2011 ONSC 4365
Ontario Superior Court of Justice

McHale v. Ontario (Attorney General)

2011 CarswellOnt 5984, 2011 ONSC 4365, [2011] O.J. No. 3099, 239 C.R.R. (2d) 73, 96 W.C.B. (2d) 28

Gary McHale, Applicant and Attorney General (Ontario), Respondent

C.A. Tucker J.

Heard: April 25, 2011
Judgment: June 29, 2011
Docket: Cayuga CR 18/2010

Counsel: Gary McHale, for himself
John Nixon, for Respondent

Subject: Criminal; Public; Evidence; Constitutional

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Criminal law --- Victims' rights and third party remedies — Private prosecutions

Judicial review of prosecutor's statutory stay of proceedings — Requirement for abuse of process — In context of alleged "insurrection", informant swore out information commencing private prosecution — Counsel for Crown, who had allegedly been involved with private prosecutions previously instituted by informant, directed statutory stay of proceedings — Informant brought application for judicial review, alleging inter alia that Crown counsel showed bias — Application dismissed — Crown's discretion to stay private prosecution pursuant to s. 579(1) of Criminal Code is reviewable where decision to stay constitutes abuse of process — To constitute abuse of process in private prosecution stay case, "flagrant impropriety" must be established, being "misconduct bordering on corruption, violation of the law, bias or improper motive" — In present case no evidence of bias was shown, as on record stay was directed inter alia that "'riot act' had not been read to alleged participants in insurrection and, as such, the legal requirement of the charge could not be established" — Accordingly abuse of process was not made out and application must be dismissed.

Table of Authorities

Cases considered by *C.A. Tucker J.*:

Perks v. R. (1998), 26 C.E.L.R. (N.S.) 251, 57 O.T.C. 21, 1998 CarswellOnt 416 (Ont. Gen. Div.) — followed

R. v. LaForme (1995), [1996] 1 C.N.L.R. 193, 1995 CarswellOnt 4181 (Ont. Prov. Div.) — considered

R. v. Larosa (2002), 163 O.A.C. 108, 98 C.R.R. (2d) 210, 2002 CarswellOnt 2787, 166 C.C.C. (3d) 449 (Ont. C.A.) — considered

R. v. McHale (2010), 256 C.C.C. (3d) 26, 261 O.A.C. 354, 76 C.R. (6th) 371, 2010 CarswellOnt 3280, 2010 ONCA 361 (Ont. C.A.) — followed

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

R. v. Power (1994), 2 M.V.R. (3d) 161, [1994] 1 S.C.R. 601, 89 C.C.C. (3d) 1, 117 Nfld. & P.E.I.R. 269, 365 A.P.R. 269, 165 N.R. 241, 29 C.R. (4th) 1, 1994 CarswellNfld 9, 1994 CarswellNfld 278 (S.C.C.) — considered

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 15 — referred to

Criminal Code, R.S.C. 1985, c. C-46

Generally — referred to

s. 579 — referred to

s. 579(1) — considered

APPLICATION by informant for judicial review of decision of Crown Attorney directing stay of proceedings instituted by private prosecution.

***C.A. Tucker J.*:**

Issue

1 Should the court review a prosecutorial stay of a private prosecution on the facts of this case?

Preliminary Objection

2 The Crown sought to strike the application of Mr. McHale at the outset of the hearing. The argument of the Crown is the remedy sought by the applicant to review and quash the actions of the Attorney General when it stayed the information laid by the applicant in a private prosecution has no basis in law and no case law to support it.

3 It is the Crown's position based upon the case of *R. v. Power*, [1994] S.C.J. No. 29 (S.C.C.), that the court's ability is limited to halt prosecutions where an accused's rights under the *Charter* have been infringed, and does not extend to allow for judicial review and the resulting application of extraordinary remedies. The Crown acknowledges that *Power* also finds that there may be an abuse of process in a case where the Crown refused to continue a trial.

4 It is acknowledged, however, "that courts have an inherent and residual discretion to prevent an abuse of the court process. In *R. v. Power*, *supra*, Justice L'Heureux-Dubé states at para. 12:

> Where there is conspicuous evidence of improper motives or of bad faith or of an act so wrong that it violates the conscience of the community, such that it would genuinely be unfair and indecent to proceed, then, and only then, should courts intervene to prevent an abuse of process which could bring the administration of justice into disrepute. Cases of this nature will be extremely rare.

5 Although there may not be any case in Canada where the court has overturned a prosecutorial stay, it is clear that the possibility of such is discussed in the case law, albeit described as occurring only in the rarest of cases where there is clear evidence of abuse of process. I quote from *Perks v. R.*, [1998] O.J. No. 421 (Ont. Gen. Div.), at para. 11:

> Here the Applicant wants to force a prosecution to proceed when the Attorney General believes it to be contrary to the public interest. While there are cases which have applied the same test to applications to force a prosecution to continue as

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

> to applications to stay a prosecution ... I note that in none of these cases was the application successful. For my part, I view the circumstances in which such an application could be successful, or in which an evidentiary hearing should be permitted, to be even more circumscribed than described in cases like Power and Durette. I need not attempt to exhaustively define the circumstances, but a case where corruption on the part of the prosecutor could be shown is the one obvious example. Failing that, however, I can at present imagine no other situation which would call for the extraordinary intervention of a judge to place an accused in jeopardy, which generally involves potential penal consequences, in contradiction to the express view of the Attorney General. As L'Heureux-Dubé noted in Power, at p. 19, "In our system, a judge does not have the authority to tell prosecutors which crimes to prosecute or when to prosecute them." Nor in my view, does a judge have the authority to interfere with a prosecutor's decision to stop a prosecution.
>
> 12 For these reasons, I am of the view that the Applicant was not entitled to an evidentiary hearing before the Justice of the Peace, and that there is no basis to make an order of mandamus to compel such a hearing.

Accordingly, the preliminary objection of the Crown I find to be unsuccessful.

Analysis and Decision

6 It is clear from the decision of the Court of Appeal in *R. v. McHale*, [2010] O.J. No. 2030 (Ont. C.A.), that the Crown's right to withdrawal versus its right to enter a stay are two different processes which may be exercised in different ways. A withdrawal arises from common law while a stay is a function of statute. Accordingly, in that case the court held that the pre-enquete was required to be heard prior to the Crown entering the withdrawal. The same does not hold true for a stay. The Crown by statute may exercise its discretion to stay a proceeding pursuant to s.579(1) "at any time after any proceedings in relation to the accused ... are commenced".

7 At para. 90 the court stated in that case:

> It may seem anomalous to some that of the two available steps to terminate proceedings initiated by a private information one is available at any time after the information is laid, but the other not until a determination has been made that process shall issue. The difference resides in the source of the authority. The common law, infused by policy considerations, compels one conclusion, the plain language of the statute, another.

In this case, a stay was entered and there was no need in law for the pre-enquete to weigh the proposed evidence.

8 Here Mr. McHale alleges bias, the illegal use of the Crown's discretionary authority, breach of the *Criminal Code* in obstruction of justice, breach of the s.15 *Charter* by showing bias in favour of the police, and breach of the will of parliament.

9 In support of these many allegations we have references to other private prosecutions in which Mr. McHale was involved, references to the Law Reform Commission Report that recommended private prosecutions, the general state of "insurrection" in Caledonia, and what is said to be the personal beliefs of the Crown, in the instant case.

10 I find little of this information is either admissible and/or relevant to the issue at hand. I cannot take from a handful of examples of private prosecutions stayed by the Crown that the Crown is by these actions somehow biased in favour of the police against all private prosecutions. Firstly in these cases, it appears that the Crown had a number of different reasons for not proceeding, none of which leads necessarily to the conclusion that the Crown in Haldimand is "pro-police". The Crown had the discretion to take these actions and it did for reasons which were given on the record. Secondly, I am not in a position to determine the total number of private prosecutions that are commenced or the number that are pursued or stayed without further information without that I will not reach a conclusion that all Crowns are biased in favour of the police and/or that the office of the Crown is biased against private prosecution.

11 Nor can I take judicial notice of the state of law in Haldimand County generally at the time of the alleged breach of the Criminal Code based again on hearsay evidence.

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

12 Mr. McHale filed his own affidavit in his own application a reported discussion he had with Mr. King, the Crown in the case at issue. At best, this is untested by cross-examination and at worst it is hearsay and self-serving.

13 This leaves me with only the acceptable evidence in this case, which is the reasons given by the prosecutors for staying the action. The Crown's position in law may be wrong, for example, the matter had to be heard before a provincial court judge rather than a justice of the peace, or that a "proclamation" was required in order to proceed with the prosecution, but that is not for me to determine on this hearing.

14 At para. 6 of *R. v. LaForme* [1995 CarswellOnt 4181 (Ont. Prov. Div.)] the court held as follows:

> ... a wrong or incorrect decision by the Crown not to prosecute would not necessarily constitute a flagrant impropriety.

15 At para. 8 in *Perks v. R.* flagrant impropriety was described as "misconduct bordering on corruption, violation of the law, bias or improper motive".

16 In *R. v. Larosa*, [2002] O.J. No. 3219 (Ont. C.A.) para. 79 the court held that "an allegation must be supportable by the record before the court, or if the record is lacking or insufficient, by an offer of proof". Here the record is sufficient and it is clear.

17 What is relevant to the court is that a reasoned explanation was provided to the court that discloses no bias. The Crown, Mr. King, indicated to the court that he was staying the information pursuant to s.579, that there were several problems with the prosecution, including the fact that the "riot act" had not been read and, as such, the legal requirement of the charge could not be established. Accordingly, the record here as in *Perks v. R.*, *supra*, para. 9, "discloses no basis to embark on an evidentiary hearing."

18 Accordingly, the application is dismissed.

Application dismissed.

End of Document Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.