
- [14] [1972] 2 W.W.R. 66 (Sask.).
- [15] [1972] 5 W.W.R. 255 (Alta.).
- [16] [1974] 3 W.W.R. 621 (B.C.).
- [17] (1975), 14 C.C.C. (2d) 23 (Ont.).
- [18] (1976), 26 C.C.C. (2d) 540 (Ont.).
- [19] (1975), 30 C.R.N.S. 387 (B.C.).
- [20] (1973), 11 C.C.C. (2d) 502 (B.C.).
- [21] (1975), 14 C.C.C. (2d) 10 (Ont.).
- [22] (1970), 10 C.R.N.S. 385 (Que.).
- [23] [1970] 3 C.C.C. 398(Ont.).
- [24] [1967] S.C.R. 492.
- [25] [1976] 2 All E.R. 497.
- [26] [1971] S.C.R. 184.
- [27] [1976] 2 All E.R. 497.
- [28] [1975] 1 S.C.R. 729.
- [29] [1975] 1 S.C.R. 756.
- [30] [1965] S.C.R. 57.
- [31] [1971] S.C.R. 614.

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