C.A.C. No. 118036

NOVA SCOTIA COURT OF APPEAL
Cite as: R. v. Walsh, 1996 NSCA 101

Hallett, Chipman and Flinn, JJ.A.

BETWEEN:

HER MAJESTY THE QUEEN	)	Denise C. Smith
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	Joel E. Pink, Q.C.
	)	for the Respondent
TREVOR WALSH	)	
	)	
Respondent	)	Appeal Heard:
	)	January 4, 1996
	)	
	)	Judgment Delivered:
	)	March 26, 1996
	)	
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	)	
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THE COURT: Appeal allowed per reasons for judgment of Hallett, J.A.; Chipman and Flinn, JJ.A. concurring.

HALLETT, J.A.:

This is an appeal from a decision of Justice Simon MacDonald of the Supreme Court staying proceedings on an Indictment dated February 28th, 1995, in which the respondent was charged with the offence of unlawfully causing bodily harm to Michael Collier in committing an assault on him contrary to s. 267(1)(b) of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46. The offence is alleged to have occurred on April 30th, 1994, at or near St. Mary's University parking lot. As a result of the alleged assault Mr. Collier suffered a broken tooth, two cracked teeth and lacerations requiring numerous sutures to his upper lip.

Facts

On the application for the stay of proceedings, counsel for the respondent filed his affidavit as to what took place in the summary conviction court when Mr. Collier failed to appear to prosecute a private Information he had sworn out against the respondent alleging common assault. The appellant filed an affidavit of Mr. Collier detailing the events which gave rise to his non-appearance.

Following the alleged assault, Mr. Collier went to the Halifax Police Department. He was advised by a Commissionaire on duty to swear a private Information against the respondent. On May 10th, 1994, he swore an Information that he was unlawfully assaulted by the respondent contrary to s. 266(b) of the **Criminal Code**; the offence of common assault. It is a so-called hybrid offence which can be prosecuted either as an indictable offence under s. 266(a) with liability for a term of imprisonment not exceeding five years or an offence punishable on summary conviction (s. 266(b)).

W.C. Cummings, the Justice of the Peace who swore the Information, advised Mr. Collier that he was to be present on June 7th, 1994, at 10 o'clock in the forenoon in

Court Room #1 and further advised him that if he did not appear the charge would be dismissed.

Mr. Collier was subsequently advised by legal counsel that due to the nature of the injuries received the proper charge against the respondent was not common assault but rather assault causing bodily harm. As a result of that he again contacted the Halifax City Police Department and shortly thereafter was contacted by the investigator, Constable R. Lowther who confirmed that the nature of the injuries which he received were indeed such as to make a charge of assault causing bodily harm appropriate. Mr. Collier was advised that the police would be handling the matter of charging the respondent from that point in time. These dealings with Constable Lowther occurred prior to June 7th, 1994.

In his affidavit Mr. Collier states that he had no personal knowledge as to the operation of the criminal justice system and that he honestly believed following his discussions with Constable Lowther it was not necessary for him to attend in Provincial Court on the 7th day of June, 1994, as the matter was no longer being handled by himself but was being handled by the police.

On May 30th, 1994, the Halifax Police Department swore a new Information alleging that the respondent "on or about the 30th day of April, 1994, at or near Halifax, in the County of Halifax, did unlawfully cause bodily harm to Michael Collier in committing an assault upon him, contrary to s. 267(1)(b) of the **Criminal Code**."

There is no evidence as to whether the respondent was served with the new Information before or after June 7th, 1994.

On June 7th, 1994, the respondent appeared in Provincial Court at Halifax to answer the private Information that had been sworn by Mr. Collier alleging a common assault. Mr. Collier did not appear in Provincial Court for the respondent's arraignment on the private Information.

In the affidavit filed by counsel for the respondent in the proceedings before Mr. Justice MacDonald counsel states:

> "5. That I listened to the tape of the proceedings before The Honourable Judge Hughes Randall and what occurred is as follows:
>
> > a. The applicant's [respondent's] name was called and he proceeded to the front of the courtroom.
> >
> > b. Prior to any plea being entered The Honourable Judge Hughes Randall called for the complainant, Michael Collier, to come forward.
> >
> > c. Michael Collier was not present in the courtroom and did not come forward when his name was called and thereafter Judge Randall advised the applicant that the matter was dismissed for want of prosecution."

It is clear from the foregoing that the respondent was neither arraigned nor was he asked to plead to the summary conviction offence.

Section 799 of the **Criminal Code**, R.S.C. 1985, c. C-46 provides:

> "799. Where, in proceedings to which this Part applies, the defendant appears for the trial and the prosecutor, having had due notice, does not appear, the summary conviction court may dismiss the information or may adjourn the trial to some other time upon such terms as it considers proper."

On July 7th, 1994, the respondent appeared in Provincial Court at Halifax to answer the charge of unlawfully causing bodily harm contrary to s. 267(1)(b) of the **Criminal Code**. The matter of his election was put over to July 28th.

On or about July 28th the Clerk of the Provincial Court, pursuant to s. 808 of the **Criminal Code** issued an Order for Dismissal with respect to the proceedings before Judge Randall.

Section 808 of the **Code** provides:

> "808. (1) Where the summary conviction court dismisses an information, it may, if requested by the defendant, draw up an order of dismissal and shall give to the defendant a certified copy of the order of dismissal.
>
> (2) A copy of an order of dismissal, certified in accordance with subsection (1) is, without further proof, a bar to any subsequent proceedings against the defendant in respect of the same cause."

The Order issued on July 28th recites that the respondent was charged with common assault contrary to s. 266(b) of the **Criminal Code** and that Mr. Collier did not appear on June 7th, 1994, being the scheduled date for plea and that the charge was dismissed.

On the same date the proceedings on the new charge were adjourned until September 22nd, 1994, for the entry of a plea.

On August 24th, 1994, the respondent re-elected to be tried by a judge of the Supreme Court sitting without a jury and a date for the preliminary inquiry was set for February 22nd, 1995.

On February 20th, 1995, the respondent waived his right to a preliminary inquiry.

On February 28th, 1995, the respondent was charged with assault causing bodily harm in the Bill of Indictment dated February 28th, 1995, to which I referred at the outset of these reasons.

On March 2nd, 1995, the respondent appeared in the Supreme Court of Nova Scotia and pleaded *autrefois acquit*.

On March 9th, 1995, this plea was heard by MacDonald J.; he reserved decision.

Justice MacDonald's Decision

On May 11th, 1995, Justice MacDonald rendered a written decision in which he dismissed the respondent's plea of *autrefois acquit*. The operative parts of the decision are as follows:

> "I, therefore, accept the Crown's position that, in this case, there was no joiner of the issue because, in fact, no plea was entered. That being so, I am satisfied, and find, that the special plea of *autrefois acquit* does not apply as Mr. Walsh was never placed in jeopardy."

Justice MacDonald then went on to consider the additional argument that had been put forward by counsel for the respondent that the Order for Dismissal with respect to the private Information was a bar to proceeding on the Indictment. Justice MacDonald concluded that the two charges arose from the same incident and that both matters were the same in whole or in part and that:

> ". . . . .the second charge could have been included in the first trial because the Crown could have amended its information to conform to the evidence. There is also the possibility that, on the second charge, the trial judge could find Mr. Walsh guilty of the included offence of common assault. This would not be fair as he had appeared and received his order for dismissal.
>
> The Crown argues that the two charges must be the same as required by **R. v. Van Rassel** (1990), 53 C.C.C. (3d) 353, particularly at page 360. However, I am satisfied that the charges in this application meet the test for the reasons I have stated above. In any event, on the facts of this case, I find and conclude that the second charge is a subsequent proceeding against Mr. Walsh 'in respect of the same cause' as set out in section 808(2) of the **Criminal Code**."

Justice MacDonald then reviewed the facts of the case. Following that he quoted from the comments of MacKeigan C.J. in **R. v. Pirri** (1978), 41 C.C.C. (2d) 499 where Chief Justice MacKeigan of the Appeal Division of the Supreme Court stated at p. 502 that he doubted if a magistrate, considering a second Information for the same cause, could disregard or go behind a certificate of dismissal and that if the dismissal was wrong

in law or made without jurisdiction that surely the Crown's remedy was to appeal or to seek to have the order of dismissal quashed. Justice MacDonald then concluded his decision as follows:

> "I do not agree with the Crown's position that the certificate of dismissal before the court is simply a piece of paper and that the court may look behind it. I find, in view of the comments of Chief Justice MacKeigan, that the certificate of dismissal, absent an appeal or an order quashing the certificate, remains valid on its face. There have been no applications to have it quashed or set aside, nor has there been an appeal in this matter. In the circumstances here, I do not feel that the failure of Mr. Walsh to enter a plea of not guilty is sufficient to set aside the order.
>
> I am satisfied that the certificate for dismissal stands on its face and, consequently, is a bar to the Crown from proceeding on the second charge. That being so, I would allow the application and am prepared to issue an order that the second charge be stayed."

Pursuant to s. 676(1) of the **Code** the Crown has appealed the stay.

Position of the Appellant

It is the position of the Crown that Justice MacDonald erred in ruling that the Order of Dismissal issued under s. 808 of the **Criminal Code** in the summary conviction proceeding on the common assault charge constituted a bar to the proceedings by Indictment alleging the commission of the offence of assault causing bodily harm.

Pursuant to s. 799 of the **Criminal Code** a summary conviction court may dismiss an Information if the prosecutor does not appear.

The Crown's first argument is based on the definition of "proceedings" in Part XXVII of the **Code** which Part deals with summary convictions. Pursuant to s. 785 the word "proceedings" as used in Part XXVII means:

> "(a) proceedings in respect of offences that are declared by an Act of Parliament or an enactment made

> thereunder to be punishable on summary conviction, and
>
> (b) proceedings where a justice is authorized by an Act of Parliament or an enactment made thereunder to make an order."

Section 786.(1) of the **Code** states:

> 786. (1) Except where otherwise provided by law, this Part applies to proceedings as defined in this Part."

An Act of Parliament obviously includes the **Criminal Code.**

The Crown argues that in applying the plain meaning rule, the word "proceedings" as used in s. 808 must be interpreted in light of the definition of that word in s. 785. Therefore, the Crown argues that the dismissal order issued pursuant to s. 808 is only a bar to subsequent proceedings in respect of offences that are declared to be punishable on summary conviction. The Crown, therefore, asserts that the Order for Dismissal is not a bar to the Crown proceeding by Indictment charging the respondent with an offence under s. 267(1)(b) of the **Code**.

The Crown also argues that Judge Randall acted without jurisdiction when he dismissed the private Information without having taken a plea from the accused as without a plea the respondent was not in jeopardy. On this second argument the Crown relies on **R. v. Atkinson** (1977), 37 C.C.C. (2d) 416 (S.C.C.) and **Petersen v. The Queen** (1982), 69 C.C.C. (2d) 385 (S.C.C.).

The Crown submits that Justice MacDonald erred in assuming that Judge Randall acted within his jurisdiction in dismissing the private Information; Justice MacDonald stated:

> "Judge Randall on his own initiative dismissed the Information. He could have decided to adjourn the matter but he chose to dismiss it. He exercised his discretion."

Position of the Respondent

The position taken by counsel for the respondent is that the Order for Dismissal stands in full force and effect until set aside either on appeal or in prerogative proceedings by a superior court of criminal jurisdiction. He relies on **Petersen v. The Queen** (supra). The Crown neither appealed the Order nor took prerogative proceedings to set aside the order for dismissal. He also relies on the *obiter* statement made in **R. v. Pirri** (supra) to which I have already referred, the exact text of which is as follows:

> "Cases can arise where a Magistrate is without jurisdiction and where, if he issued an order of dismissal, it may be a nullity. Even then, however, I doubt if a Magistrate considering a second information for the same cause can disregard or go behind a s. 743 certificate. If the first dismissal was wrong in law or without jurisdiction, the Crown's remedy is surely to appeal or seek to have the order of dismissal quashed."

With respect to the Crown's argument that the issuance of a certificate of dismissal pursuant to s. 808(2) of the **Code** bars subsequent proceedings only in summary conviction offences, counsel for the respondent asserts that the decision of **R. v. Rothman** (1966), 4 C.C.C. 316 (Ont. H.C.) to this effect is not the law. He relies on decisions of English courts in **R. v. Elrington** (1861), 1 B. & S. 688; 121 E.R. 870 and **The Queen v. Miles** (1890), 24 Q.B. 423 in support of his argument that the conviction or acquittal of a person of offences in summary proceedings will bar subsequent proceedings of a criminal nature founded on the same facts, even if the subsequent proceedings are by Indictment for substantially the same offence but in "an aggravated form".

While counsel for the respondent acknowledges that Judge Randall erred in dismissing the common assault charge without the respondent first having entered a plea he submits that such an error was made within jurisdiction.

Analysis of Arguments raised respecting the interpretation of s. 808(2) of the Code

Counsel for the appellant contends that a certificate of dismissal is only a bar to subsequent proceedings in a summary conviction court. It is necessary to consider the case law on the effect of a dismissal of an Information by a summary conviction court pursuant to s. 799 of the **Criminal Code**. This question was fully considered in **R. v. Riddle** (supra) and in **Petersen v. The Queen** (supra). For convenience I will, again, set out the provisions of these sections:

> 799. Where, in proceedings to which this Part applies, the defendant appears for the trial and the prosecutor, having had due notice, does not appear, the summary conviction court may dismiss the information or may adjourn the trial to some other time upon such terms as it considers proper.
>
> 808. (1) Where the summary conviction court dismisses an information it may, if requested by the defendant, draw up an order of dismissal and shall give to the defendant a certified copy of the order of dismissal.
>
> (2) A copy of an order of dismissal, certified in accordance with subsection (1) is, without further proof, a bar to any subsequent proceedings against the defendant in respect of the same cause."

The headnote of **Riddle** (supra) in 48 C.C.C. (2d) 365 succinctly sets out what that case was about and the court's interpretation of the provisions of the **Code** that are relevant to the issue before us. The headnote states:

> "The accused was charged with common assault. He pleaded not guilty and the matter was adjourned for trial. On the appointed date the case was not heard and another trial date was set. On that second date the informant failed to appear. An application by the Crown for an adjournment was refused. The Crown then called no evidence and the trial Judge dismissed the charge. A week later the informant swore a new identical information. At trial on this charge the plea of *autrefois acquit* was upheld and the charge dismissed. An appeal by the Crown by way of stated case was dismissed as was a subsequent appeal to the Alberta Supreme Court,

Appellate Division. On further appeal by the Crown to the Supreme Court of Canada, *held*, the appeal should be dismissed.

At common law where the accused sought to rely on a prior dismissal of a charge the proper procedure in summary conviction matters was simply to enter a general plea of not guilty embracing the concept of *res judicata*. While technically such a general plea was not one of *autrefois acquit* that was of no consequence since the Court would nevertheless give effect to the broad maxim, *nemo debet bis vezari pro una et eadem causa*. The charge having been dismissed by a Court of competent jurisdiction the accused could not be charged again in the same matter.

While ss. 534 to 537, the provisions of the *Criminal Code* dealing with the special pleas of *autrefois acquit* and *autrefois convict*, are in Part XVII of the *Criminal Code* headed "Procedure by Indictment" those pleas are available in summary conviction matters. Part XXIV of the *Criminal Code* does not contain all the law relating to summary convictions, and in as much as there was something akin to the plea of *autrefois acquit* available at common law in summary conviction matters it would take language other than that found in ss. 534 to 537 to manifest an intent by Parliament to take away such defence. Thus, while the special plea of *autrefois acquit* is not mentioned in Part XXIV it would be taking an unduly technical and narrow interpretation not to give effect to it in summary conviction matters. Further, the procedure provided by s. 743 of the *Criminal Code* whereby the summary conviction Court may draw up an order of dismissal, a certified copy of which is a bar to any subsequent proceedings against the accused in respect of the same cause, does not supplant the common law rights. The procedure in s. 743 simply serves to supplement those rights and to provide a second and convenient method of proving a previous acquittal to bar subsequent proceedings. Accordingly, the right to raise the special plea of *autrefois acquit* is available in summary conviction matters. Moreover, it is available where, as here, the Crown offered no evidence after the accused had entered a plea of not guilty on the first trial. There is no requirement that there was a trial "on the merits" on the first occasion. 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 accused continues in jeopardy until final determination of the matter by rendering of the verdict. Should the accused avail himself of the certificate of dismissal provided for in s. 743(1), s-s. (2) bars any subsequent proceedings without reference to the events giving rise to the dismissal, and s. 734 gives the Judge the right to "dismiss the information" where the prosecutor fails to appear for the trial. In principle there is no reason why the situation should be different because the accused failed to obtain the certificate. Nor, in principle, is it easy to distinguish between the situation where the

> Crown leads evidence which fails to make out a case for the accused to answer and the situation where no evidence is led. Provided the case has proceeded to a verdict and a dismissal, that should be sufficient. The phrase "on the merits" adds nothing to the test for the application of the *bis vexari* maxim . The general requirement is merely that the previous dismissal must have been made by a Court of competent jurisdiction whose proceedings were free from jurisdictional error and which rendered judgment on the charge." {Emphasis added}

The decision in **Riddle** (supra) is relevant to this appeal with respect to the following issues which it resolved: (i) Part XXVII of the **Code** - Summary Convictions does not contain all the law relating to summary convictions; (ii) the procedure provided by s. 808 whereby a defendant (against whom an Information had been laid which has been dismissed for non-appearance of the prosecutor) may obtain a certificate of dismissal, does not supplant an accused's common law right to plead *autrefois acquit*; (iii) the s. 808(2) procedure that allows a defendant to obtain a certificate of dismissal supplements the rights of an accused by providing a convenient method of proving a previous acquittal; (iv) there is no requirement that there be a trial on the merits in order to obtain a certificate of dismissal; (v) a criminal trial commences and an accused is normally in jeopardy from the moment issue is joined before a judge having jurisdiction.

The situation we have under consideration is different from **Riddle** (supra) in three respects: (i) the respondent was not arraigned nor asked to plead as mandated by the provisions of the **Code** relating to summary proceedings (s. 801); **Riddle** had pleaded not guilty; and (ii) the respondent obtained a certificate of dismissal; **Riddle** did not; and (iii) the subsequent proceedings in **Riddle** (supra) were in a summary conviction court whereas the subsequent proceedings against the respondent were by Indictment charging the respondent with an indictable offence.

In **Riddle** (supra) the Court made the following comments with respect to the

effect of the certificate of dismissal; the Court stated at p. 374:

> "Section 743 [now s. 808] is intended in my view to supplement, and not to supplant, common law rights. It is in aid, rather than in derogation, of those rights. The certificate affords a mechanism, borrowed from English statute law of some antiquity, facilitating proof of dismissal of an information.
>
> Section 743 [now s. 808] only deals with an order of dismissal and the effect of a certified copy of that order. It is, at the very least, implicit in that section that every dismissal for failure of the prosecutor to appear will be a bar to subsequent proceedings. As Friedland points out in his book, at p. 57, that section can hardly be a 'complete code applicable to summary proceedings in place of the special pleas spelled out for indictable offences . . .because, for one reason, no provision is made for a previous conviction'. In that author's view, with which I agree, all that s. 743 [now s. 808] does 'is to allow the accused to prove his defence by means of a certified copy of the order of dismissal - a procedure which would probably not be available to him at common law." {Emphasis added}

In the foregoing paragraph there appear to be somewhat contradictory statements as to the effect of obtaining a certificate of dismissal pursuant to s. 808; I have underlined them. The last sentence in the paragraph must be read in the context of the fact that in **Riddle** the defendant had not obtained a certificate of dismissal and the Crown was asserting that the certificate was required before the dismissal could be raised as a bar to subsequent proceedings. The Court held that s. 808 did not supplant but rather supplemented the common law rights of an accused. Therefore, obtaining a certificate was not necessary in order to raise the plea of *autrefois acquit*. In **Riddle** the court did not determine the availability of the defence provided by s. 808(2) when the subsequent proceedings were by way of indictment.

In interpreting s. 799 and s. 808, the overriding principle is that full effect must be given to both the common law and the provisions of the Statute in the absence of irreconcilable conflict (see **Riddle** at p. 373). In my opinion there is not an irreconcilable conflict between the common law right to plead *autrefois acquit* and the statutory provision

in s. 808. Both the common law and the statutory provisions can be given effect as is evident from the decision in **Riddle**.

It is clear from the **Code** that the certificate of dismissal will bar "any subsequent proceedings" in respect of the same cause.

Returning to the proper interpretation of s. 808(2), I would note that in **R. v. Logan** (1982), 64 C.C.C. (2d) 238 Justice Pace commented on the *obiter* remarks of MacKeigan C.J. in **Pirri** (supra) which I have previously set out in this decision and upon which counsel for the respondent relies. Mr. Justice Pace stated at p. 244:

> "Clearly, the Chief Justice was considering the effect of a plea of *autrefois acquit* supported in evidence by an order of dismissal made pursuant to s. 743 of the *Code* to a summary conviction offence under a provincial statute. In that context he held that there was no necessity to look beyond the certified copy of the order to bar proceedings on the second information." {My Emphasis}

This view would lend support to the interpretation of s. 808 of the **Code** as put forward by counsel for the appellant and would be consistent with the words used in Part XXVII of the **Code** defining "proceedings" as used in that Part.

In addition to the decision in **Riddle**, the Supreme Court of Canada's decision in **Petersen** provides some assistance in considering this issue. In **Petersen** the accused was charged with two offences including a refusal to comply with a breathalyzer demand pursuant to s. 235 of the **Criminal Code**. The Crown proceeded by way of summary conviction and the accused entered a plea of not guilty. There were several adjournments at the request of counsel for the accused. However, at the trial the provincial court judge dismissed the Information without hearing evidence as he was of the opinion he lacked jurisdiction as it was not shown that the accused had consented to the various adjournments which had exceeded the maximum limit of eight (8) days. The Crown laid

an identical Information but by way of Indictment. The accused entered a plea of *autrefois acquit* which was dismissed. The accused was acquitted by the trial judge after a trial but that acquittal was reversed on appeal and a conviction entered. On appeal by the accused the Supreme Court of Canada held that the accused's appeal should be allowed.

The **Petersen** decision is relevant for the following two statements of principle: (1) a plea of *autrefois acquit* is available and should succeed when an accused shows that he was placed in jeopardy on the same matter on an earlier occasion before a court of competent jurisdiction and that there was a disposition in his favour resulting in an acquittal or dismissal of the charge; and (2) the dismissal by the summary conviction court so long as it stood was a bar to proceedings on the same charge even though the Crown proceeded by way of indictment on the subsequent proceeding. The order for dismissal would stand until rescinded, quashed or reversed on appeal and if in force and effect when the plea of *autrefois acquit* is raised in the subsequent proceedings, the order should be given full effect.

There are two relevant differences between the facts in **Petersen** and the facts of the case we have under consideration: (i) in **Petersen** the charge in the subsequent proceeding by way of indictment was identical as that laid in the prior summary proceedings; in the case we have under consideration the charge was not identical; (ii) in **Petersen** there was a plea of not guilty; in the case we have under consideration the Information was dismissed prior to plea.

The issue raised by the appellant on this appeal respecting the interpretation of s. 808(2) was not raised in **Petersen** (supra) as the accused did not rely on the certificate to support his plea of *autrefois acquit*. He relied on the dismissal under s. 799.

Disposition on the First Issue

I agree with the Crown's interpretation of s. 808(2) of the **Code**. The word "proceedings" as it appears in subsection (2) must be given the meaning Parliament assigned to it by the definition of "proceedings" in s. 785. At the time the subsequent Information was laid (May 20th, 1994), assault causing bodily harm was an indictable offence. By an amendment to s. 267 (1994, c. 44, s. 17) the offence became a hybrid offence as of February 15, 1995. On February 28th, 1995 the bill of Indictment charging the respondent with assault causing bodily harm contrary to s. 267(1)(b) of the **Code** was preferred. Pursuant to the provisions of s. 34(1)(a) of the **Interpretation Act**, R.S.C. 1985, c. I-21 hybrid offences are indictable until the prosecution elects to proceed by summary conviction. Accordingly, in this case, the issuance of a certificate pursuant to s. 808(2) on the first charge does not bar the subsequent proceedings charging the respondent by indictment with the offence of assault causing bodily harm contrary to s. 267(1)(b) of the **Code**.

This finding does not end the matter. It is still necessary to determine if the plea of *autrefois acquit* ought to have succeeded as the common assault charge had been dismissed pursuant to s. 799.

Analysis of Arguments and the 'in jeopardy' Issue

The general requirement to successfully plead *autrefois acquit* is to prove that there had been a previous dismissal of the same or a substantially the same offence by a court of competent jurisdiction whose proceedings were free from jurisdictional error and which rendered a judgment of acquittal or a judgment having the effect of an acquittal.

On the facts of this case the key question is whether Judge Randall had

jurisdiction to dismiss the Information having failed to arraign the respondent and take his plea.

Section 801(1) of the **Code** provides:

> "801. (1) Where the defendant appears for the trial, the substance of the information laid against him shall be stated to him, and he shall be asked,
> (a) whether he pleads guilty or not guilty to the information, where the proceedings are in respect of an offence that is punishable on summary conviction; or
> (b) whether he has cause to show why an order should not be made against him, in proceedings where a justice is authorized by law to make an order."

Some 35 years ago, a majority of the Supreme Court of Canada in **Smith v. R.**, [1959] S.C.R. 638 held that the failure of a summary conviction court to take the plea from a juvenile, as mandated by what is now s. 801 of the **Code**, deprived the Court of jurisdiction. The juvenile had been convicted; the finding of delinquency was quashed by the Supreme Court of Canada. If this decision is applied to the facts of this case, Judge Randall had no jurisdiction to dismiss the Information and the dismissal would be a nullity.

However, in a recent decision of the Supreme Court of Canada in **R. v. N. (C.)**, [1992] 3 S.C.R. 471 there is an indication that the taking of a plea may not be all that fundamental to a court's jurisdiction.

In **R. v. N.(C.)** the accused whose plea had not been taken at trial as a result of an oversight went ahead with the trial and was convicted. His appeal to the Quebec Court of Appeal was allowed on the ground that a plea not having been taken, the trial court had no jurisdiction. The majority of the Court were not prepared to consider this failure to be an error that could be cured by the application of s. 686(1)(b)(iii) or (iv) of the **Criminal Code**. Brossard J.A., in dissent, held that the failure to arraign an accused and take a plea was <u>not</u> fatal where the accused has a subsequent trial, where the court had jurisdiction

over the class of offences of which the accused had been convicted and where the accused suffered no prejudice thereby. Brossard J.A. held that in such circumstances an appeal court may apply the saving provision of s. 686(1)(b)(iv) of the **Code** known as the harmless error rule and uphold the conviction. The Supreme Court of Canada, in adopting the reasons of Brossard J.A., stated that "the procedural errors made in this case are irregularities covered by s. 686(1)(b)(iv) of the **Criminal Code**", allowed the appeal and restored the guilty verdict of the trial judge. I would note that the accused in **R. v. N.(C.)** (supra) was charged with an indictable offence and the trial was in a superior court. This is a distinguishing factor as Judge Randall's jurisdiction to convict is statutory and, therefore, dependent on compliance with s. 801 of the **Code** which requires a summary conviction court to arraign a defendant who appears in that court and ask him to plead to the offence charged. Furthermore, in **R. v. N.(C.)** (supra) there was a trial in which the accused had fully participated. However, it is to be noted that there is no express provision in s. 799 requiring the taking of a plea before a dismissal for failure of the prosecutor to appear. It can be argued that in such circumstances the taking of the plea would be a superfluous formality.

The Crown relies on the decision of the Supreme Court of Canada in **R. v. Atkinson** (supra) to support its position that as a plea had not been taken the respondent was not in jeopardy and therefore cannot successfully raise the plea of *autrefois acquit*. In **Atkinson** the accused was charged with trafficking in marihuana. In the midst of the Preliminary the Provincial Court Judge allowed the accused to re-elect to be tried then and there. He acquitted the accused. The report of the decision shows that the Crown had not given notice of intention to introduce a certificate of analysis as proof that the substance was marihuana. It was at that point in the Preliminary that the defence requested, and the court agreed, to convert the Preliminary Inquiry into a trial. In allowing the Crown appeal,

Friedman, C.J. for the Manitoba Court of Appeal stated (1977) 32 C.C.C. (2d) 361 at p. 362:

> "It is plain that what the learned Provincial Court Judge did operated as a change of the rules in the middle of the game. Crown counsel in his factum argued that the Provincial Court Judge lacked the power to do what he had done. In our view it is unnecessary to deal with that submission in the present case. What occurred was so manifestly unfair to the Crown, preventing it from putting in its case fairly and fully, that the order in question cannot be allowed to stand."

On appeal from that decision the Supreme Court of Canada in a short oral decision held that since "no plea was taken after the re-election permitted by the Magistrate, there was no legal trial and hence the judgment of the Manitoba Court of Appeal and the acquittal by the Magistrate are set aside." The effect of this decision would be a re-trial of the accused.

The **Atkinson** decision did not involve an interpretation of s. 799 of the **Code** but does illustrate the significance and importance of the plea in criminal proceedings.

In addition to the Supreme Court of Canada decisions in **Riddle** and **Petersen**, other cases that touch on the issue and give some guidance in determining the effect of a dismissal under s. 799 on a plea of *autrefois acquit* are **R. v. Gould** [1987] 1 S.C.R. 499; **R. v. Pretty**, (1989) 47 C.C.C. (3d) 70 (B.C.C.A.); **R. v. Karpinski** (1957), 117 C.C.C. 241; [1957] S.C.R. 343; **R. v. Selhi** (1985), 18 C.C.C. (3d) 131 (Sask) aff'd (1990), 53 C.C.C. (3d) 576 (S.C.C.); **R. v. Logan** (1982), 64 C.C.C. (2d) 238 and **R. v. MacNeill** (1982), 54 N.S.R. (2d) 72.

In **Gould** an application had been made to quash a committal for trial. The application was granted. The Attorney General then preferred a direct indictment against the accused who raised the plea of *autrefois acquit* at trial. The trial judge dismissed the indictment. On appeal the Saskatchewan Court of Appeal in allowing the appeal, and after

discussing the decisions of the Supreme Court of Canada in **Riddle** and **Petersen**, stated at p. 435 of (1985), 5 W.W.R. that the basic requirement to succeed on a plea of *autrefois acquit* is:

> ".....that the accused must show that he was placed in jeopardy on the same matter on an earlier occasion and that there was an acquittal or dismissal of the charge by a court of competent jurisdiction. In the instant case it is true that on the earlier occasion there was a quashing of the committal and that the indictment was set aside. However, the respondent had not then been placed in jeopardy. The order setting aside the committal had been made before the respondent entered a plea to the indictment. It follows therefore that there were no proceedings in which judgment on the charge could have been rendered."

The Saskatchewan Court of Appeal concluded:

> "The instant case had not proceeded beyond the committal for trial. Until he pleaded to the indictment arising out of the committal the respondent was not placed in jeopardy."

The Supreme Court of Canada, in a short oral judgment dismissing the appeal from the decision of the Saskatchewan Court of Appeal, held that the accused was never in jeopardy on the first indictment. I have concluded from reading these two decisions in **Gould** that the underlying reason the accused was never in jeopardy was not that he had not pleaded but that the Information had been quashed before trial and as a result there was "<u>no proceeding in which a final judgment on the charge could have been rendered</u>".

In **R. v. Pretty** (supra), the British Columbia Court of Appeal found that an accused is not in jeopardy until he pleads. At p. 71 the Court stated:

> "No case can be found in which a quashing before plea has been found to place the accused at jeopardy so that the resulting dismissal or acquittal can found a finding of *autrefois acquit*. Even after plea, the elements of *autrefois acquit* may not be present but <u>the taking of a plea has always been held to be an essential element</u>." {Emphasis added}

The Court went on to state that any doubt there may have been on that question was laid to rest by the decision of the Supreme Court of Canada in **R. v. Gould** (supra). In these cases the courts were dealing with a situation where an Information was quashed before a plea. The courts were not dealing with a situation where an Information was dismissed pursuant to s. 799 of the **Code** for failure of the prosecutor to appear to prosecute the offence.

When a charge is withdrawn before a plea there is no proceeding in which the accused could be convicted. Therefore, *autrefois acquit* is not available on a subsequent charge. (**R. v. Karpinski** (1957), 117 C.C.C. 241; [1957] S.C.R. 343; and **R. v. Selhi** (1985), 18 C.C.C. (3d) 131, (Sask. C.A.) affirmed (1990), 53 C.C.C. (3d) 576 (S.C.C.)).

The essence of these decisions is that when an Information has been quashed or withdrawn at the first proceeding there was in effect no proceeding in which the accused could have been convicted and, therefore, the plea of *autrefois acquit* has no application in the so-called subsequent proceeding. This line of decisions does not turn simply on the fact that a plea was not taken. However, the decisions do illustrate the importance of whether a plea has been taken or not when considering a plea of *autrefois acquit* in subsequent proceedings.

In **Logan** there had been a plea of not guilty; the majority of the Court held that the plea of *autrefois acquit* was not available in the subsequent proceeding. The primary reason for this was that the legislation under which the charge had been laid in the first instance had been declared *ultra vires* of Parliament. As a consequent there was no charge upon which the accused could have been convicted. Thus, the accused was not in jeopardy at the first trial and the certificate of dismissal was therefore a nullity.

In **R. v. MacNeill** the charge had been found to be a nullity prior to plea.

However, the wording of the Appeal Court decision in **MacNeill** does stress the fact that as the plea had not been taken the accused was not in jeopardy. It could equally have been said that there was no proceeding in which the accused could have been found guilty as the charge had been declared to be a nullity.

Disposition of the Second Issue

For the respondent to successfully raise the plea of *autrefois acquit* he was required to prove that he was previously acquitted by a court of competent jurisdiction for the same or a substantially similar offence as assault causing bodily harm and that the acquittal was free from jurisdictional error.

The certificate of dismissal issued to the respondent is evidence of the dismissal of the common assault charge (**Riddle**). However, in view of my interpretation of s. 808(2), its effect is to only bar subsequent summary proceedings in the same cause.

The dismissal by Judge Randall of the common assault charge pursuant to s. 799 of the **Code** is equivalent to an acquittal; it ended the proceedings.

Section 610(1) of the **Code** appears to be a codification of the law developed in **Elrington**; s. 610(1) provides:

> "610. (1) Where an indictment charges substantially the same offence as that charged in an indictment on which an accused was previously convicted or acquitted, but adds a statement of intention or circumstances of aggravation tending, if proved, to increase the punishment, the previous conviction or acquittal bars the subsequent indictment."

Applying s. 610(1) of the **Code** the dismissal of the common assault charge would bar the subsequent indictment for assault causing bodily harm provided the dismissal was free from jurisdictional error. If one considers that Judge Randall's failure to take the respondent's plea was merely a procedural error within jurisdiction or that there is no requirement in s. 799 to take the accused's plea if the prosecutor does not appear,

Judge Randall had the jurisdiction pursuant to s. 799 to dismiss the common assault charge. However, he could not have convicted the respondent without arraigning him and taking his plea as mandated by s. 801 of the **Code**.

All the case law to which I have referred supports the proposition that to successfully raise the plea of *autrefois acquit* to a subsequent charge, the accused must have previously been" in jeopardy" on the same or substantially the same offence. For the purpose of considering the plea of *autrefois acquit*, there are no cases which hold that an accused is in jeopardy before entering a plea. In my opinion this is a satisfactory point in the sequence of criminal proceedings to draw the line as to when an accused is "in jeopardy" for the purpose of considering the merits of a plea of *autrefois acquit*. In short, the concept that an accused must have been in jeopardy on a previous occasion, in my opinion, means in jeopardy of being convicted in the prior proceedings for the same or substantially the same offence. Therefore, without have pleaded before Judge Randall the respondent was not in jeopardy. Therefore the dismissal of the common assault charge cannot support the respondent's plea of *autrefois acquit*. While the Crown could have appealed the dismissal or moved to have it quashed the failure of the Crown to do so does not absolve the requirement that the respondent, to support his plea of *autrefois acquit*, must prove that he was in jeopardy of being convicted in the prior proceedings. This is fundamental to succeed on a plea of *autrefois acquit*. The comments in **Petersen** (supra) that the Crown cannot ignore a dismissal under s. 799 and lay a new Information without having appealed or moved to quash the dismissal were made in the context of the facts of that case, in particular, that the accused had pleaded not guilty and was, therefore, in jeopardy; that is in danger of being convicted in the proceedings.

In the absence of a plea before Judge Randall, there was no proceeding in which the respondent could have been convicted. Therefore, the dismissal cannot bar the

subsequent proceeding by way of indictment on the charge of assault causing bodily harm.

Justice MacDonald erred in concluding that the certificate of dismissal issued under s. 808(2) barred the subsequent proceedings by indictment. The appeal ought to be allowed ,the stay of proceedings on the s. 267)(1)(b) charge ought to be set aside and a new trial ordered.

Hallett, J.A.

Concurred in:

Chipman, J.A.

Flinn, J.A.

C.A.C. No. 118036

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and -

TREVOR WALSH

Respondent

REASONS FOR JUDGMENT BY:

HALLETT, J.A.