**2000** **C.R. No. 170978**

**IN THE SUPREME COURT OF NOVA SCOTIA**
**Cite as R. v. Desmond, 2002 NSSC 10**

**IN THE MATTER OF Section 334(b); Section 267(b) and Section 271 of the Criminal Code of Canada**

**Between:**

**CLEVELAND DESMOND**

**APPLICANT**

**v.**

**HER MAJESTY THE QUEEN**

**RESPONDENT**

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**Decision on Application for Stay of Criminal Proceedings**

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**HEARD**: Before the Honourable Justice A. David MacAdam, at Halifax, Nova Scotia

**DATES:** January 9 & January 16, 2002

**DECISION:** January 16, 2002 (Orally)

**WRITTEN RELEASE**: January 25, 2002

**COUNSEL:** Shannon L. Ingraham, counsel for the Applicant
Dennis Theman & Leonard MacKay, counsel for the Respondent

Date: 20020125
Docket: C.R. No. 170978

MacAdam, J.:

[1] An investigating officer, Constable Ron Robinson, on behalf of and with the express consent of a complainant, brokered a deal with a suspected offender, whereby in exchange for return of jewelry taken during the course of an alleged sexual assault and robbery, there would be no criminal proceedings. The deal fell apart when apparently the accused substituted ,in the ring, a cubic zirconia for the diamond. As a result, charges of committing a sexual assault, committing an assault causing bodily harm and robbery were laid against the accused.

[2] The applicant contends the activities of the constable, in relation to the investigation of these offences, constitutes an abuse of process pursuant to both the common law and the ***Canadian Charter of Rights and Freedoms***.

[3] The essential facts on this application are not in dispute and counsel have presented an agreed statement of facts summarizing the events leading up to the laying of charges against the accused in September 2000. The accused denies the offences and in fact has advanced an alibi defence stating he was not present with the complainant at the time she alleges these events occurred. He acknowledges, however, knowing the person who he said had her jewelry and, as a result, was able to retrieve the jewelry which he delivered to Constable Robinson for delivery to the complainant. Although essentially irrelevant to this application, the Crown has advanced evidence that suggests the accused was misleading Constable Robinson by stating he did not have possession of the jewelry at the time when, according to statements obtained from third parties, the accused was identified as having taken the ring into a jewelry store to have the diamond removed and replaced with the cubic zirconia.

[4] The agreed statement of facts, to the extent relevant to this application, do not materially differ from notes made by Constable Robinson in his *"Continuation Reports*". Constable Robinson, in his affidavit of December 21, 2001, stated the internal procedures of the Royal Canadian Mounted Police require officers investigating criminal cases to prepare and file "*Continuation Reports*". It is clear from the *Continuation Reports* made by Constable Robinson that both he and the complainant sought to use the criminal process to effect recovery of the complainant's property.

[5] On August 8, Constable Robinson and the complainant discussed what was more important to her, whether to have the accused *"go to court for sexual assault or get her jewelry back."* Her response was *"get her jewelry back"*. She replied affirmatively when asked if she would consider getting her jewelry back in lieu of charges.

[6] Although the *Continuation Reports,* dated August 9 indicate the accused was told that *"he would not be promised anything"*, the *Reports* of August 10, record that after the accused said the complainant would have to pay for return of the jewelry, Constable Robinson explained *"that this wasn't the deal and that he would have to provide the jewelry or be charged."* Later, the same day, after informing the complainant of what had occurred,

and the complainant then demanding her jewelry back, the *Reports* continue:

> Writer advised that the only avenue would be to charge him and request restitution in court.

[7] The focus, at the time, was clearly not on the criminal nature of the events or incidents between the complainant and accused, but on recovering, at the complainant's request, her jewelry.

[8] On August 16, the accused called Constable Robinson, stating he had agreed to pay a friend to get the jewelry back and would *"return the same"*, on the condition Constable Robinson, would not charge him. Constable Robinson advised he would not charge him as the complainant wanted her jewelry back *"first and foremost"*.

[9] The complainant attended on August 21, 2000, to retrieve her jewelry from Constable Robinson. She apparently repeated that the most important thing was for her to get her property back. Constable Robinson's *Reports* continue:

> The writer had advised her that if Cleveland would give her property back then she had made the agreement that he wouldn't be charged. The writer again advised her of this. At this point the writer will be concluding the file.

[10] The deal, however, did not fly. The accused had apparently arranged to have the diamond in the ring removed and replaced with a cubic zirconia. The complainant informed Constable Robinson of this on August 23. On August 28, he received a call from the accused, during which the accused, in response to Constable Robinson advising him to bring the diamond back, replied, *"I can't."*

[11] Constable Robinson, at the preliminary hearing, testified he had told the accused that *"he reneged on the agreement that was made...and that I had no other choice but to proceed with the investigation."*

[12] In September 2000, Constable Robinson swore out an Information against the accused.

[13] Clearly, this prosecution has proceeded because the accused reneged on a deal to return the jewelry, in particular, the diamond in the ring, that had been taken from the complainant.

[14] As issue is whether the conduct of the investigation amounted to an abuse of process, either, or both, at common law and under the ***Charter***. Not in issue is whether, absent any evidence developed subsequent to the commencement of negotiations of the deal, or as a result of conversations between the police and the accused, there is sufficient evidence to sustain a criminal prosecution. The apparent evidence suggests the possibility neither may, in fact, be required. The issue is whether the circumstances justify the conclusion there has been an abuse of the criminal judicial system by the negotiation of the deal itself.

[15] In ***R. v. O'Connor*** (1995), 103 C.C.C. (3d) 1, Justice L'Heureux - Dubé, commented on the relationship between the common law test for abuse of process and the granting of stays of proceeding as a remedy under ***s. 24(1)*** of the ***Charter***. At para. 68, Justice L'Heureux - Dubé observes:

> I also recognize that . . . the common law and Charter analyses have often been kept separate because of the differing onus of proof upon the accused under the two regimes. In R v. Keyowski (1986), 28 C.C.C. (3d) 553 at pp. 561-2, 53 C.R. (3d) 1 [1986] 5 W.W.R. 150 (Sask. C.A.), for instance, it was noted that while the burden of proof under the Charter was the balance of probabilities, the burden under the common law was "the clearest of cases". It is important to remember, however, that even if a violation of s. 7 is proved on a balance of probabilities, the court must still determine what remedy is just and appropriate under s. 24(1) . The power granted in s. 24(1) is in terms discretionary, and it is by no means automatic that a stay of proceedings should be granted for a violation of s. 7. On the contrary, I would think that the remedy of a judicial stay of proceedings would be appropriate under s. 24(1) only in the clearest of cases. In this way, the threshold for obtaining a stay of proceeding remains, under the Charter as under the common law doctrine of abuse of process, the "clearest of cases".

[16] And later, at para. 71:

> The principles of fundamental justice both reflect and accommodate the nature of the common law doctrine of abuse of process. Although I am willing to concede that the focus of the common law doctrine of abuse of process has traditionally been more on the protection of the integrity of the judicial system whereas the focus of the Charter has traditionally been more on the protection of individual rights, I believe that the overlap between the two has now become so significant that there is no real utility in maintaining two distinct analytic regimes.

[17] In considering these events, I am satisfied there was no improper motivation on the part of the police, including Constable Robinson, as well as his supervisor, who had apparently authorized the deal. Constable Robinson appears to have been motivated by a desire to assist the complainant in achieving what she most wanted, namely the return of her jewelry. At issue is the propriety of an investigating officer, negotiating relief from criminal prosecution in exchange for payment or return of money or property by a suspected or accused individual.

[18] In ***R. v. C.R.S.***, [1999] N.S.J. No. 99 at para. 23, the court summarized the criteria for a judicial stay enumerated in ***Canada (Minister of Citizenship and Immigration) v. Tobiass*** (1997), 118 C.C.C. (3d) 443:

> (a) Is this one of those "clearest of cases" where continuing this prosecution would represent an inevitable affront to society's sense of fair play and decency?
>
> (b) If so, does this affront outweigh society's justifiable and understandable interest in seeing cases such as these prosecuted effectively?
>
> (c) If so, is there any relief (short of a stay) that would tip the balance in

favour of proceeding.

(d) If not, then a stay will be unavoidable.

[19] Although made in factual circumstances different than those involving the "deal" made with the accused, the questions are no less applicable in the present case. In ***C.R.S.***, *supra*, the accused had been charged with sexually assaulting his nephew some 20 years previous. The court held the perception arising from the circumstances suggested the appearance the criminal courts were being used to *"bolster a civil case through a charging process that appears subjective by nature; one that denies the Accused an objective Crown review."* The court found that the circumstances would offend the communities sense of fair play and decency and continuing the prosecution would only serve to perpetuate this image. It was therefore one of the "clearest of cases" and the court was left with no choice but to issue a stay.

[20] The reasons of Justice Sopinka in ***R. v. Finn*** (1997), 112 C.C.C. (3d) 288, in delivering the judgment of the court dismissing an appeal, included the statement it was not one of *"those clearest of cases in which an abuse of process should be found."* Justice Sopinka noted charges had been laid after an independent investigation and decision by the authorities and therefore it could not be said that the purpose of the prosecution was to advance the civil interest of the complainant to recover a debt. Justice Sopinka did not specifically comment on the statements by Justice Marshall of the *Newfoundland Court of Appeal*, (1996) 106 C.C.C. (3d) 43 at p. 57, where, on behalf of the court, he had stated:

> Where there has been neither police nor Crown involvement, nor acquiescence, in the perceived misuse of the criminal justice system through complaints laid by the alleged victim to enforce recovery of moneys from the accused, the Attorney General's power to prosecute ought not to be impaired. The complainants' motivation for laying the complaints should not have the effect of absolving the accused from responsibility to respond to legitimate charges. It is reasonable to infer that the public, for different reasons depending upon the awareness of the respective interests protected by the civil and criminal law, would perceive nothing perverse in a public prosecution of complaints, such as this appeal presents, where there was neither direct nor indirect police participation in the complainant's impugned conduct. To the contrary, it appears more logical to anticipate that the general public would view adversely the entry of a stay, which would be tantamount to acquittal, in these circumstances.

[21] In the present circumstance there was clearly police involvement, from the beginning, in negotiating the deal or agreement to withhold the laying of criminal charges in exchange for return of the complainant's jewelry. Counsel for the accused says this distinguishes the present case from the circumstances considered in ***R. v. Finn***, *supra*, both by the Newfoundland Court of Appeal and the Supreme Court of Canada.

[22] Defence counsel, in her brief, refers to the decision of then Associate Chief Justice Palmeter, in ***R. v. Hines***, [1995] N.S.J. No. 151, where he granted an application for a stay on two charges of assault and two charges of assault causing bodily harm by the

accused against his former wife. The Associate Chief Justice found this was a clear and exceptional case and amounted to an attempt at extortion that would *"tarnish the integrity of the court"* and would be an *"affront to fair play and decency"*. After stating he had very little sympathy for an accused who abuses their wife, a para. 32, he continued:

> Accordingly, I find that the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of this case and I find that the administration of justice is best served by staying these proceedings. I should say that I do not feel there was any impropriety on the part of the police. They proceeded as they thought best under the circumstances.

[23] Justice Palmeter referred, with apparent approval, to the decision of the majority of the British Columbia Court of Appeal in ***Rex v. Bell*** (1929), 51 C.C.C. 388, where the police officer had apparently said to the accused, *"...we would have to prosecute him unless he made some arrangement with the creditors or dug up this money..."*. Chief Justice Macdonald, in the reasons of the majority, after stating the evidence did not appear in the circumstances sufficient to found a conviction, added:

> ...it is apparent to us that the criminal proceedings were manifestly not taken in vindication of public justice but wholly because the appellant's refusal to comply with the demand to 'dig up the money or take the consequences'. The prosecution was, therefore, an abuse of the process of the magistrate's court which we cannot countenance. We think that the Criminal Courts are not to be held *in terrorem* over alleged debtors.

[24] Counsel's brief references a decision of the British Columbia Supreme Court:

> In **R. v. Thore**, [2001] B.C.J. No. 720 (B.C.S.C.) the defendant had smashed the complainant's windshield as a drunken prank. The complainant was not interested in pressing criminal charges against him, but only wanted to be reimbursed for the cost of replacing her windshield. The police officer involved in the complaint relayed this information to the accused. The accused then attempted to come up with the money to reimburse the complainant. Unfortunately, the accused did not reimburse the victim and mischief charges were laid against him.
>
> The court found that although the police officer's conduct in attempting to facilitate a resolution between the parties was not done in bad faith, it was still a misuse of his authority and the criminal justice system. The court held at paragraph 20 that:

> Obviously, there is a societal interest in seeing that a vandal such as Mr. Thore is punished for willfully destroying another person's property without any provocation. However, in my view, any affront to fair play and decency in Mr. Thore not being brought to justice for his conduct is outweighed by the societal interest in ensuring that the criminal process is not used as a means to collect private debts.

The court goes on to state at paragraph 21:

> If the case only involved the statements made by Ms. Sutherland, I might have been inclined to agree with the analysis of the trial judge. However, the statement made by the police officer to Mr. Thore was such as to bring the circumstances within the "clearest of cases" where a stay of proceedings should have been ordered.

[25] This rejection of the use of the criminal law to collect a civil debt is one of long standing. The applicant notes, as authorities, ***R. v. Leroux*** (1928), 50 C.C.C. 52 and ***R. v. Laird*** (1983) 4 C.C.C.(3d) 92.

[26] The applicant's brief continues:

> In **R. v. Henwood** [1993] O.J. No. 2081 this general rule was restated at paragraph 16 where Justice Lally held:
>
> > The law is clear that the use of the criminal process to collect a civil debt may constitute an abuse of the courts' process. The courts recognize that criminal prosecution may result in the collection of a monetary debt and therefore abuse of process is only found when the criminal process is used solely for the collection of the civil debt or where the conduct of the complainant is oppressive and/or threatening.
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> In **R. v. Falzette** [1999] O.J. No. 5465 at paragraphs 13 and 14, the court quotes from Justice Krever's decision in **R. v. Miles of Music** (1989) 48 C.C.C. (3d) 96 at 106:
>
> > The authorities I have been referred to make it clear that before there can be said to be an abuse of process, the respondents must show on a balance of probabilities that the cause of the unfairness that underlies the concept is executive action or conduct of the executive. No case can fall within the category of the clearest of cases unless it can be fairly said that the cause of the apparent

> unfairness complained of can be laid at the doorstep of the executive, that is to say can be attributed to either the police or the Crown or both.

This requirement, however, does not mean that there must be prosecutorial misconduct or improper motive to found an abuse. The requirement does not go that far.

[27] The Crown asserts that unlike in the present instance in each of the cases cited by the applicant's counsel, the deal was first transmitted to the accused prior to any police involvement, whereas it was Constable Robinson who first communicated the purported deal in the present circumstances. As already noted by Justice Marshall in ***R. v. Finn****, supra*, and Justice Krever in ***Miles of Music****, supra*, abuse of process requires the perceived misuse of the criminal justice system to have been effected by the executive, namely, the police or the Crown, by either their actual involvement or acquiescence. Justice Melnick said as much when he stated in ***R. v. Thore****, supra*, his analysis might have been different if the statements had only involved the complainant and not the police officer. Consequently, where in the present circumstance the first communication of any deal to the accused was by the investigating officer, rather than by the complainant, it is difficult to see how this would eliminate any *"abuse of the criminal judicial system"* because the investigating officer, rather than the complainant, first outlined the terms of the deal whereby the accused would not be prosecuted.

[28] Where a stay is ordered it is not on the basis of the merits of the prosecution but rather because continuing with the proceedings *"...would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of the court's process through oppressive or vexatious proceedings."* This outline of the court's power to stay proceedings was adopted by the Supreme Court of Canada in ***R. v. Jewitt***, [1985], 2 S.C.R. 128 at para. 25, from the reasons of the Ontario Court of Appeal in ***R. v. Young***,(1984), 13 C.C.C. (3d) 1. The Chief Justice, in rendering the reasons of the court in ***R. v. Jewitt****, supra*, at para. 56, also stated:

> The stay of proceedings for abuse of process is given as a substitute for an acquittal because, while on the merits the accused may not deserve an acquittal, the Crown by its abuse of process is disentitled to a conviction. No consideration of the merits – that is whether the accused is guilty independently of a consideration of the conduct of the Crown – is required to justify a stay.

[29] To similar effect, Justice L'Heureux-Dubé, in ***Conway v. The Queen*** (1989), 49 C.C.C. (3d) 289, at p. 302, stated:

> Under the doctrine of abuse of process, the unfair or oppressive treatment of an appellant disentitles the Crown to carry on with the prosecution of the charge. The prosecution is set aside, not on the merits (see Jewitt, supra, at p. 23), but because it is tainted to such a degree that to allow it to proceed would tarnish the integrity of the court. The doctrine is one of the safeguards designed to ensure "that the

repression of crime through the conviction of the guilty is done in a way which reflects our fundamental values as a society" : Rothman v. The Queen (1981), 59 C.C.C. (2d) 30 at p. 69, 121 D.L.R. (3d) 578, [1981] 1 S.C.R. 640 (S.C.C.), per Lamer, J.. It acknowledges that courts must have the respect and support of the community in order that the administration of criminal justice may properly fulfil its function. Consequently, where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases, then the administration of justice is best served by staying the proceedings.

[30] Justice L'Heureux - Dubé went on to comment that stays for abuse of process are not limited to cases where there is evidence of prosecutorial misconduct. As noted earlier, I am satisfied there was here neither bad faith nor improper motivation on the part of the investigating officer and his supervisor.

[31] The Crown's supplementary brief refers to the decision of ***R. v. MacDonald*** (1990), 54 C.C.C. (3d) 97, where the offender was told he would only be charged as an accessory after the fact if he gave a *"truthful statement"* to the police. As a result of further information obtained by the police, they decided the statement was not truthful and he was charged with first degree murder. The Ontario Court of Appeal upheld the trial judge's ruling that the actions of the authorities had not amounted to an abuse of process. Relevant in our case is that there was nothing later learned by the police, after the *"deal"*, that changed their understanding of what had occurred. At the time the *"deal"* was made, the investigating officer was satisfied there was reasonable and probable grounds to charge Mr. Desmond with these offences. The fact that later, after the *"deal"* fell through because of the substitution of the cubic zirconia for the diamond, and the apparent involvement of Mr. Desmond in the switch, did not alter what the investigating officer believed, on reasonable and probable grounds; namely that the accused had committed these offences. It is the *"deal"* that constituted the *"abuse of process"*, not the fact the accused reneged on upholding his part of the *"deal"*. The circumstances here do not, in my view, parallel the circumstances in ***R. v. MacDonald,*** *supra*, where, at the time of the deal the police believed the offender's role was different than what subsequently received evidence suggested, and the accused by his untruthful statement, had participated in misleading the police. Although the offender was untruthful in suggesting he did not have the ring, since on the evidence of independent witnesses he was apparently identified as being the person who brought in the ring to have the diamond substituted, the investigating officer was in no way misled as to what he believed to have been the offender's involvement in these offences.

[32] Having regard to ***R. v. MacDonald,*** *supra*, the defence suggests it is distinguishable because the agreement there involved the police agreeing to drop a more serious charge, but not all charges, in exchange for the *"truthful statement"*. I am not satisfied that even had the *"deal"* been that the police would not charge the more serious offences of the sexual assault and robbery, but continued with the assault causing bodily harm, that this would have affected the nature of the abuse in this case. The abuse was the *"deal"*, whatever it was, in exchange for not proceeding with some or all charges.

[33] The Crown, in the supplementary written submission, also asserts:

> Where the police have conducted an independent investigation before laying charges, then the exceptional remedy of a stay of proceedings ought not to be granted, even when there has been a prior threat by the complainant to go to the police if a "civil" claim is not settled.

[34] The basis for permitting the proceedings to continue is not, in my view, simply because the police have conducted an independent investigation, since presumably that would be the norm in most criminal prosecutions, but rather the fact pursuit of prosecution of criminal offences is a matter of public interest and not to be prevented by discussions, negotiations or arrangements privately made between victims and offenders. It is for this reason the authorities have required the participation, or at least, acquiescence of the Crown or police, that is *"executive action or acquiescence."*

[35] The Crown brief correctly outlines the burden, citing ***R. v. Henwood***, [1993] O.J. No. 2081 (Ontario Ct. J. - Gen. Div.), at para. 17:

> The onus of establishing that there has been an abuse of process is on the accused who must establish on the balance of probabilities that the proceedings are oppressive or vexatious or offensive to the principles of fundamental justice and fair play.

[36] The Crown brief then continues:

> In R. v. C.R.S., [1999] N.S.J. No. 99 (N.S.S.C.) Q.L., MacDonald, A.C.J.N.S. said, at paragraph 20:
>
> > Thus in the case at bar the burden is on the Accused to establish on the balance of probabilities, that this " prosecution is conducted in such a manner as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process."
>
> And the Nova Scotia Supreme Court, Appeal Division in R. v. Waugh, (1985), 21 C.C.C. (3d) 80, said, per Macdonald, J.A. for the bench, at page 95:
>
> > In order to stay criminal proceedings on the ground that they were commenced to effect collection of a civil debt or to enforce some other civil remedy it must be clearly shown that such was the sole and only purpose for their commencement.

[37] The Crown brief, also correctly observes that recovery of a civil debt is not precluded as an attendant consequence of a criminal prosecution. The brief notes:

> As stated in R. v. Henwood, supra, at paragraph 16 (page 3, Q.L.):
>
> > The courts recognize that criminal prosecution may result in the

> collection of a monetary debt...

And the Nova Scotia Court of Appeal stated, in R. v. Waugh, supra, at page 94 *[sic - page 93]* (page 11, Q.L.):

> The fact that a prosecution may result in the collection of a monetary debt is recognized by the Criminal Code wherein provision is made in s. 655 *[now 738]* for the restitution of property, including money, obtained by the commission of crime.

[38] Having considered the criteria in ***Canada (Minister of Citizenship and Immigration) v. Tobiass**, supra*, referred to earlier, I am satisfied this is *"one of the clearest of cases"*, where continuing the prosecution would represent an affront to society's sense of fair play and decency, and this affront outweighs society's justifiable and understandable interest in seeing cases such these prosecuted effectively, and there is no relief, short of a stay, that would be appropriate in the present circumstance. The abuse relates to the trading off of a criminal prosecution for return of property and not to the gathering of evidence in support of the prosecution itself. Suggested by the Crown is that the court might consider the less drastic remedy of restricting the evidence at trial, and in particular, precluding the use of statements made by the accused after the making of the agreement. This would not remove the *"tarnish to the integrity to the judicial process"* involved in this instance.

[39] In respect to the requirement that the collection of the debt must be the "sole purpose" of the criminal proceeding, as noted in ***R. v. Waugh,** supra, **R. v. Henwood,** supra* and ***R. v. Laird,** supra*, I am satisfied that where the proceedings continue only because the accused person has failed to live up to an agreement to deliver certain property, it can then be said the *"sole purpose"* is the collection of the debt. The fact the investigating officer believes there is sufficient evidence to proceed with the prosecution, does not mean the *"sole purpose"* in proceeding does not arise out of the failure to uphold the deal. The question is answered by asking whether the prosecution would have proceeded, or could have proceeded, if the accused had upheld his part of the bargain.

[40] In addition to the charges of sexual assault, assault causing bodily harm and theft, Mr. Desmond has been charged with obstructing justice arising out of events allegedly occurring on October 12, 2000. As such, the incidents on which this charge is based occurred more than a month after the *"deal"* apparently finally fell through, that is, August 28, 2000 and weeks after the laying of the charges of sexual assault, assault causing bodily harm and robbery in September. The defence, in its written supplementary submission, does not suggest this charge should be stayed. The *"abuse of process"* in relation to these offences occurred before the events that are suggested as the foundation of the obstruction of justice charge. There is "*no abuse of process"* in respect to this charge, and no remedy is required, including no stay of this charge.

J.