29/96

SUPREME COURT OF VICTORIA

BROWN v WYND and ANOR

O'Bryan J

23, 24 July 1996

PRACTICE AND PROCEDURE – ABUSE OF PROCESS – ALLEGED AGREEMENT TO WITHDRAW CHARGES IF PLEA OF GUILTY TO OTHER CHARGES – OTHER CHARGES SOUGHT TO BE SUBSEQUENTLY PROCEEDED WITH – WHETHER AN ABUSE OF PROCESS – WHETHER MAGISTRATE SHOULD HEAR AND DETERMINE AN APPLICATION TO STAY BEFORE PROCEEDING WITH SUMMARY CHARGES.

B. was charged with a number of indictable offences and 59 counts of unlawful possession. When B. was committed for trial on the indictable offences, the summary charges were adjourned to a date to be fixed. During the trial, B. changed his plea to "guilty" and was later sentenced. When the 59 summary charges were subsequently listed for hearing before a magistrate, B. submitted that they should be stayed as an abuse of process on the ground that at the trial an agreement was allegedly made between the Prosecutor and B.'s legal advisers that in consideration of B.'s pleading guilty the summary charges would not be prosecuted. The magistrate declined to rule upon B.'s submission. Upon application for mandamus —

HELD: Application granted.
(1) The magistrate was required to hear and determine the application to stay the proceedings before commencing to hear and determine the charges.

(2) If B. satisfied the court that his legal advisers reached the agreement as alleged, the Crown and/or the informant could not resile from such an agreement and any subsequent hearing of the summary charges would constitute an abuse of process.
***R v Swingler* [1996] VicRp 17; [1996] 1 VR 257; (1995) 80 A Crim R 471, referred to.**

O'BRYAN J: [1] Application for judicial review of an order or determination by a magistrate in the Magistrates' Court at Warrnambool on 3 May 1996, pursuant to Order 56 of the *Rules of Civil Procedure in Victoria*. The relief or remedy claimed by the plaintiff is in the nature of mandamus, based upon the refusal of the magistrate to hear evidence relevant to an application by the plaintiff (the defendant in the court below) that charges pending against him in the Magistrates' Court should be stayed as an abuse of process.

On 26 July 1994 the plaintiff was charged with a number of indictable offences including, trafficking in a drug of dependence (two charges), theft (multiple charges), handling stolen property and 59 counts of unlawful possession of items of property suspected of being stolen or unlawfully obtained. These charges came before the Magistrates' Court at Warrnambool in due course. The plaintiff was subsequently committed for trial in the County Court at Warrnambool on a number of indictable offences and 59 counts of unlawful possession, which are triable summarily, were adjourned *sine die*. In August 1995, in the County Court at Warrnambool, three presentments were filed containing, in ZA202, two counts of trafficking in a drug of dependence, in ZA203, 11 counts of handling stolen goods and nine counts of theft, and in ZA438, two counts of handling stolen goods.

To these presentments the plaintiff pleaded not guilty and the trial commenced. On 18 August, being the fourth day of trial, following discussions between the plaintiff's legal **[2]** advisers and the prosecutor, the plaintiff changed his plea from not guilty to guilty to 15 counts in the three presentments. Thirteen of these counts involved handling stolen property.

The plaintiff alleges that before he agreed to plead guilty to the 15 counts his legal advisers informed him that they had reached an agreement with the prosecutor for the Queen that in consideration of his change of plea to guilty the Crown would not prosecute further in the Magistrates' Court the 59 summary offences of unlawful possession.

This Court is unable to make any finding of fact in relation to the alleged agreement.

Evidence of the terms of the agreement has not been placed before the Court in this proceeding. If an agreement was made Mr Walmsley, of counsel, who appeared for the plaintiff in the County Court trial, and Mr Kemp, his instructing solicitor, participated in discussions with Mr Moore, the prosecutor for the Queen and possibly other persons which resulted in an agreement. The plaintiff had deposed that he asked Mr Walmsley and Mr Kemp to make sure that in pleading guilty to counts in the County Court: "This finished and finalised all my matters, including the Magistrates' Court charges, which were outstanding." The plaintiff changed his plea to guilty and was remanded to Melbourne for plea and sentence in October.

On 12 October the plaintiff was sentenced in the County Court to serve a term of imprisonment. Some time later he was informed that the informant to the summary offences of unlawful possession intended to proceed in the **[3]** Magistrates' Court at Warrnambool. On 3 May 1996, when the summary offences were called on for hearing, counsel for the plaintiff submitted to the learned magistrate that the plaintiff intended to apply to have the charges stayed as an abuse of process on account of the agreement made in the County Court.

In an affidavit made by the plaintiff and filed herein the plaintiff deposed: "Mr Simon of counsel then indicated there were two further witnesses who would give evidence about the discussions that took place in the County Court at Warrnambool". (para 19). "The magistrate then indicated that he did not believe that he should determine what took place in the County Court and that he would rule on that after lunch.

After the luncheon adjournment the magistrate ruled that he would not allow any further evidence to be called on the application." (para 20). The magistrate ruled that he was not going to hear evidence of what took place in the County Court, that he had spoken to another magistrate and he agreed that it was not appropriate to look into what had taken place in another jurisdiction; that he would therefore not allow any more evidence to be called but would hear the submissions of counsel.

Mr Silbert who appeared for the first defendant conceded that the Magistrates' Court has jurisdiction to determine an application to stay a proceeding as an abuse of process. In my opinion, as a matter of convenience and fairness, this issue should have been determined before the court began to hear the charges against the plaintiff. If the plaintiff satisfies the court that his legal **[4]** advisers reached an agreement with the prosecutor for the Queen that in consideration of him pleading guilty in the County Court to a number of indictable offences, proceedings pending in the Magistrates' Court in respect of 59 summary offences would not be prosecuted, the subsequent hearing of those charges on 3 May 1996 constituted an abuse of process.

The Crown and/or the informant could not resile from such an agreement: Cf. *Williamson v Trainor* [1992] 2 Qd R 572; (1991) 56 A Crim R 102, a decision of the Queensland Court of Criminal Appeal; *R v Swingler* [1996] VicRp 17; [1996] 1 VR 257 at 264-265; (1995) 80 A Crim R 471. In *Swingler* the Court of Appeal said:

> "It is by now well accepted that a superior court can, in the exercise of its supervisory jurisdiction, stay a prosecution if it is satisfied that, in the circumstances, it would be oppressive to allow the prosecution to proceed.
>
> > 'The inherent jurisdiction of a superior court to stay its proceedings on grounds of abuse of process extends to all those categories of cases in which the processes and procedures of the Court which exist to administer justice with fairness and impartiality may be converted to instruments of injustice or unfairness.'
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> *Walton v Gardiner* [1993] HCA 77; (1993) 112 ALR 289; (1993) 67 ALJR 485; (1993) 177 CLR 378 at 392-3 per Mason CJ, Deane and Dawson JJ. See also *Moevao v Department of Labour* (1980) 1 NZLR 464 at 481-2 per Richardson J.
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> This jurisdiction has been exercised in recent years permanently to stay proceedings in a variety of circumstances: for example, to stay a hearing of disciplinary charges alleging conduct where the court had previously granted a permanent stay of other charges alleging the same conduct (*Walton v Gardiner*), above); where the Crown had presented the accused for trial on charges in respect of which he had previously been granted an immunity from prosecution (*R v Georgiadis* [1984] VicRp 82; [1984] VR 1030); where an investigating police officer, with apparent authority, had promised a suspect that he would not be prosecuted because it was believed he would be a Crown witness (*R v Croydon Justices; Ex parte Dean* [1993] QB 769; [1993] 3 All ER 129; (1993) 98 Cr App R 76;

[1993] Crim LR 759; [1993] 3 WLR 198) or for other good reason (*R v Tilley* (1992) 109 FLR 155); or even in circumstances where the prosecuting authority had used its power **[5]** to file an ex officio indictment after discharge by committing magistrates: *R v Gagliardi and Fillipidis* (1987) 45 SASR 418; (1987) 26 A Crim R 391.

The circumstances which will lead a court to exercise this jurisdiction have variously been described as "exceptional" or "rare". It is a power which should be used "sparingly and with the utmost caution": *Jago v District Court of NSW* [1989] HCA 46; (1989) 168 CLR 23 at 76; 87 ALR 577; (1989) 63 ALJR 640; 41 A Crim R 307 per Gaudron J. It is a jurisdiction which will only be exercised where it is readily apparent that it should be exercised to prevent "prosecutorial oppression". It is a power which

> 'is not concerned with the manner of a person's trial, but is concerned with the question whether that person should be tried at all. There are no set categories of case. Whilst instances of the exercise of the power will be rare, it will certainly be invoked where the evidence indicates that it would be unacceptably oppressive or unfair to an accused or an affront to the public conscience to permit the prosecution to proceed.'*R v Gagliardi and Fillipidis* at 433."

I repeat, I am unable to make any findings upon the alleged agreement. The evidence has never been heard or tested in a court of competent jurisdiction. The complaint of the plaintiff is that the learned magistrate failed to perform his duty, which required him to hear and determine the application to stay the proceeding as an abuse of process before he commenced to hear the case involving the 59 charges. Mr Silbert, for the Crown, very properly conceded that the learned magistrate was required to hear and determine the application. Consequently, the remedy sought by the plaintiff will be granted in this court and the following orders are made.

(1) That the further hearing of the 59 charges in the Magistrates' Court at Warrnambool is stayed until the hearing and determination of an application by the **[6]** plaintiff that the hearing of the 59 charges be stayed as an abuse of process.

(2) That the learned magistrate sitting at Warrnambool Magistrates' Court hear and determine the application of Maxwell David Brown that 59 charges of unlawful possession be stayed as an abuse of process.

(3) That the plaintiff's costs of this proceeding be taxed and paid by the first named defendant.

(4) That an indemnity certificate be granted to the first-named defendant.

APPEARANCES: For the Appellants: Mr M Simon, counsel. Solicitors: Jonathan Kemp & Assoc. For the Respondent: Mr GJC Silbert, counsel. Solicitors: DPP.
