

R. v. Scott, [1990] 3 S.C.R. 979

Winston Livingstone Scott *Appellant*

v.

Her Majesty The Queen *Respondent*

and

The Attorney General for Ontario

Intervener

indexed as: r. v. scott

File No.: 21400.

1990: June 18; 1990: December 13.

Present: Dickson C.J.* and Lamer C.J.** and Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory and McLachlin JJ.

on appeal from the court of appeal for ontario

Criminal law -- Abuse of process -- Stay and recommencement of proceedings -- Stay sought by Crown to avoid unfavourable ruling -- Proceedings subsequently reinstituted -- Whether stay and recommencement of proceedings constituted abuse of process -- Whether Crown's action violates

* Chief Justice at the time of hearing.

** Chief Justice at the time of judgment.

s. 7 or s. 11(d) of the Canadian Charter of Rights and Freedoms -- Criminal Code, R.S.C. 1970, c. C-34, s. 508.

Constitutional law -- Charter of Rights -- Fundamental justice -- Stay and recommencement of proceedings -- Stay sought by Crown to avoid unfavourable ruling -- Proceedings subsequently reinstituted -- Whether Crown's action violates s. 7 of the Canadian Charter of Rights and Freedoms -- Criminal Code, R.S.C 1970, c. C-34, s. 508.

Constitutional law -- Charter of Rights -- Fair trial -- Stay and recommencement of proceedings -- Stay sought by Crown to avoid disclosing identity of police informer -- Proceedings subsequently reinstituted -- Whether accused denied right to make full answer and defence -- Whether Crown's action violates s. 11(d) of the Canadian Charter of Rights and Freedoms -- Criminal Code, R.S.C. 1970, c. C-34, s. 508.

Criminal law -- Procedure -- Witness appearing in courtroom after Crown's final submissions -- Whether trial judge erred in refusing to hear evidence of witness where accused claiming to have been entrapped.

Criminal law -- Defence -- Entrapment -- Manner in which entrapment claim should be dealt with by the courts.

Criminal law -- Procedure -- Witness failing to appear in court although served with subpoena -- Whether trial judge erred in failing to issue material witness warrant.

Evidence -- Privilege respecting police informers -- Defence counsel seeking to question police officer as to identity of informer -- Refusal by trial judge to permit disclosure of informer's identity -- Whether accused denied right to make full answer and defence.

Defence counsel in the course of cross-examination posed a question which would have led to disclosure of the identity of a police informer. Crown counsel objected to the question as being irrelevant and exercised her discretion to stay the proceedings under s. 508(1) of the *Criminal Code*. The proceedings were then re-instituted under s. 508(2). The defence was unsuccessful in its application to stay the proceedings for abuse of process at this stage and at the commencement of the new trial. During the course of the new trial, defence counsel again tried to put a line of questions which would ultimately identify the informer, arguing that it was relevant to the issue of entrapment. The trial judge held the disclosure of the informer's identity unnecessary because there had been no evidence of entrapment to this point. After the Crown had completed its case, defence counsel advised that he would not be calling evidence and then, at the suggestion of the trial judge, sought and was granted an adjournment in order to have a witness located and served with a subpoena. The witness failed to appear at the resumption of the trial and the appellant's request that a material witness warrant be issued pursuant to s. 626 of the *Code* was denied. Following this ruling, and after counsel for the Crown and a co-accused had completed their submissions, the witness appeared in the courtroom. The trial judge refused the appellant's request to re-open the case to allow the witness to testify because his evidence would still be immaterial absent other evidence of entrapment. The appellant was convicted on four counts of trafficking in a narcotic and one count of possession for the purpose of trafficking. His appeal to the Court of Appeal for Ontario was dismissed.

The issues raised in this appeal are: (1) whether the stay sought at the first trial followed by the commencement of fresh proceedings by the Crown constituted an abuse of process; and (2) whether the appellant was precluded from making full answer and defence to the charges.

Held (Lamer C.J. and La Forest, Sopinka and McLachlin JJ. dissenting): The appeal should be dismissed.

Per Dickson C.J. and Wilson, L'Heureux-Dubé, Gonthier and Cory JJ.: The Crown acted properly in staying the proceedings to protect the identity of the informer and in moving at the first reasonable opportunity to renew the proceedings. It could not be said that the appellant was prejudiced in any way by delay in his trial as he was at all times in custody on another matter. Neither the stay nor the re-institution of the proceedings constituted an abuse of process or an infringement of any *Charter* rights.

The trial judge made no error in refusing to permit cross-examination that would have revealed the identity of the police informer. None of the exceptions to the rule against disclosure applies to the case at bar. The alleged informer could not have been a material witness to any of the incidents comprising the counts of the indictment. There was no evidence upon which an argument could be made that the informer acted as an *agent provocateur*. Nor was any attack made on the validity of the search warrant that might have required a disclosure of the informer's identity.

In refusing to issue the material witness warrant requested by defence counsel, the trial judge exercised her discretion in accordance with the appropriate principles of law and made no error in this ruling that could justify overturning her discretion. She was not satisfied that

the prerequisite conditions to the issuance of the warrant had been fulfilled or that the evidence of the witness would be material.

It was not unreasonable for the trial judge to exercise her discretion and refuse to permit the witness to be called when he appeared in the courtroom following the final submissions of counsel for the Crown and for the co-accused. No explanation was offered as to the way in which the evidence of the witness would be relevant. The trial judge had an obligation to ensure that the trial proceeded in a reasonably expeditious and orderly manner. She had to take into account, not simply the effect of delay and inconvenience, but the possibility of prejudice to the co-accused. Furthermore, the evidence adduced made it apparent that the appellant could not have met the burden of showing on the balance of probabilities that entrapment occurred.

Per Lamer C.J. and La Forest and McLachlin JJ. (dissenting): The conduct of the Crown in staying the proceedings to avoid an adverse judicial ruling and then recommencing them constituted an abuse of process. The use of the power to stay, combined with re-institution of proceedings as a means of avoiding an unfavourable ruling, gives the Crown an advantage not available to the accused. The normal and proper operation of the judicial system contemplates that judicial errors be corrected through the appeal process. The fact that the Crown acted in good faith is insufficient to justify an abuse of process.

The public has an interest in prosecuting crimes as well as in protecting the identity of informers. Both interests could have been met had the Crown adopted the alternative of calling no further evidence and appealing the resulting acquittal. In the circumstances, it cannot be said that the public interest justified or offset the affront to justice and fairness involved in the course the Crown chose to follow. As the case for abuse of process had been

established, it was unnecessary to consider whether a breach of s. 11(b) of the *Charter* had occurred.

The trial judge erred in refusing to hear the witness on the issue of entrapment. The issue of entrapment is to be determined separately from the issue of guilt or innocence and the only question is whether the entrapment constitutes an abuse of process requiring that the proceedings be stayed or set aside. Implicit in the notion of entrapment is the concession of having committed at least the *actus reus* of the offence and fairness suggests that the accused should not be obliged to call evidence on this question until after the principal issue of guilt or innocence has been determined. It was far from clear that the witness's evidence would have been irrelevant and the appellant was entitled to call evidence relevant to entrapment after the verdict on his guilt.

The Crown's abuse of process could not be rectified by a new trial and a stay of proceedings should be entered.

Per Sopinka J. (dissenting): The reasons of Cory J. concerning s. 508 of the *Criminal Code* and the cross-examination of the police officer were agreed with. The trial judge properly exercised her discretion in refusing to issue a material witness warrant. The conclusion of McLachlin J. with respect to the propriety of the trial judge's refusal to reopen the case was agreed with. Although the trial judge erred in refusing to reopen the case, there was no need for a new trial. The substantive verdict of guilty did not need to be disturbed since the evidence relevant to entrapment is not relevant to culpability. In order to rectify the error and restore the appellant's opportunity to make full answer and defence, it was only necessary to vacate the formal conviction and remit the matter to the trial judge for an evidentiary hearing on the issue of entrapment.

Cases Cited

By Cory J.

Referred to: *Bisaillon v. Keable*, [1983] 2 S.C.R. 60; *R. v. Hunter* (1987), 34 C.C.C. (3d) 14; *R. v. Fortin* (1989), 33 O.A.C. 123; *R. v. Mack*, [1988] 2 S.C.R. 903; *R. v. Keyowski*, [1988] 1 S.C.R. 657; *Roviaro v. United States*, 353 U.S. 53 (1957); *R. v. Davies* (1982), 1 C.C.C. (3d) 299; *R. v. Kinzie* (1956), 25 C.R. 6; *Darville v. The Queen* (1956), 25 C.R. 1; *Amato v. The Queen*, [1982] 2 S.C.R. 418; *R. v. Conway*, [1989] 1 S.C.R. 1659; *R. v. Garofoli*, [1990] 2 S.C.R. 1421.

By McLachlin J. (dissenting)

R. v. Conway, [1989] 1 S.C.R. 1659; *R. v. Keyowski*, [1988] 1 S.C.R. 657; *R. v. Jewitt*, [1985] 2 S.C.R. 128; *R. v. Moore*, [1988] 1 S.C.R. 1097; *R. v. McAnish and Cook* (1973), 15 C.C.C. (2d) 494; *R. v. Scheller (No. 1)* (1976), 32 C.C.C. (2d) 273; *R. v. Weightman and Cunningham* (1977), 37 C.C.C. (2d) 303; *R. v. Banas and Haverkamp* (1982), 36 O.R. (2d) 164; *R. v. Mack*, [1988] 2 S.C.R. 903.

By Sopinka J. (dissenting)

R. v. Mack, [1988] 2 S.C.R. 903.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 7, 11(b), (d).

Criminal Code, R.S.C. 1970, c. C-34, ss. 2, "Attorney General", 508 [am. 1972, c. 13, s. 43; 1985, c. 19, s. 117], 626.

Authors Cited

Bewers, M. S. "Comments -- Defendant's Right to a Confidential Informant's Identity" (1979), 40 *La. L. Rev.* 146.

Stuart, Don. *Canadian Criminal Law: A Treatise*, 2nd ed. Toronto: Carswells, 1987.

Wigmore, John Henry. *Evidence in Trials at Common Law*, vol. 8. Revised by John T. McNaughton. Boston: Little, Brown & Co., 1961.

Williams, Paul W. "The Defense of Entrapment and Related Problems in Criminal Prosecution" (1959), 28 *Fordham L. Rev.* 399.

APPEAL from a judgment of the Ontario Court of Appeal, Nos. 200/88 and 220/88, February 2, 1989, dismissing the appellant's appeal from his conviction of trafficking in a narcotic and possession of a narcotic for the purpose of trafficking. Appeal dismissed, Lamer C.J. and La Forest, Sopinka and McLachlin JJ. dissenting.

Bruce R. Shilton, for the appellant.

R. W. Hubbard, for the respondent.

W. J. Blacklock, for the intervener.

//Cory J.//

The judgment of Dickson C.J. and Wilson, L'Heureux-Dubé, Gonthier and Cory JJ. was delivered by

CORY J. -- Two issues are raised by the appellant. First, it is said that the stay sought at the first trial followed by the commencement of fresh proceedings by the Crown constitute an abuse of process.

The second, and somewhat more difficult issue, is whether the accused Scott was precluded from making full answer and defence to the charges of trafficking in cocaine. The appellant's argument is based upon three rulings of the trial judge. The first prohibited the accused from cross-examining a police officer as to the identity of the informer involved in the case. Next, the trial judge refused to issue a material arrest warrant for a witness. Finally, the judge refused to re-open the trial to allow a witness to testify at a time when the evidence appeared to have been completed and counsel for the Crown and the co-accused had completed their final submissions.

Factual Background

Scott and his half-brother Donald Mitchell were charged on several counts relating to the possession of cocaine for the purposes of trafficking. Scott was charged alone on three counts, Mitchell individually on one count, and the two were jointly charged on three counts.

On December 20, 1985, Ronald Wretham, a police constable working undercover, acting on information received from an informer, initiated talks with Scott. Over the next five months, Scott made a number of sales of cocaine to Wretham, sought loans from the officer in order to purchase substantial amounts of cocaine and promised to supply the officer with

a large quantity of the drug. During this period there were numerous meetings and conversations and various amounts of cocaine were delivered in exchange for funds paid by Wretham.

The circumstances of the requested loans are of some significance. On January 24, 1986, the undercover officer met with Scott at Mitchell's residence. During this meeting Scott suggested a "business proposition" to the officer. Scott stated that he was prepared to "front" fairly large quantities of cocaine -- one or two ounces at a time -- to Wretham on credit. Wretham would pay him back later when he in turn had sold the cocaine. Wretham declined the offer, explaining that through his business he always had short-term access to funds that could be used to purchase cocaine. On hearing that, Scott told the officer that he could supply him with larger quantities of cocaine and that the unit price would be cheaper as the quantities purchased increased. He advised the officer that he would soon receive a kilo of cocaine. Wretham confirmed that he would be interested in purchasing a part, perhaps a pound, of that amount.

Discussions as to the arrangements for purchasing a portion of the kilo of cocaine continued. At Scott's request, Wretham met him on February 22. At that time Scott told the officer that he would have to get a lesser amount of cocaine from a different source. He explained that he would need to pay for the drug before he could supply it to Wretham. He asked the officer to loan him two to three thousand dollars for a few days. He offered his car, a BMW, as collateral. He suggested that in addition to supplying one pound of ninety per cent pure cocaine at an agreed-upon price, he would give Wretham one and a half ounces of cocaine free as interest on the loan. Wretham took some time to think about the offer and eventually agreed to make the loan on terms that were substantially similar to those suggested by Scott. Although the loan was never made, Scott agreed to supply Wretham with a pound of cocaine.

As time passed, Wretham concluded that Scott had the cocaine in his possession but was stalling on his promise to deliver it. At their last meeting, a disagreement arose as to how the deal was to be completed. Wretham sensed their relationship was deteriorating. He called in his supporting officers and arrested Scott. A warrant to search Scott's apartment was obtained based in part on information supplied by the same informer who had initially told the police that Scott was selling drugs.

The search of Scott's premises resulted in the seizure of a quantity of cocaine and paraphernalia used in the processing and packaging of the drug. It must be noted that the validity of the search warrant itself has never been attacked. Rather, the appellant has challenged the refusal of the trial judge to permit cross-examination that would identify the informer who had supplied the information both as to Scott's drug-related activities and for the search warrant.

The Initial Trial and the Stay of Proceedings

The procedural history of this case is important and must be set out in some detail. Scott elected to be tried by judge alone. On the second day of the trial, during the cross-examination of the investigating officer, the presiding judge permitted defence counsel to ask the officer why a person by the name of Winston Ross had been arrested on the same day as the appellant. When this question was put to the officer, Crown counsel objected strenuously on the grounds that it was irrelevant and would inevitably lead to the identification of the police informer. She argued that if Ross had material information to give to the court he could be subpoenaed and called as a witness. In response to the submission the trial judge stated:

I have some difficulty with the relevancy of the question. Of course, cross-examination can be for numerous purposes, and I am not sure what the purpose of the question is but I think counsel should go on and maybe sometime we will know what the relevancy of the question is.

Crown counsel conscientiously attempted to draw the attention of the judge to the decision of this Court in *Bisaillon v. Keable*, [1983] 2 S.C.R. 60. She strongly urged that the import of the decision was binding and applicable to the ruling she sought. The trial judge made it crystal clear that he did not wish to hear her submissions on this point. As a consequence, Crown counsel exercised her discretion under s. 508(1) of the *Criminal Code*, R.S.C. 1970, c. C-34, to stay the proceedings. She explained that "the questioning [His] Honour has permitted would be one that would reveal whether or not a particular person was an informant".

The Recommencement of Proceedings

Shortly thereafter, pursuant to s. 508(2) of the *Code*, the Crown notified the clerk of the District Court that the proceedings against the appellant Scott were being re-instituted. When the indictment was presented before Locke Dist. Ct. J., defence counsel moved to have the proceedings stayed. The appellant argued that the decision of the Crown to stay and then to recommence proceedings amounted to an abuse of process. It was said that the Crown's motive for invoking s. 508(1) and s. (2) was "oblique" because Crown counsel was simply using the power granted by the section to circumvent an evidentiary ruling with which she disagreed.

Locke Dist. Ct. J. refused the appellant's application to stay the proceedings. He found that the question which provoked the Crown counsel's objection "was clearly capable of eliciting an answer disclosing the identity of any police informant who may have existed" and that "the

identity of an informant, in this case, would be an unnecessary ingredient to establish the innocence of the accused", particularly since the case involved the alleged sale of narcotics to an undercover police officer. He pointed out that despite being given the opportunity to do so, defence counsel failed to establish an evidentiary basis during the cross-examination of the police officer to show any relevance for ascertaining the identity of the informer. Further, he indicated that the Crown's objection had not been given the consideration it merited.

Relying on a decision of the Ontario Court of Appeal in *R. v. Hunter* (1987), 34 C.C.C. (3d) 14, Locke Dist. Ct. J. expressed the opinion that the trial judge should have taken greater care to determine whether the identification of the informer was necessary. He found, as well, that there was nothing oblique or improper in Crown counsel's invocation of s. 508 of the *Code* to protect the identity of the informer. He therefore dismissed the application.

The New Trial

At the commencement of the new trial, defence counsel renewed the motion for a stay of proceedings and requested, in the alternative, that the matter be sent back to the original trial judge. German Dist. Ct. J., presiding at the new trial, dismissed both applications. In doing so, she expressly agreed with the ruling made by Locke Dist. Ct. J.

Later in the proceedings, defence counsel attempted to undertake the same line of questioning as to the identity of the informer that had caused the Crown to stay the proceedings at the first trial. Once again the Crown objected. Defence counsel argued that the identity of the informer was relevant to the defence of entrapment he intended to raise on Scott's behalf.

The trial judge rejected the argument. She held that the disclosure of the name of the police informer was unnecessary because up to this point there was no evidence of entrapment. Certainly no such evidence had been elicited in the cross-examination of the police officer. However, she advised that she was quite prepared to allow the defence to call Winston Ross as a witness or to adduce any other evidence that might lay the foundation for the defence of entrapment. Indeed, she repeated her position on this issue later during the proceedings.

When the Crown had completed its case, counsel for Scott initially indicated that he was not going to call any evidence. The trial judge gave him time to reconsider his decision. When the trial resumed, Scott's counsel indicated that he wished to have Winston Ross take the stand. He requested an adjournment for one month so that Ross could be located and served with a subpoena. In spite of objections from Scott's co-accused, the adjournment was granted.

One month later, when the trial resumed, Ross was absent. The appellant requested that a material witness warrant be issued for Ross pursuant to the provisions of s. 626 of the *Criminal Code*. The trial judge denied the request. She put forward two grounds for her decision. First, she was not satisfied that the affidavit of service was adequate. Further, she expressed the view that there had still been no basis put forward by the defence to indicate that Scott had been entrapped. She found therefore that any potential evidence Ross could give would be immaterial.

Following this ruling, counsel began their final arguments. When counsel for the Crown and the co-accused Mitchell had completed their submissions, the witness Ross appeared in the courtroom. But the trial judge refused to re-open the case to allow Ross to testify. She expressed the view once again that any evidence Ross might tender remained immaterial since there was still no other evidence of entrapment. At the conclusion of all submissions, Scott

was convicted on four counts of trafficking in a narcotic and one count of possession of a narcotic for the purpose of trafficking.

The Court of Appeal

Scott's appeal was heard at the same time as *R. v. Fortin* (1989), 33 O.A.C. 123. The reasoning for the court's dismissal of the appeal is, in part, contained in the *Fortin* decision. The balance of the reasons is set out in the endorsement disposing of the case at bar. On the first issue of abuse of process, the court rejected the argument that s. 508 of the *Criminal Code* contravened s. 7 of the *Canadian Charter of Rights and Freedoms* and was, as a result, unconstitutional. The court expressed the view that the impugned section "is an adequate expression of the power which has always rested in the Attorney General and which is essential to the proper enforcement of criminal law". Moreover, it noted that safeguards for the protection of the individual against the improper use of this power had existed before the *Charter* and they were still valid. It was the view of the court that these rights had been enhanced by the passage of the *Charter*.

The court held that a Crown counsel possessed the power to direct a stay of proceedings since the statute conferred that power upon the "Attorney General or counsel instructed by him". It stated that s. 508 must be read together with the definition of "Attorney General" set out in s. 2 of the *Criminal Code* and considered in light of other sections of the *Code* that confer power on the Attorney General. Finally, the Court of Appeal in its endorsement stated that Crown counsel by staying the proceedings was not simply circumventing an unfavourable ruling, but was protecting an important public interest. It observed that while the use of the stay must always be subject to judicial review, "having regard to the public interests with which the Crown was concerned, there was compelling reason to stay the proceedings".

When it dealt with the claim of entrapment presented in *Fortin, supra*, the Court of Appeal entered a stay on the grounds that Fortin was induced to traffic in a situation where the police could at most only have reasonably suspected that he was a user. It followed in the view of the Court of Appeal that according to the principles set out in *R. v. Mack*, [1988] 2 S.C.R. 903, the police went beyond providing Fortin with an opportunity to commit the offence. Rather, the police involved Fortin in procuring the commission of the very offence with which he was charged. As for Scott, the Court of Appeal simply noted that there was no basis on the facts for arguing that the trial judge had erred in refusing to stay proceedings on the grounds of entrapment.

Analysis

Stay and Recommencement of Proceedings

In staying the first trial, Crown counsel acted pursuant to the provisions of s. 508 (now s. 579) of the *Code*. That section reads as follows:

508. (1) The Attorney General or counsel instructed by him for that purpose may, at any time after any proceedings in relation to an accused or a defendant are commenced and before judgment, direct the clerk or other proper officer of the court to make an entry on the record that the proceedings are stayed by his direction, and such entry shall be made forthwith thereafter, whereupon the proceedings shall be stayed accordingly and any recognizance relating to the proceedings is vacated.

(2) Proceedings stayed in accordance with subsection (1) may be recommenced, without laying a new information or preferring a new indictment, as the case may be, by the Attorney General or counsel instructed by him for that purpose giving notice of the recommencement to the clerk of the court in which the stay of proceedings was entered, but where no such notice is given within one year after the entry of the stay of proceedings, or before the expiration of the time within which the proceedings could have been commenced, whichever is the earlier, the proceedings shall be deemed never to have been commenced.

The validity of the provision itself is not at issue. Rather, the appellant challenges the manner in which the section was used by Crown counsel. It is the appellant's submission that the staying and recommencement of proceedings was undertaken solely to circumvent an unfavourable ruling made by the trial judge. To act in this way, it is argued, constitutes an abuse of process.

At the outset, it must be noted that Crown counsel was at all times acting in good faith. The Crown was obliged to protect the identity of the informer: see *R. v. Hunter, supra*. Crown counsel attempted to fulfil that obligation. Yet the judge presiding at the first trial made it very clear by his rulings and statements that he would not listen to the Crown's submission.

In my view, Crown counsel acted properly in staying the action to protect the identity of an informer. In the circumstances, the Crown was not bound to follow the lengthy and somewhat circuitous route of offering no further evidence and appealing the inevitable acquittal. On the facts of this case, it was appropriate for the Crown to move for a stay in accordance with the statutory authority granted by s. 508 (now s. 579) of the *Code*. Subsequent to the stay of proceedings the Crown moved at the first reasonable opportunity to renew them. Once again the Crown acted properly. In the circumstances of this case, it could not possibly be said that the appellant was prejudiced in any way by delay in his trial as he was at all times in custody on another matter.

The actions of the Crown were not abusive. They were aimed solely at protecting the identity of the police informer, a value which has long been recognized as important to society. The principles which should guide a court in considering a stay of proceedings have been set out in *R. v. Keyowski*, [1988] 1 S.C.R. 657. There Wilson J., giving the reasons for the Court, stated at pp. 658-59:

The availability of a stay of proceedings to remedy an abuse of process was confirmed by this Court in *R. v. Jewitt*, [1985] 2 S.C.R. 128. On that occasion the Court stated that the test for abuse of process was that initially formulated by the Ontario Court of Appeal in *R. v. Young* (1984), 40 C.R. (3d) 289. A stay should be granted 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", or where the proceedings are "oppressive or vexatious" ([1985] 2 S.C.R. at pp. 136-37). The Court in *Jewitt* also adopted "the caveat added by the Court in *Young* that this is a power which can be exercised only in the 'clearest of cases'" (p. 137).

This same principle was set forth by L'Heureux-Dubé J., writing for the majority, in *R. v. Conway*, [1989] 1 S.C.R. 1659. At page 1667 she wrote:

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] 1 S.C.R. 640, at p. 689, *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.

Neither the stay nor the reinstitution of the proceedings can be said to constitute either an abuse of process or an infringement of any *Charter* rights. Locke Dist. Ct. J. and German Dist. Ct. J. were correct in their decision to refuse to grant Scott's application to stay the new trial. In my view this is not one of those rare but "clearest of cases" in which a stay of proceedings should be granted.

Was the Accused Given the Opportunity to Make Full Answer and Defence?

In order to resolve this issue, it is necessary to review three of the rulings made by German Dist. Ct. J. at various stages of the trial. I will consider each ruling in turn to determine if an error was made that prevented the appellant from making full answer and defence. Each ruling

requires a consideration of the evidence and the references will of necessity be somewhat repetitive.

(i) The Cross-Examination of the Police Officer as to the Identity of the Informer

The appellant argues that he had the right to ask whether Ross was the police informer involved in this case. It is said that this forms part of the right of the accused to make full answer and defence. Yet the interest of an accused in ascertaining an answer to such a question must be balanced against the need to protect the identity of police informers.

The value of informers to police investigations has long been recognized. As long as crimes have been committed, certainly as long as they have been prosecuted, informers have played an important role in their investigation. It may well be true that some informers act for compensation or for self-serving purposes. Whatever their motives, the position of informers is always precarious and their role is fraught with danger.

The role of informers in drug-related cases is particularly important and dangerous. Informers often provide the only means for the police to gain some knowledge of the workings of drug trafficking operations and networks. It has been estimated that in the United States some ninety-five per cent of all federal narcotics cases involve the work of informers: see Williams, "The Defense of Entrapment and Related Problems in Criminal Prosecution" (1959), 28 *Fordham L. Rev.* 399, at p. 403, and also M. S. Bowers, "Comments -- Defendant's Right to a Confidential Informant's Identity" (1979), 40 *La. L. Rev.* 146, at p. 148, note 4. The investigation often will be based upon a relationship of trust between the police officer and the informer, something that may take a long time to establish. The safety, indeed the lives, not

only of the informers but also of the undercover police officers will depend on that relationship of trust.

Trafficking in narcotics is a lucrative enterprise. The retribution wreaked on informers and undercover officers who attempt to gather evidence is often obscenely cruel. Little assistance can be expected from informers if their identity is not protected. There can be no relationship of trust established by the police with informers without that protection. If the investigation of drug-related crime is to continue then, to the extent it is possible, the identity of informers must be protected.

The need to protect the identity of an informer has long been recognized by the courts of Canada and other jurisdictions. The Ontario Court of Appeal set out some of the reasons for maintaining this protection in *Hunter, supra*, at p. 18:

The rule against the non-disclosure of information which might identify an informer is one of long standing. It developed from an acceptance of the role of informers in the solution of crimes and the apprehension of criminals. It was recognized that citizens have a duty to divulge to the police any information that they may have pertaining to the commission of a crime. It was also obvious to the courts from very early times that the identity of an informer would have to be concealed both for his or her own protection, and to encourage others to divulge to the authorities any information pertaining to crimes. It was in order to achieve these goals that the rule was developed.

The same principle was recognized by this Court in *Bisaillon v. Keable, supra*. There Beetz J. stated at p. 93:

It follows from these reasons that at common law the secrecy rule regarding police informers' identity has chiefly taken the form of rules of evidence based on the public interest, which prohibit judicial disclosure of police informers' identity by peace officers who have learned the informers' identity in the course of their duties. A witness also may not be compelled to state whether he is himself a police informer. The rule was developed in criminal proceedings, apparently in trials for high treason, but it also applies in civil

matters, and in both cases it has been established for reasons which relate to the essential effectiveness of the criminal law. . . . Its application does not depend on the judge's discretion, as it is a legal rule of public order by which the judge is bound.

It should also be mentioned that its application is not subject to any formal requirement and, if no one raises it, the Court must apply it of its own motion.

See also the reasons of Sopinka J., writing for the majority, in *R. v. Garofoli*, [1990] 2 S.C.R. 1421.

This rule is also recognized in other jurisdictions: see, e.g. *Wigmore on Evidence*, McNaughton Rev., vol. 8, at pp. 761-62.

The principle is thus well accepted. Yet the rule cannot be absolute. In our system the right of an individual accused to establish his or her innocence by raising a reasonable doubt as to guilt has always remained paramount. Beetz J. in *Bisaillon*, *supra*, acknowledged that there was an exception to the rule protecting informers' identity. He wrote at p. 93:

The rule is subject to only one exception, imposed by the need to demonstrate the innocence of an accused person. There are no exceptions in proceedings other than criminal.

Certainly, if the informer is a material witness to the crime then his or her identity must be revealed. In *Roviaro v. United States*, 353 U.S. 53 (1957), the United States Supreme Court held that the informer's identity would be divulged if the informer was a material witness. Canadian courts have very properly followed the same path in circumstances where the informer is the only material witness to the crime: see *R. v. Davies* (1982), 1 C.C.C. (3d) 299 (Ont. C.A.).

An exception should also be made where the informer has acted as *agent provocateur*. For example, in *R. v. Davies, supra*, the informer not only introduced the police to the accused, but also played an instrumental role in the trafficking scheme itself. In those circumstances, his identity had to be revealed. This exception could be properly extended to cases where the accused intends to rely upon the defence of entrapment. However, in order to rely on this exception, the accused will, as a general rule, be required to establish some evidentiary basis for the defence.

A third exception may exist where the accused seeks to establish that the search was not undertaken on reasonable grounds and therefore contravened the provisions of s. 8 of the *Charter*. Even under these conditions, a court should strive to provide as much evidence as possible to the defence by means of editing the information on which the search warrant was based without disclosing the identity of the informer. That disclosure should only be made in circumstances where it is absolutely essential: see *R. v. Hunter, supra*.

None of these exceptions apply to the case at bar. First, the alleged informer could not have been a material witness to any of the incidents comprising the counts of the indictment. Indeed, no submissions were made that he was.

Second, on the facts of this case there was no evidence upon which an argument could be made that the informer acted as an *agent provocateur*. While one can readily conceive of situations where the line between the informer passing on information as to the activities of the accused and the informer actively inducing the accused to commit a crime could be blurred, this is not such a situation. Here the case against the accused was almost exclusively based on the evidence gathered by an undercover police officer over a period of five months. This uncontradicted evidence indicated that it was Scott who initiated the various drug-related

transactions. It was Scott who was the leader in all the transactions. It was Scott who made the first offer to provide larger quantities of cocaine and deliver them to the police officer. It was Scott who asked the officer for a loan and offered to put up his car as security in order to obtain the funds to purchase larger quantities of cocaine.

It will be remembered that while German Dist. Ct. J. did not allow questions that would have identified the informer, she did permit the appellant to cross-examine the police officer on the issue as to whether Ross was present during any of the transactions at issue and whether he played any role that would engage an entrapment defence. She advised the defence counsel of her position in this way:

Now, I think that the Crown is correct. You may ask questions designed to go towards a defence of entrapment. But you may not ask or I will not permit the officer to answer questions that will go to identify the informant. So if you can ask the questions that don't go to his, show his identity, then that's fine.

The cross-examination of the police officer failed to provide any indication that Scott had been entrapped. From this ruling and other pronouncements made by the judge during the course of the trial, it is clear that if any basis for an entrapment defence had been revealed, the trial judge would have reconsidered her position regarding the protection of the informer's identity. It is significant that counsel for Scott did not ask those questions. There was simply no evidentiary basis established that would enable Scott to argue that he was entrapped and that permitted Scott's counsel to ask whether Ross was the police informer involved in the case.

Finally, it is clear that the third exception did not apply. Defence counsel made no attack upon the validity of the search warrant that might have required a disclosure of the informer's identity.

The trial judge very properly took a flexible approach to the possible need to reveal the identity of the informer. In light of the position taken by the appellant throughout the trial and the manner in which the case proceeded, the appellant cannot contend that any error was made by the trial judge in refusing, in the circumstances of the case, to permit cross-examination that would have revealed the identity of the police informer. In my view, the trial judge made no error in her ruling on this issue.

(ii) The Trial Judge's Refusal to Issue the Material Witness Warrant

When the trial resumed, after the thirty-day adjournment, Ross did not appear. Counsel for Scott moved to obtain a warrant pursuant to the provisions of s. 626(2) (now s. 698) of the *Criminal Code*. That section provides as follows:

626. (1) Where a person is likely to give material evidence in a proceeding to which this Act applies, a subpoena may be issued in accordance with this Part requiring that person to attend to give evidence.

(2) Where it is made to appear that a person who is likely to give material evidence

(a) will not attend in response to a subpoena if a subpoena is issued, or

(b) is evading service of a subpoena,

a court, justice or provincial court judge having power to issue a subpoena to require the attendance of that person to give evidence may issue a warrant in Form 12 to cause that person to be arrested and to be brought to give evidence.

(3) Except where paragraph (2)(a) applies, a warrant in Form 12 shall not be issued unless a subpoena has first been issued.

Before issuing a warrant, a trial judge must be satisfied on two points: first, that proper attempts to serve the potential witness with the subpoena have been undertaken and second, that the proposed witness is a material witness. These requirements are apparent from the wording of s. 626 itself and the related provisions of the *Code*. Subsections 626(1) and (3) provide expressly that before a warrant can be issued, a subpoena must be issued and served in the usual manner. Second, and more importantly, both ss. 626(1) and (2) state that the proposed witness must be someone who is "likely to give material evidence". It is a pre-condition of the issuance of the warrant that the trial judge be satisfied of the materiality of the evidence the witness may give.

German Dist. Ct. J. was not satisfied that either of the prerequisite conditions had been fulfilled. She found that the information contained in the affidavit of service in the subpoena was inadequate and that the issuance of the subpoena had not been completed in accordance with the standards set out in the *Code*. This is a decision that falls within the discretion of the trial judge and in my view her findings on this point would be sufficient to justify her refusal to issue the warrant.

However, there was another ground upon which she based her decision, namely that she was not satisfied that the evidence of Ross could be material.

The materiality of the evidence to be given by the proposed witness is a fundamentally important pre-condition of the issuance of the warrant. This is a matter that must be determined solely by the trial judge. In *R. v. Kinzie* (1956), 25 C.R. 6, the Ontario Court of Appeal held that the power to issue a warrant was within the discretion of the trial judge. The court held that the issuance of the warrant is not a matter of right but must be justified by demonstrating to the trial judge that the witness is likely to give material evidence. The

decision of the Court of Appeal was based in turn on the principle set out by this Court in *Darville v. The Queen* (1956), 25 C.R. 1. In that case an adjournment to subpoena further witnesses was refused by the trial judge and his decision was upheld on appeal because the materiality of the evidence had not been demonstrated. The reasons of this Court confirmed that the trial judge's discretion could be reviewed only if it had not been exercised in a judicial manner.

In the case under consideration, counsel for Scott had not demonstrated during the course of the trial or upon the application for the bench warrant that the evidence of Ross would be material. There is no evidence that Ross was ever in a position to overhear any of the conversations between Scott and the police or that he was in any way involved in the drug transactions. Neither is there any evidence that he acted as an *agent provocateur* or encouraged, importuned, or influenced Scott or the police to enter into the drug transactions.

Nor can I accept the argument that the granting of the adjournment in order that Ross be subpoenaed could be taken as a recognition by the trial judge that Ross was likely to give material evidence so that a warrant should be issued. Although the materiality of the evidence is a pre-condition to both the issuing of a subpoena to a witness under s. 626(1) and the issuance of a warrant under s. 626(2), this does not mean that the same level of demonstrated materiality is sufficient to satisfy both subsections.

The material arrest warrant provision is clearly an exceptional remedy. The consequences of the issuance of a warrant are far more serious for the witness than is the service of a subpoena. The very liberty of the subject is involved. It is one thing to attend court in answer to a subpoena. The subpoenaed witness may feel compelled to attend but attends by an act of his or her own will. It is quite another to be picked up by the police and escorted to the

courtroom. The issuance of the warrant should therefore be subject to careful consideration when an application is made to the trial judge for its issuance. It is appropriate and indeed essential that the trial judge undertake a new inquiry into the materiality of the potential evidence to determine whether or not the warrant should be issued.

In this case, the trial judge considered the pre-conditions for the issuance of the warrant and found they were lacking. She exercised her discretion in accordance with the appropriate principles of law. The exercise of that discretion should not be lightly overturned by an appellate court. In my view, no error was made by the trial judge in this ruling that could justify overturning her discretion.

(iii) The Trial Judge's Refusal to Hear the Evidence of Ross When He Appeared

It will be recalled that Ross appeared in court after counsel for the Crown and Mitchell had completed their final submissions. The trial judge refused to permit Ross to be called as a witness at this stage. Once again, this is a matter that came within the trial judge's discretion. Although another trial judge might have come to another decision, I cannot find that an error was committed in this case.

The most important consideration in any criminal trial is that it be conducted fairly in accordance with the law. Scott received a fair trial. It may well be that despite the potentially unfair and inconvenient disruption, it would have been preferable had the trial judge permitted Ross to testify. Yet the trial process cannot be allowed to become a mine field that presents a host of uncharted, potentially explosive traps to even the most skilled and patient of trial judges. Good luck should not be the sole criterion for the successful conclusion of a criminal trial.

Let us review once again the situation that presented itself to the trial judge when Ross appeared. At the conclusion of the Crown's case, Scott's counsel had indicated that no evidence would be called on his behalf. At no time during the cross-examination of the police officer nor at any time during the trial had any evidence been called that would establish the materiality of the evidence of Ross. Rather, the evidence portrayed an eager drug dealer anxious to make a sale. There was no indication that Scott was influenced, instigated, provoked or encouraged by Ross to make the sales or was influenced in any way by him. Nor was there any evidence that Ross influenced the actions of the police in any way.

Any evidence of Ross's involvement could have come from either the police or Scott. The police evidence certainly did not indicate that Ross was instrumental in instigating, entrapping or provoking Scott to commit the crimes. Scott had chosen not to testify. Before granting permission for Ross to testify at this late stage, it was only reasonable that the defence explain in what way the evidence of the witness would be relevant. No such explanation was offered. The trial judge had an obligation to ensure that the trial proceeded in a reasonably expeditious and orderly manner. She had to take into account, not simply the effect of delay and inconvenience, but the possibility of prejudice to the co-accused who had objected to the granting of the adjournment. She was given no real basis for permitting Ross to testify after all the evidence and most of the final submissions had been completed.

In these circumstances it was not unreasonable for the trial judge to exercise her discretion and refuse to permit Ross to be called as a witness at this late stage of the proceedings. As a reasonable exercise of discretion, it should not be overturned. Indeed, counsel for the appellant did not take issue with the decision of the trial judge not to re-open the case, either in his factum or in oral argument. Rather, he acknowledged that it was a discretionary decision and frankly conceded that he could not demonstrate any error in law which would warrant challenging that decision. That is a sufficient basis to dispose of this issue.

Nonetheless, something should be said of the effect this Court's decision in *R. v. Mack, supra*, could have on this case.

Relevance of the Decision in R. v. Mack

The second trial took place before the decision was rendered by this Court in *R. v. Mack, supra*. Prior to that decision, the procedure to be followed where the defence of entrapment was raised was unclear: see, e.g. the helpful discussion of the situation by D. Stuart, *Canadian Criminal Law* (2nd ed. 1987), at pp. 480-91. A question existed whether the defence of entrapment was a substantial one to be decided by the jury or a policy-oriented defence based on the inherent power of courts to stay proceedings for abuse of process. This question was not resolved by the decision of this Court in *Amato v. The Queen*, [1982] 2 S.C.R. 418. The minority judgment of Estey J., however, laid the foundation for the separation of the issue of entrapment from the substantive elements of the offence. This was the position adopted unanimously by this Court in *Mack, supra*, where it was held that the defence of entrapment was to be separated from the general defence. It was to be invoked and determined by the trial judge alone after a finding of guilt had been made on all the requisite elements of the offence by the trier of the fact. Lamer J., speaking for the Court, stated at p. 972:

Finally, I am of the view that before a judge considers whether a stay of proceedings lies because of entrapment, it must be absolutely clear that the Crown had discharged its burden of proving beyond a reasonable doubt that the accused had committed all the essential elements of the offence. If this is not clear and there is a jury, the guilt or innocence of the accused must be determined apart from evidence which is relevant only to the issue of entrapment. This protects the right of an accused to an acquittal where the circumstances so warrant. If the jury decides the accused has committed all of the elements of the crime, it is then open to the judge to stay the proceedings because of entrapment by refusing to register a conviction. It is not necessary nor advisable in this case to expand on the details of procedure. Because the guilt or innocence of the accused is not in issue at the time an entrapment claim is to be decided, the right of an accused to the benefit of a jury trial in s. 11(f) of the *Charter* is in no way infringed.

With the issue of entrapment separated from the rest of the defence, it is incumbent on the accused to establish on the balance of probabilities that entrapment occurred. I believe the evidence adduced in this case makes it apparent that the accused could not have met the burden of showing entrapment. Scott, on the evidence, was an eager drug dealer anxious to sell cocaine in substantial quantities. It is difficult to imagine that the evidence of Ross alone could demonstrate that there had been any entrapment of Scott. Even if his testimony were favourable, it would have to contradict the evidence of the police and it would be unsupported by any evidence from Scott. In those circumstances, even if there had been a wrongful exercise of discretion, I could not see any value in directing the trial judge to hear Ross on the issue of entrapment.

Conclusion

When each ruling of the trial judge is examined, in order and in context, it becomes apparent that in each instance she exercised her discretion in accordance with the correct principles of law. As a result, I can find no basis for overturning her decisions.

I would dismiss the appeal.

The reasons of Lamer C.J. and La Forest and McLachlin JJ. were delivered by

//McLachlin J.//

MCLACHLIN J. (dissenting) -- I have had the advantage of reading the reasons of Justice Cory. I agree with him on all issues save two. First, I am of the view that it was not open to the Crown to recommence proceedings against the accused after entering the stay of

proceedings. Second, I would find that the second trial judge erred in refusing to hear the witness Ross on the issue of entrapment.

Recommencement of Proceedings After Entering a Stay

The first trial judge made a ruling that the defence could ask a police officer in cross-examination why Winston Ross had been arrested on the same day as the appellant. Crown counsel had objected strenuously to the question on the ground that it might reveal the identity of a police informer. Faced with the ruling, Crown counsel advised the court that the Crown was entering a stay under s. 508(1) of the *Criminal Code*. Shortly thereafter, the Crown notified the clerk of the court that it was re-instituting the proceedings against the accused. The appellant moved to have the second proceeding stayed. His motion was rejected. The trial proceeded before a new judge, German Dist. Ct. J. German Dist. Ct. J. refused to allow questioning as to the identity of the informer -- the line of questioning which the first judge would have permitted -- on the ground that no evidentiary basis for a defence of entrapment had been made out. In the end she convicted the accused.

The accused contends that the conduct of the Crown in staying the charges before the first judge because it did not like his ruling in favour of the defence, and reinstating them in hopes of a more favourable ruling from a different judge, constitutes an abuse of process and an infringement of the accused's rights under ss. 7 and 11(d) of the *Canadian Charter of Rights and Freedoms*. The Crown takes the position that there was no abuse of process or *Charter* infringement because its conduct was justified in the public interest and did not unduly prejudice the accused.

It is useful at the outset to state what is not at issue. In particular, the constitutionality of s. 508(1) of the *Criminal Code* is not raised. It is not suggested that the Crown does not have the power to enter stays, nor that this might not be appropriate in many situations. The only question is whether the Crown's conduct in entering a stay and then recommencing the proceedings for the purpose of avoiding an unfavourable evidentiary ruling constitutes an abuse of process or violates the *Charter*, with the result that the convictions should be set aside. The issue, as I see it, is whether, once an accused has been put in jeopardy by entering a plea to a charge, the Crown may stay that proceeding and institute a new proceeding in order to overcome an unfavourable ruling by the trial judge.

The Law with Respect to Abuse of Process

This Court has recognized the doctrine of abuse of process, quite independently of the *Charter*. A judge has the power to stay or strike down proceedings which are oppressive or vexatious and violate the fundamental principles of justice underlying the community's sense of fair play and decency. The power is to be exercised only in the "clearest of cases". As stated in *R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667:

A trial judge has discretion to stay proceedings in order to remedy an abuse of the court's process. This Court affirmed the discretion "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 or vexatious proceedings" (*R. v. Jewitt*, [1985] 2 S.C.R. 128, at pp. 136-37, borrowing from *R. v. Young* (1984), 40 C.R. (3d) 289 (Ont. C.A.)). The judge's power may be exercised only in the "clearest of cases" (*Jewitt, supra*, at p. 137).

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. 148), 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] 1 S.C.R. 640, at p. 689, *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.

In summary, abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice. I add that I would read these criteria cumulatively. While Wilson J. in *R. v. Keyowski*, [1988] 1 S.C.R. 657, at pp. 658-59, used the conjunction "or" in relation to the two conditions, both concepts seem to me to be integral to the jurisprudence surrounding the remedy of a stay of proceedings and the considerations discussed in *R. v. Jewitt*, [1985] 2 S.C.R. 128, and *R. v. Conway*, *supra*. It is not every example of unfairness or vexatiousness in a trial which gives rise to concerns of abuse of process. Abuse of process connotes unfairness and vexatiousness of such a degree that it contravenes our fundamental notions of justice and thus undermines the integrity of the judicial process. To borrow the language of *Conway*, the affront to fair play and decency must be disproportionate to the societal interest in prosecution of criminal cases.

I move from the general principle to the concerns raised by the Crown's conduct in this case. The submissions made to us, as reflected in the reasons of Cory J., focused in part on the issue of whether there was evidence of prosecutorial misconduct or bad faith in this case. While these may be factors in determining whether an abuse of process has been established, they are neither necessary nor sufficient. In *R. v. Keyowski*, *supra*, Wilson J., speaking for the Court, stated, at p. 659:

To define "oppressive" as requiring misconduct or an improper motive would, in my view, unduly restrict the operation of the doctrine. In this case, for example, where there is no suggestion of misconduct, such a definition would prevent any limit being placed on the number of trials that could take place. Prosecutorial misconduct and improper motivation are but two of many factors to be taken into account when a court is called upon to consider whether or not in a particular case the Crown's exercise of its discretion to re-lay the indictment amounts to an abuse of process.

While prosecutorial misconduct or bad faith *per se* may not be at issue, this case raises three concerns which have been addressed by the courts in the context of abuse of process. The first is the evil of "judge-shopping". The second is concern for the impartiality of the administration of justice, both real and perceived. The third concerns the need to uphold the dignity of the judiciary and judicial process.

The concern with "judge-shopping" arises from the use of the stay to avoid the consequences of an unfavourable ruling. Normally, Crown counsel faced with an unfavourable ruling is expected to accept it. The remedy is by way of appeal. To permit the Crown to stay a proceeding because of an unfavourable ruling and then reinstate the proceeding before a different judge in the hope of a different ruling is obviously to condone, in some sense, judge-shopping, notwithstanding that the Crown's motive may have been honourable.

Such conduct also raises concern for the impartiality of the administration of justice, real and perceived. The use of the power to stay, combined with reinstitution of proceedings as a means of avoiding an unfavourable ruling, gives the Crown an advantage not available to the accused. An accused's only remedy for an unfavourable ruling is an appeal: the Crown, if conduct such as that raised in this case is condoned, has a choice of whether to stay and start afresh before a new judge or to appeal. Absolute equality between the prosecution and the

defence may not be possible. But good reasons must exist if the Crown, which already has at its disposal the superior resources of the state, is to be given an advantage such as this.

Finally, the case raises concerns for the dignity of the judiciary and the integrity of the judicial process. The normal and proper operation of the judicial system contemplates that judicial errors be corrected through the appeal process. That process should not be subverted without good reason. From the point of view of theory, an order or ruling stands as valid until set aside on appeal. Any other assumption leads to uncertainty and confusion. It may, moreover, result in the "error" of one trial judge being implicitly "corrected" by another judge of the same level. This is precisely what happened in the case at bar; Locke Dist. Ct. J. was called upon to quash the second proceeding, and German Dist. Ct. J. was called upon during that proceeding to make a ruling at odds with that of the first judge. Lamer J. (as he then was) warned against these evils in *R. v. Moore*, [1988] 1 S.C.R. 1097, at p. 1130, a case concerned with the legitimacy of new proceedings after the quashing of an information for failure to allege a material averment:

. . . this is no reason to allow the Crown to lay an amended charge once the accused has been acquitted, albeit by error. The trial judge's decision is open to appeal. Assuming error is found, the Court of Appeal will direct him to amend and hear the case, or will amend the charge itself and then return the file to the judge for trial on the amended charge. The fact that this will result in the accused being tried on the amended charge in any event, is no reason for downgrading the "quashing" so as to permit the Crown to relay an amended charge without facing a special plea. When a judge quashes under s. 529, that decision is deemed without error until reversed by a Court of Appeal. Otherwise the second judge, ordinarily of the same jurisdiction, when assessing whether the "quashing" is or is not tantamount to an acquittal for the purpose of determining whether there is *autrefois acquit*, would have to determine whether his colleague was or was not in error in deciding to quash.

These concerns are underlined in a series of cases dealing with the refusal by a trial judge to grant the Crown's request for an adjournment, usually as a result of the unavailability of a key witness. In the first of the three cases I will refer to, the Crown stayed proceedings

pursuant to s. 508 of the *Code* and then laid a new information in order to re-institute proceedings. In the latter two cases, the Crown simply attempted to withdraw the charge with a view to relaying it and proceeding when the witness relied upon was available. I propose to quote from each of these three cases -- all of which resulted in the Court's ordering a stay of proceedings -- in order to capture some of the concerns to which I have alluded:

It is not the function of this Court to review the discretion of the Judge who refused the adjournment of the first information. Whatever dilemma the prosecution may face in subjecting a discretionary ruling of a lower Court to the scrutiny of a higher Court, the procedural expediency adopted in this case cannot be countenanced as a substitute for an appeal or prerogative proceeding

It is not too difficult to contemplate the evils where such a procedure could be extended to manoeuvre any trial proceeding before a Judge of choice.

Per Jones Prov. Ct. J. in *R. v. McAnish and Cook* (1973), 15 C.C.C. (2d) 494 (B.C.), at p. 495.

It seems quite apparent that the purported withdrawal of the informations at that stage after an unsuccessful attempt for an adjournment, was a move designed to circumvent the Judge's ruling which they found unsatisfactory The Crown have [*sic*] simply ignored the dismissals of the Court and re-laid the informations

When the accused is brought back to face the same charge, that was disposed of by the Court, without any ruling by a higher Court as to the propriety of the lower Court's ruling, it does not appear to the accused or the public, that the administration of justice is impartial, but rather that it is something to be manipulated by the Crown.

Per Crossland Prov. Ct. J. in *R. v. Scheller (No. 1)* (1976), 32 C.C.C. (2d) 273 (Ont.), at pp. 278 and 283.

I find that the procedure adopted by the Crown in this case of withdrawing the charge and re-laying it subsequently was calculated to circumvent the Judge's refusal to grant an adjournment. It was an affront to the dignity both of the Provincial Court Judge and the relevant appellate authorities. More important, it constituted an attack upon the judicial system itself by an endeavour to bypass or disregard judicial authority in an endeavour to take the control of a criminal proceeding out of the hands of the appropriate judicial officer.

Per Vanek Prov. Ct. J. in *R. v. Weightman and Cunningham* (1977), 37 C.C.C. (2d) 303 (Ont.), at pp. 317-18.

I recognize that each of these cases can be readily distinguished from the present case; indeed, a key factor mentioned in *R. v. McAnish and Cook* was that the Crown laid a new information instead of proceeding as permitted by s. 508(2) of the *Criminal Code*, as the Crown did here. Nevertheless, the concerns which they enunciate are the very concerns raised in this case. They suggest at the very least that each concern must be carefully considered to ensure that the unfairness and oppressiveness amounting to abuse of process are not present here.

Application of the Law to the Facts of This Case

The Court of Appeal found there was no abuse of process or *Charter* violation in the Crown's staying of proceedings before the first judge after the adverse ruling, and then recommencing them before a new judge. It stated that Crown counsel was not simply circumventing an unfavourable ruling, but was protecting an important public interest. Observing that the use of a stay must remain subject to judicial review, it concluded that "having regard to the public interests with which the Crown was concerned, there was compelling reason to stay the proceedings".

In essence, the Court of Appeal is saying that the use of a stay to circumvent an adverse ruling is legitimate because the Crown had a good reason founded in public interest for following the course it did. I question whether such reasoning is sufficient to avoid the inference of abuse of process. As this Court stated in *Keyowski, supra*, the Crown's good faith and motive are only two of the factors to be considered in determining whether an abuse of process is made out. The same has repeatedly been held with respect to *Charter* breaches;

under the *Charter* lack of good faith and motive are irrelevant on the question of whether the accused's rights have been breached, although they may be considered under s. 24(2) in determining the use to which evidence obtained as a result of a breach may be put. It would appear at least necessary to take the further step of examining the magnitude of the affront to justice and fairness against the public interest in prosecution. The reasoning of the Court of Appeal, moreover, fails to fully address the real concerns raised by the Crown's conduct -- concerns relating to judge-shopping, the impartiality of the administration of justice and the integrity and dignity of the judicial process.

I have the same concerns with regard to the reasons of my colleague, Cory J. He, too, emphasizes that the Crown acted in good faith and that its actions were not abusive, in the sense that they were aimed at protecting the identity of a police informer. This, while relevant, is insufficient in itself to justify an abuse of process.

Cory J. makes two further points. The Crown, he says, had no alternative but to stay the trial in order to fulfil its duty. I cannot agree. The Crown, faced with the evidentiary ruling which might have led to disclosure of the informer's identity, could have stood the witness down and declined to call further evidence. The result would probably have been an acquittal. The Crown then could have appealed the acquittal on the ground of the judge's erroneous ruling in the usual way, asking for a new trial. This is what happened in *R. v. Banas and Haverkamp* (1982), 36 O.R. (2d) 164. There the Ontario Court of Appeal allowed an appeal from an acquittal made after the Crown declined to lead evidence following an adverse ruling. Martin J.A. stated at p. 169:

We do not think that the Crown, in the circumstances, is precluded from appealing the directed verdict because Crown counsel decided not to continue with the trial which he considered would be fruitless and which would not result in a conviction due to

the erroneous exclusion of vital evidence. We are satisfied that if the trial judge had not excluded the evidence of the intercepted private communications the verdict of the jury would not necessarily have been the same.

If the Crown had followed this course in the case at bar the concerns to which I have alluded would have been avoided. The Crown could not be accused of judge-shopping, since the new trial would be the result of a court decision rather than a Crown decision. Concerns for the impartiality of the administration of justice would not arise, since the critical decision would be made by the Court of Appeal where the accused may be fully heard. And the integrity and dignity of the judicial process would be preserved, in that the adverse ruling would not be circumvented by the act of the Crown, but would be properly set aside by an appellate court.

Finally, Cory J. alludes to the fact that the accused was not prejudiced by way of delay since he was at all times in custody on another matter. Generally speaking (and leaving to one side the question of trial delay under s. 11(b) of the *Charter* where differing views have been expressed) it is not incumbent upon an accused to demonstrate actual prejudice as a condition of being able to rely on his *Charter* rights. Nor does prejudice figure prominently in the jurisprudence on abuse of process.

Finding myself unconvinced by the reasons enunciated in the court below or by Cory J. for the proposition that abuse of process or breach of the *Charter* has not been made out, I find it necessary to embark on my own analysis. Guidance as to the content of "oppressive", "vexatious" and "contrary to the fundamental principles of justice", the basic test for abuse of process, may be had from the cases which have considered that doctrine. Those cases invoke concerns for the fairness of the process from the vantage point of the accused as well as the public interest in proper functioning of the judicial system. The specific concerns raised in this case involve the spectre of judge-shopping, concern for impartiality of the judicial process,

and concern for the maintenance of the integrity and dignity of the judicial system and the judges within it. These concerns must be balanced against the public interest in prosecuting crimes to ascertain whether they outweigh that interest with the result that allowing the proceedings to stand would tarnish the image of the court.

Each of the concerns I have raised may be seen to involve a fundamental principle of justice underlying our community's sense of fair play and justice. A system that allows the Crown an advantage in choosing or changing judges, a system which either in fact or appearance is partial, a system which permits a judge's ruling to be circumvented other than by the normal appeal process -- such a system would be open to the charge that it offended the fundamental principles of justice upon which our society rests. By the same token, proceedings which permit such abuses might be characterized as "vexatious" or "unfair".

The question is whether the apparent concerns are of such gravity that they may be said to outweigh the public interest. In my view the answer is yes. The public has an interest in prosecuting crimes as well as in protecting the identity of informers. But, as I have already suggested, both these interests could have been met by adopting the alternative of calling no further evidence and appealing the resulting acquittal. In these circumstances, it cannot be said that the public interest justifies or offsets the affront to justice and fairness involved in the course the Crown chose to follow. The situation, moreover, falls within the rubric of "the clearest of cases". The deviation from the fundamental principles of justice is clear and, being unnecessary, incapable of justification. I conclude that the requirements for abuse of process are clearly met in this case.

I conclude that the Crown's conduct in staying the proceedings to avoid an adverse judicial ruling and then recommencing them establishes the case for abuse of process. Having so

concluded, it is unnecessary to consider the position under the *Charter*. I leave the question of remedy to later in these reasons.

The Trial Judge's Refusal to Receive the Evidence of Ross

In the course of the second trial, the trial judge granted an adjournment so the defence could subpoena a witness named Ross whom the defence wished to question on the issue of entrapment. Ross did not arrive until counsel for the Crown and for one of the accused had completed their submissions. The trial judge refused to permit Ross to be called at this stage.

The record in the case on appeal reveals there was evidence that the first conversation between the police officer and the appellant took place at Ross's auto body shop, that the police officer had previous knowledge of Ross, and that the police officer and Ross were talking when the appellant arrived. There was also evidence that the appellant had bought a car from Ross which he later used as collateral in the drug transaction with the police officer.

And, finally, there was evidence that Ross was arrested "in relation to these matters", simultaneously with the appellant and his co-accused, and that there were no reasonable and probable grounds to arrest Ross. The charges against Ross were not proceeded with.

This evidence suggests that Ross was connected with the transaction giving rise to the charges. It is sufficient to raise questions about the nature of his involvement. One of the explanations might have been that he assisted in entrapping the accused. Notwithstanding the lack of other positive evidence to that point indicating entrapment, I cannot concur in the view that there was "no real basis for permitting Ross to testify".

Notwithstanding the possible relevance of Ross's evidence, I would not interfere with the trial judge's exercise of her discretion to refuse to hear Ross, had the proposed evidence related to the merits of the case.

This, however, was not the case in my view. Ross's evidence was tendered not on the principal question of guilt or innocence, but on the subsidiary issue of entrapment. The issue of entrapment must be determined apart from the issue of guilt or innocence: *R. v. Mack*, [1988] 2 S.C.R. 903. It is a policy-related issue. The only question is whether the entrapment constitutes an abuse of process requiring that the proceedings be stayed or set aside. The distinction between the question of guilt or innocence, and the subsidiary issue of entrapment, is underlined by the fact that in a jury trial the issue of entrapment is decided by the trial judge alone, after the jury has returned its verdict on the guilt or innocence of the accused.

This Court has not yet laid down a definitive procedure to govern the issue of entrapment, apart from emphasizing that the question is separate from the trial *per se*. As Lamer J. (as he then was) stated in *Mack*, at p. 972:

. . . the guilt or innocence of the accused must be determined apart from evidence which is relevant only to the issue of entrapment. This protects the right of an accused to an acquittal where the circumstances so warrant. If the jury decides the accused has committed all of the elements of the crime, it is then open to the judge to stay the proceedings because of entrapment by refusing to register a conviction. It is not necessary nor advisable in this case to expand on the details of procedure . . . the guilt or innocence of the accused is not in issue at the time an entrapment claim is to be decided . . .

At the time when Ross appeared, the trial on the issue of guilt or innocence was in the process of being concluded. The evidence was in and the submissions of law were underway. The question is whether it was too late at this point to raise the issue of entrapment. The trial judge held it was, treating the issue of entrapment as one which must be raised in the course

of the trial proper. Thus she said: "There is no evidence in this trial that [Ross] would assist in an entrapment defence. So I can't see the purpose." [Emphasis added.]

Following the logic in *Mack*, I think the answer to the question of whether it was too late to receive the evidence of Ross because the relevance of his evidence had not been established in the course of the trial must be negative. Without deciding that evidence of entrapment cannot or should not be led during the course of a trial directed to determining the guilt or innocence of the accused, *Mack* seems to make it clear that the decision on entrapment is one which must be made separately from the issue of guilt or innocence. In these circumstances, I think the accused should have the right, if he or she wishes, to call evidence as to entrapment, after the case on guilt or innocence is completed. In many cases, it will be to the advantage of the accused to delay the evidence on entrapment to this stage. For example, the accused might not wish to take the stand during the trial of guilt or innocence, as is his or her right, but might wish to do so later on the subsequent issue of entrapment. Implicit in the notion of entrapment is the concession of having committed at least the *actus reus* of the offence; fairness suggests that the accused should not be obliged to call evidence on this question until after the principal issue of his or her guilt or innocence has been determined. This is the logic behind the separation of process dictated by *Mack*.

In consequence, I am of the view that the trial judge did not have a discretion to refuse to accept the evidence of Ross on the issue of entrapment, provided that relevancy -- the basic condition of the reception of any evidence -- was established. The guilt or innocence of the accused not yet having been determined, the question of entrapment had not yet arisen for decision. The accused was entitled, if he chose, to call evidence relevant to entrapment after the verdict on his guilt. The trial judge did not let him do this. Unless the evidence was clearly irrelevant, that constituted an error. As I have already indicated, it was far from clear

that Ross's evidence would have been irrelevant; one explanation for Ross's connection with the transaction could have been that he was used to entrap the accused.

Remedy

The appellant asks that the appeal be allowed and for a stay of proceedings or a new trial. Were the only error that of refusal to hear Ross, I would be inclined to direct a hearing on the issue of entrapment. However, the Crown's use of a stay and recommencement of proceedings constitutes an abuse of process which could not be rectified by a new trial. This suggests that the proper result is to allow the appeal and enter a stay of proceedings.

Conclusion

I would allow the appeal and enter a stay of proceedings.

//Sopinka J.//

The following are the reasons delivered by

SOPINKA J. (dissenting) -- I have had the advantage of reading the judgment prepared in this appeal by Justice Cory. I agree with my colleague's reasons in respect of the appellant's arguments concerning s. 508 of the *Criminal Code*, R.S.C. 1970, c. C-34, and the cross-examination of the police officer. I am further of the view that the learned trial judge properly exercised her discretion in refusing to issue a material witness warrant. However, I respectfully disagree with my colleague on the issue of the propriety of the trial judge's refusal to reopen the case to permit the appellant to call the witness Ross, once it became apparent that

Ross had appeared. With respect to this issue I agree with the conclusion reached by Justice McLachlin and with her reasons.

Notwithstanding error on the part of the trial judge, it does not follow that there need be a new trial. In view of the procedure required by *R. v. Mack*, [1988] 2 S.C.R. 903, the substantive verdict of guilty rendered by the trial judge need not be disturbed, since the evidence relevant to a *Mack* application is not relevant to culpability: *Mack, supra*, at pp. 965, 972 and 975. In order to rectify the error and restore the appellant's opportunity to make full answer and defence, it is only necessary to vacate the formal conviction and remit the matter to the trial judge for an evidentiary hearing on the issue of entrapment. I would so order.

Appeal dismissed, LAMER C.J. and LA FOREST, SOPINKA and MCLACHLIN JJ. dissenting.

Solicitors for the appellant: Hamilton, Shilton & Shaw, Toronto.

Solicitors for the respondent: John C. Tait, Ottawa.

Solicitors for the intervener: The Attorney General of Ontario, Toronto.