

The reasons for judgment of the Court were delivered orally by:

CHIPMAN, J.A.:

This is an appeal from a decision of Judge Archibald in Provincial Court granting a stay of a charge of trafficking in cocaine contrary to s. 4(1) of the **Narcotic Control Act**.

The information charging the respondent was sworn on October 18, 1996. On October 25, 1996, he first appeared in Provincial Court and was released on a recognizance with conditions. He elected trial in Provincial Court on November 13, 1996 and the matter was set for trial for July 9, 1997.

On July 9, 1997 the respondent failed to appear for trial and a warrant was issued for his arrest. On July 11, 1997 he appeared in Provincial Court under arrest. He was represented by counsel. He entered a guilty plea. A presentence report was ordered and he was released on the original recognizance. Sentencing was set for October 7, 1997.

On October 7, 1997 the respondent failed to appear for sentencing. A warrant was again issued for his arrest. He was brought into Provincial Court on November 25, 1997 on the warrant and was released. He appeared on December 9, 1997. He was not represented by counsel and sentencing was set for February 17, 1998. On that date he appeared in Provincial Court not represented by counsel. He requested an

adjournment to attain counsel and the matter was set over to February 26, 1998.

On February 26, 1998 the respondent appeared in Provincial Court and moved to withdraw his guilty plea. This was permitted and the matter was set for March 12, 1998 at which time he appeared with counsel and the matter was set for trial on April 23, 1998.

On April 23, 1998 the respondent failed to appear for trial and a warrant was again issued for his arrest. He was brought to court on April 24, 1998 and a show cause hearing was adjourned until April 27, 1998. On that date, he appeared for a bail hearing. He was again represented by counsel, bail was denied and he was remanded until April 28, 1998 for the purposes of setting a trial date. On that date he appeared in Provincial Court represented by counsel. His counsel withdrew, and the matter was set for trial on May 14, 1998 at 1:30 p.m.

On May 14, 1998 at 1:30 p.m. the Crown appeared by counsel at Halifax Provincial Court. Judge Archibald was the presiding judge. The respondent was late being transported from the Halifax Correctional Centre to court.

The following is a transcript of Judge Archibald's decision and the proceedings leading up to it:

COURT CLERT: Please be seated. I've called Cells, Your

Honour. Larry Borden is in custody and is not here yet.

THE COURT: Oh, you have an information?

COURT CLERK: Yes, Your Honour

THE COURT: Someone.

COURT CLERK: It's . . . Mr. Covan is the Crown.

MR. MARK J. COVAN: Good afternoon, Your Honour.

THE COURT: So, Mr. Borden is not here.

MR. MARK J. COVAN: Mr. Borden is in Cells, Your Honour. I believe they are bringing him up now.

THE COURT: Uh, hum.

MR. MARK J. COVAN: I don't believe he has counsel, Your Honour.

THE COURT: That will be convenient.

[Court Clerk on telephone to Cells.]

THE COURT: The other person on the information has been dealt with or is to be dealt with somewhere else, some other time?

MR. MARK J. COVAN: He has been dealt with, Your Honour.

[Court Clerk on telephone to Cells.]

COURT CLERK: Should just be a couple of minutes now, Your Honour. They've radioed to the van that's bringing him.

THE COURT: And the van is where?

COURT CLERK: They wouldn't tell me where the van was, Your Honour. Just minutes away.

THE COURT: So, it will . . . he will be here at 1:41 then.

COURT CLERK: Yes.

THE COURT: We'll wait until that time. In relation to ... is he in custody in relation to this matter or some other matter?

MR. MARK J. COVAN: Yes, he's on remand, Your Honour, in relation to these charges.

(Pause)

THE COURT: 1:45, the prisoner is not here. In my opinion the ... he's a prisoner of the Crown. They have some obligation to see that he's here. So, I'm going to stay the charges.

The Crown appeals to this Court pursuant to s. 676(1)(c) of the **Criminal Code**. The matter was set down for hearing on this date in Chambers on May 28, 1998. At that time the respondent was present. He is present today without counsel. We have heard argument on this appeal from counsel for the Crown and from the respondent in person respectively.

We are satisfied that this appeal must be allowed.

In granting a stay, Judge Archibald did not direct his mind to the principles governing the exercise of this power. A stay is a remedy to be applied, only in the clearest of cases, to prevent an abuse of process. It is only necessary here to refer to the following passage from a decision of L'Heureux-Dubé, J. in **R. v. O'Connor** (1995), 103 C.C.C. (3d) 1 at p. 33:

[59] The modern resurgence of the common law doctrine of abuse of process began with the judgment of this court in **R. v. Jewitt** (1985), 21 C.C.C. (3d) 7, 20 D.L.R. (4th) 651, [1985] 2 S.C.R. 128. In **Jewitt**, the court set down what has since become the standard formulation of the test, at p. 14 C.C.C., pp. 658-9 D.L.R.:

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 at p. 1354 (H.L.):

“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.”

I would adopt the conclusion of the Ontario Court of Appeal in **R. v. Young, supra**, and affirm that [at p. 31]:

“ . . . 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 and

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”.

There was no evidence of abuse of process before Judge Archibald in this case.

Furthermore, Judge Archibald made his decision without giving the Crown an opportunity to be heard. Surely no further elaboration on this point is necessary.

The stay of the charge against the respondent is set aside and a new trial is ordered.

Chipman, J.A.

Concurred in:

Hallett, J.A.

Roscoe, J.A.