



HALLETT J.A.:

This is a summary appeal, pursuant to s. 830(2) of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46, from a decision of a Provincial Court judge staying proceedings on an Information charging the respondent with theft of property of Sobeys Stores Incorporated.

The appeal is on the ground that the Provincial Court judge ordered the stay in the absence of any evidentiary basis.

The matter first came before Chief Judge MacDonald of the Provincial Court on January 10th, 1996, for arraignment. The respondent had received an Appearance Notice; he was not present in court. At the request of Crown counsel a warrant was issued.

Crown counsel then stated to the Court:

"MR. MARTIN: Your Honour, also at the direction of Judge Randall, Mr. Tim Muise from the investigation company that works for Sobey's was here at the arraignment. I don't know if that should be noted. Judge Randall was inclined to have Sobey's matters dismissed if ... if they weren't here. I just put on record that Mr. Muise is here. I presume he's free to go now, Your Honour?"

On January 30th, 1996, Judge Randall was presiding in Arraignment Court. The transcript of those proceedings shows the following:

"THE CLERK: Jason Probert?

MR. MARTIN: Your Honour, this is a Sobey's matter, but I note that Mr. Muise, the investigator, was here for the arraignment when Mr. Probert wasn't.

THE COURT: In order for ... in order for me to not stay these matters, they have to ... I have to have assurance from your big boss that the ... the request that I made to him is going to be complied with. I have had nothing, so the matter

is still stayed. The matter is stayed, sir, by the Court.

THE CLERK: You're free to go.

THE COURT: Prior to plea. You may be entitled... the police may be in touch with you at a later date, we don't know."

On October 19th, 1995, Judge Randall had written to the Director of Public Prosecutions with respect to the prosecution of charges arising out of thefts from stores operated by Sobeys Stores Incorporated. In that letter Judge Randall made reference to his experience that the personnel engaged by the security firm hired by Sobeys did not always appear at trials involving thefts from Sobeys and, as a consequence, the charges are dismissed. Judge Randall was of the opinion that this was unfair to those that pleaded guilty to thefts from Sobeys. In his letter to the Director of Public Prosecutions Judge Randall concluded:

"It has always been my view that any store which employs their own employees or contracts out store security, should be required to process their own charges from the beginning to the final termination in the Court, without assistance from the Police or Crown Attorneys' office.

Therefore, due to my recent experience with Sobeys Stores, I propose that in January, 1996, my next arraignment month, that all new information from them will be stayed by me until such time as I am satisfied that all parties, Police, Crown Attorneys' Office and Defence Counsel, are assured that the case will be proceeded with to its conclusion."

From Mr. Martin's comments made to Chief Judge MacDonald on January 10th it would appear that Judge Randall was inclined to dismiss Sobeys matters, even at the arraignment stage, if the witness from the investigation company was not in Court for the arraignment.

It would appear from his letter to the Director of Public Prosecutions that

Judge Randall did not want to have the Court's time wasted in proceedings that would not go to their conclusion in the event of a not guilty plea.

While Judge Randall's letter to the Director of Public Prosecutions is not clear, apparently he wanted some sort of assurance from the Director that Informations involving thefts from Sobeys would be proceeded with to a conclusion in the event of a not guilty plea.

### **Disposition of the Appeal**

A stay of proceedings in a criminal matter is a drastic remedy and should only be invoked in the clearest of cases (**R. v. O'Connor** (1995), 103 C.C.C. (3d) 1 (S.C.C.)).

A judge cannot order a stay merely on the basis that in the past key witnesses did not attend to give evidence in cases involving a particular complainant.

There was no evidence before Judge Randall that the key Crown witnesses in this particular prosecution would not attend to give evidence.

Without evidence, Judge Randall ought not to have stayed the proceeding. There was a valid Information sworn by a police officer which was before the Court. The Crown prosecutor was in attendance; the respondent was in attendance. The purpose of the hearing was to arraign the respondent, take his plea and set the matter down for trial.

The Information before Judge Randall should have been processed in the normal manner by taking the respondent's plea and setting a trial date. In failing to do so the learned Provincial Court judge erred in law. Accordingly, the appeal is allowed and the matter remitted to the Provincial Court.

Hallett J.A.

Concurred in:

Freeman J.A.

Pugsley J.A.

NOVA SCOTIA COURT OF APPEAL

**BETWEEN:**

HER MAJESTY THE QUEEN

Appellant

- and -

JASON DELANEY PROBERT

Respondent

REASONS FOR  
JUDGMENT BY:

HALLETT , J.A.