

IN THE COUNTY COURT JUDGES CRIMINAL COURT
OF DISTRICT NUMBER THREE

HER MAJESTY THE QUEEN

versus

ROBERT PAUL MURPHY

HEARD: At Yarmouth, Nova Scotia, on the 23rd day of
September, A.D. 1982.

BEFORE: His Honour Judge Peter Nicholson, J.C.C.

LAST
SUBMISSION
FROM

COUNSEL: The 9th day of November, A.D. 1982.

DECISION: The 7th day of December, A.D. 1982.

COUNSEL: R. Alain Deveau, Esq., for the Crown
Joel Pink, Esq., for the Accused

NICHOLSON, J.C.C.

The accused was charged that he at or near Yarmouth, in the County of Yarmouth, between the 11th day of September, 1979, and the 22nd day of September, 1980, did unlawfully by deceit, falsehood or other fraudulent means defraud Nova Holiday Limited, a body corporate, of a sum of money exceeding \$200.00, contrary to Section 338(1)(a) of the Criminal Code.

Having elected to be tried by a Court composed of a Judge sitting without a Jury, he appeared before me at Yarmouth on the 23rd of September, 1982, to respond to the indictment laid against him, to which he had entered a plea of not guilty. A Preliminary Inquiry was waived.

His counsel at the commencement of the proceedings made a motion that the charges against the accused ought to be stayed on the grounds that they constitute an abuse of the process of the Court.

It appears that in the summer of 1979 the accused entered into a business arrangement with one Volker Thomsen and a Mr. Egharet who are principals of Nova Holiday Limited. The accused undertook to act as their agent in caretaking and receiving the rents for a set of A-frame residential buildings situate on the westerly side of Lake Milo at Yarmouth.

The accused was then a member of the R.C.M.P. and was stationed at Yarmouth.

Evidence given before me revealed that on the 2nd of June, 1981, after some discussions with Messrs. Thomsen and Egharet, the accused acknowledged to owe Nova Holiday Limited the sum of \$6,322.32, consisting of \$4,529.52 borrowed from the Company, and arrears of rent, which he failed to collect, representing the balance. On that day he signed the following acknowledgment:

"I hereby acknowledge to have borrowed from Nova Realty Limited as of June 1st, 1981, \$6,322.32 interest at going bank rates."

The accused signed this document, and that was the last he saw of either Mr. Thomsen or Mr. Egharet. It appeared that on that occasion he was instructed to make any payments to one Paula or Frank Anderson, the new managers of Nova Holiday Limited. No amount or time limit was put on the accused in which to pay the amount owing.

Apart from one payment he made during the month of July or August of 1981, in the amount of \$350.00, he made no other payment. The payment of \$350.00 was accepted on account.

In October of 1981, through the R.C.M.P. office in Yarmouth, the accused received a message to call Mr. Clifford Hood, a solicitor in the Town of Yarmouth. Murphy returned the

call and was instructed to give Frank Anderson a call, and to tell him about payments he would be making on the loan which Hood told him was in arrears. On the 22nd of August, the accused received another call from Mr. Hood and was advised by him, "get your goddam ass in the office right away". The accused agreed to come to Hood's office right away but was told not to come now, but to be there the following day at 9:30 a.m. At that time the accused went to Hood's office where he was told that Mr. Hood was not in, but that he should wait. After 15 minutes Mr. Hood's secretary located Mr. Hood in Halifax and Murphy was told that the lawyer would get in touch with him at some other time, as he knew where he worked. I take judicial notice of the fact that at all material times up to the 27th of October, 1981, Mr. Hood was the Prosecuting Officer for the County of Yarmouth. There is an overwhelming inference that the accused was aware of that fact.

On 25 October, 1981, the accused received a letter from Mr. Hood. The second paragraph of that letter states:

"My clients have indicated to you previously that they will be reasonable in reaching an agreement with you for repayment, but you have completely ignored my repeated requests and those of Mr. Anderson; and there is no alternative at this time but to proceed to bring action against yourself for collection of the account.

It is with the greatest regret that my clients instruct me to do this; but this letter shall be formal demand for payment in the full amount of \$6,322.32 upon receipt of this letter. Payment

is to be made at my office at the above address. Failure on your part to make that payment following receipt of this letter will result in legal proceedings."

Murphy testified he took that letter to be a threat that criminal proceedings would be brought against him. In my view, that letter standing by itself certainly did not amount to a threat but taken in connection with some other facts of the case it would stand in a different light.

On the following day, 27 October, Mr. Hood wrote to Inspector S. G. McNaughten, the officer in charge of the Yarmouth Detachment of the R.C.M.P. After acquainting Inspector McNaughten with the fact that Murphy was indebted to his clients, and was taking an indifferent attitude towards payment of his account, he went on to say in part as follows:

"Because of his position, we feel it necessary, at this point, after exhausting all reasonable efforts, to seek a reasonable outcome of the matter by bringing the matter to your attention. Again, I say, my clients and myself do so with the greatest of regret, but feel we have no other course to follow.

To assist you in any investigation you may wish to make, I enclose a copy of the acknowledgment signed by Constable Murphy and my letter of demand to him. (emphasis added)

On the following day the accused's Staff Sergeant came to him and told him that the Commanding Officer wanted to see him. The two men went to Inspector McNaughten's office. The accused was informed that the Inspector had received a

letter from Clifford Hood regarding his activities with Nova Holiday Limited; and that a criminal investigation was underway. He further advised him that an order had come through from Halifax that the accused was to be suspended from his duties. Mr. Thomsen wrote to the R.C.M.P. on 15 November, 1981, as follows:

"... we wanted to finalizi [sic] this sad business and we therefore asked Mr. Murphy to sign a note that he in addition to the roughly \$3,000.00 which he repaid within some days owed us \$6,322.32.. We choose the word borrowed because we did not have any interest to cause him any real difficulties and our main interest was to get our funds back.

He promised us to repay this amount on a regular basis. But after we left nothing happened. We therefore had to go the official way."

The investigation proceeded and on the 20th day of April, 1982, the accused was charged under Section 338(1)(a) of the Criminal Code. Immediately thereafter the accused made payment of \$4,529.52 in full settlement of the account of Nova Holiday Limited. Having elected to be tried by a Court composed of a Judge sitting without a Jury, an indictment was preferred against him by the Agent for the Attorney General of Nova Scotia on the 25th of June, 1982, for having committed an offence under Section 338(1)(a)

In his evidence the accused stated that on one occasion during a telephone conversation with Mr. Hood, the date of which he did not state, Hood told the accused that if

he paid up there would be no criminal charge. That statement was not contradicted and I find as a fact that it was made. I can only conclude that the charge against the accused, referred to above, was precisely the charge mentioned in that telephone conversation.

There can be no doubt but that under appropriate circumstances this Court has an inherent jurisdiction both in criminal and civil matters to stay a proceeding that amounts to an abuse of its process, see Metropolitan Bank vs. Pooley (1885) 10 Appeal Cases, 210 (H.L.). It is important to note that this power may be invoked by any Court having criminal jurisdiction. See Rourke vs. Queen (1977) 35 C.C.C. (2d) per Chief Justice Laskin at 143.

While it has been settled by our Appeal Court in R. vs. Maxner (1981) 47 N.S.R. (2d) 97, that a Magistrate has no power to stay proceedings as an abuse of process there is nothing in that case that restricts the inherent power of a County Court Judge to exercise such jurisdiction and power.

While this jurisdiction should be exercised only in exceptional cases it is my view that the facts of this case do make it an exceptional one. There is no doubt in my mind, looking at the evidence as a whole, that the various segments of that evidence added up to a situation where an express, or

at least an implied threat was made to use the criminal law in seeking to collect money from the accused.

Whatever the nature of the transaction was between the accused and Nova Holiday Limited, represented by its servants or agents, Thomsen and Egharet, they clearly elected to treat the amount owing by Murphy as a civil debt and indeed negotiated an agreement with him as to the terms of payment. Pursuant to that agreement they in fact received from, and accepted from him a payment of \$350.00 on account. What happened after Murphy failed to make subsequent payments clearly seemed to me to amount to a chronicle of mounting pressure upon the accused to pay up or face criminal proceedings. "The criminal law was not enacted for the assistance of persons seeking to collect civil debts", as was said in R. vs. LeRoux (1928) 50 C.C.C. 52 at page 57. I find as a fact that the principals of Nova Holiday Limited had no intention of resorting to the criminal court at the time they negotiated the agreement with the accused as to the amount of the payment owing and the terms of repayment.

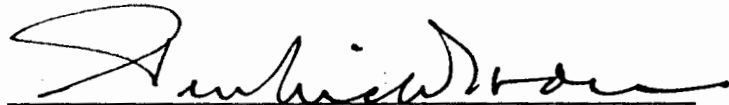
It is my view that the facts in this exceptional case are such as to justify the exercise by this Court of its power to prevent the abuse of its process by staying the proceedings brought against the accused.

Accordingly there will be an Order staying the

prosecution of the accused on the charge and the subsequent indictment preferred against him on the 25th of June, 1982, on the grounds that the same constituted an abuse of the process of this Court.

There will be no order as to costs.

DATED at Annapolis Royal, Nova Scotia, this 7th day of December, A.D. 1982.



JUDGE OF THE COUNTY COURT OF

DISTRICT NUMBER THREE

TO: The Clerk of the County Court,
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