R. v. LEONI and FOUR OTHERS

SUPREME COURT (Schofield, C.J.): November 11th, 1998

Criminal Procedure—stay of proceedings—autrefois acquit/convict—accused not triable for more serious offence arising from substantially same facts as offence already tried—Crown may show special circumstances against ordering stay—public interest in punishing serious offences insufficient

The accused were charged with importation and possession of cannabis and possession with intent to supply.

The accused were arrested by the police following a chase within

Gibraltar waters during which they were seen to throw several packages overboard. The jettisoned packages sank and could not be immediately recovered. The accused, who claimed that the packages contained tobacco, were charged with jettisoning cargo and appeared before the magistrates' court. Since they had neither been arrested for nor charged with drugs-related offences, the Crown invited the magistrates to adjourn the proceedings until a further search for the packages had been made, stating that it would not be possible to lay further charges without further evidence. At the request of the accused and on the advice of the clerk of the court that it was open to them to do so, the magistrates dealt with the existing charges to which the accused pleaded guilty, and sentenced them accordingly.

Upon leaving the court, the accused were re-arrested on charges relating to the possession of cannabis and were later charged with the present offences following recovery of a bale of cannabis from the sea. The accused applied to the Supreme Court for the proceedings to be stayed to prevent an abuse of process.

They submitted that (a) since the current charges arose out of the same facts as those on which they had already been convicted and sentenced, and since they were more serious charges than those already answered, it would be an abuse of process for the trial to continue; and (b) it was for the Crown to show that there were special circumstances in which the court should not order a stay of proceedings.

The Crown submitted in reply that (a) the present charges were so different from those already laid that the principles referred to by the accused did not apply in this case; in any event, (b) there were special circumstances warranting the continuation of the trial (i) in the public interest, since the accused should not be allowed to escape punishment for drugs-related offences, and (ii) on the basis that the magistrates should have adjourned the earlier hearing to permit all possible charges to be laid together; and (c) there would be no prejudice to the accused, since the jury would not be informed of the existing convictions.

Held, staying the proceedings:

(1) It was settled law that in the absence of special circumstances, no person should be punished a second time for an offence arising out of the same facts as an offence already dealt with by the court and that an accused should not be tried again on those facts for a more serious offence on an ascending scale of gravity. It would therefore be an abuse of process for the accused to be tried for further offences relating to cannabis, having already pleaded guilty to lesser charges of jettisoning cargo. Since the offences shared common elements, the accused's earlier admissions would compromise their position on the present offences (page 410, lines 17–45).

(2) It was for the Crown to show that there were special circumstances why the court should not order a stay of the proceedings. These did not include the public interest in punishing drugs-related offences or, in this case, the magistrates' refusal to adjourn the earlier proceedings, since they

might well have decided differently if the accused had been arrested for the drugs offences prior to the hearing and the Crown had informed the bench of the danger that the more serious charges might be jeopardized by dealing with the lesser ones. The Crown could also have sought a review of the magistrates' refusal, thereby achieving an automatic stay of proceedings. Accordingly, the proceedings would be stayed (page 410, line 45 – page 412, line 30).

Cases cited:
(1) *Connelly* v. *D.P.P.*, [1964] 2 A.C. 1254; [1964] 2 All E.R. 401, applied.
(2) *R.* v. *Beedie*, [1998] Q.B. 688; [1997] 2 Cr. App. R. 167, applied.
(3) *R.* v. *Elrington* (1861), 1 B. & S. 688; 121 E.R. 870, applied.

D.L. de Silva, Q.C. and *R. Pilley* for the accused;
A.A. Trinidad, Senior Crown Counsel, and *C. Pitto* for the Crown.

SCHOFIELD, C.J.: At about 3.00 a.m. on April 28th, 1998, police officers on duty in a police launch within Gibraltar waters sighted the five defendants in a semi-rigid inflatable craft. When the defendants saw the police launch they accelerated away and, during a chase, threw several square blue and yellow coloured packages overboard. Eventually the craft was boarded by police officers and the defendants were arrested for jettisoning cargo.

During his interview with the police the defendant Leoni said that the cargo jettisoned was tobacco. Others of the defendants denied knowledge of any cargo. The police officers effecting the arrests believed that the cargo jettisoned was cannabis. I am told that the bales sank immediately, which is the way with bales of cannabis. Bales of tobacco float for a while before they sink. Divers were sent down to recover the bales but nothing was recovered until, at the third attempt, a bale containing cannabis was recovered on April 30th, 1998 at about 9.15 a.m. Other bales containing cannabis were recovered on successive days. There is forensic evidence connecting the bales with one or more of the defendants.

Meanwhile, on April 29th, 1998, before the first bale was recovered, the defendants were taken before the magistrates' court. They were each charged with an offence of jettisoning cargo and Leoni, who was the navigator of their craft, was further charged with obstructing the police officers and of navigating without proper navigation lights. Despite the suspicions of the police officers arresting the defendants, they were neither arrested for, nor charged with, offences in relation to the possession of cannabis. Of course by the time of their appearance before the justices, the bales of cannabis had not been recovered. This could account for the failure of the Crown to charge the defendants with any drugs-related offence but does not account for the failure to arrest them for such an offence.

In the event, the justices were told by Crown Counsel that the charges which the defendants were facing were holding charges and he invited them to adjourn the hearing on the basis that investigations were ongoing. He told the justices that further serious charges might result from the search for the bales. The justices inquired of Crown Counsel whether he was laying further charges against the defendants, but he felt unable to do so because at that stage the bales had not been recovered. Defence counsel insisted that the charges already before the court be put to them and further submissions were made to the justices, after which they retired to consider whether to grant an adjournment.

The justices were advised by their clerk that the defendants were entitled to plead to the charges they faced and have the matter disposed of. He also advised them that they were entitled to adjourn the case for sentence after convicting the defendants. The justices determined to deal with matters on that day and Crown Counsel presented the facts after the defendants pleaded guilty to the charges they faced. After defence counsel had addressed the court in mitigation, Leoni was sentenced to two months' imprisonment for the obstruction offence and was subjected to no separate penalty on the other charges. The other four defendants were each fined £1,500 on the one charge of jettisoning cargo, with a term of 90 days' imprisonment in default of payment.

Immediately they left the magistrates' court, all five defendants were re-arrested by the police, it seems on charges relating to the possession of cannabis. By this time, of course, none of the bales had been recovered by the police divers. After the first bale was recovered they were each charged with offences of possession of cannabis, importation of cannabis and possession of cannabis with intent to supply and were taken before the justices again on April 30th, 1998. These are the charges which are now before this court following the committal of the defendants by the Stipendiary Magistrate. All the defendants have been held in custody since their arrest. The defendants Leoni and Pelle are Italian nationals and Saidi, Abdeselam and Ahmed are Moroccans.

The application before me is for the proceedings to be stayed on the ground that to continue with the trial would be an abuse of the court's process. I have been referred to the English Court of Appeal decision in *R.* v. *Beedie* (2), where it was held that whilst the plea of *autrefois convict* is only applicable where the same offence is alleged in the second indictment, the judge has a discretion to stay proceedings where the second offence arises out of the same or substantially the same set of facts as the first. The court went on to say that the discretion should be exercised in favour of a defendant unless the prosecution establishes that there are special circumstances for not doing so.

The facts of *Beedie* are that a woman died of carbon monoxide poisoning caused by the use of a defective gas fire at her bed-sit. The appellant was her landlord and had a duty under the Health and Safety at Work Act 1974 to

ensure that the appliance was maintained and repaired. The appellant was prosecuted under s.33 of that Act on the basis that he had not conducted his undertaking as a landlord so as to ensure, so far as was reasonably practicable, the victim's health and safety by maintaining the fire and flue in good repair and proper working order. The appellant pleaded guilty before the justices and was fined. A few weeks later, the appellant pleaded guilty to other offences in relation to other gas installations in the same premises and was fined. An inquest was held and the appellant was charged with manslaughter as a result of the verdict at the inquest.

The judge at first instance, after reviewing the leading House of Lords case of *Connelly* v. *D.P.P.* (1), rejected a plea of *autrefois convict* and proceeded with the trial, whereupon the defendant tendered a guilty plea. On appeal, the Court of Appeal held that the offence of manslaughter arose out of the same or substantially the same set of facts as the offence under s.33 of the Health and Safety at Work Act 1974 and that there were no special circumstances for not exercising their discretion in favour of the defendant, and allowed the appeal. Their Lordships identified two principles which apply to the instant case. The first, elicited from *Connelly* v. *D.P.P.*, is that no man should be punished twice for an offence arising out of the same or substantially the same set of facts. The second, enunciated as long ago as 1861 in the case of *R.* v. *Elrington* (3), was that no man should be tried again on the same facts for more serious offences on an ascending scale of gravity.

Mr. Trinidad for the Crown has argued that the offence of jettisoning cargo is so dissimilar to the offences that the defendants now face that these principles are not offended. He argues that the present charges, all drugs related, are of a different species to that of jettisoning cargo.

However, the facts which gave rise to the charge of jettisoning cargo are exactly the same facts as give rise to the new charges and those facts were in existence when the defendants appeared before the justices. It was simply the case that one piece of evidence was not available to support the facts giving rise to the charges now before the court. Where defendants are accused of the unlawful importation of cannabis jettisoned in a chase at sea, as in this case, there is an ascending scale of charges, with the offences of importation and possession with intent to supply at the top end of the scale and a charge of jettisoning cargo at the bottom end of the scale. In the middle of the scale of charges is a charge of simple possession of cannabis. The charges arise out of the same facts, and admissions on one charge may impact upon others. In this case an admission by the defendants that they jettisoned the cargo is an admission of an act of control or possession of it. It is also an admission that they were within the territorial waters.

I find, therefore, that the offences facing the defendants in the indictment before me arise out of the same set of facts as the offence of jettisoning cargo and that they are on an ascending scale of gravity. That

being the case, following the decision in *Beedie* (2), I have to decide whether there are special circumstances for not exercising my discretion to stay the proceedings in favour of the defendants.

It is not in the public interest that those against whom there is evidence of such serious offences as those charged in this case should escape a trial. However, in *Beedie* it was held that the public interest in a prosecution for manslaughter and the concerns of the victim's family did not give rise to special circumstances. It is clear, therefore, that the public interest in a prosecution for offences of importation of cannabis and possession of cannabis with intent to supply cannot, in the instant case, amount to special circumstances.

It is argued by Mr. Trinidad that the decision of the justices not to adjourn the trial was an irrational decision in the light of their being informed of the investigations then underway. I do not find that the failure of the justices to grant an adjournment gives rise to special circumstances. In the first place, even if they were in error in refusing the adjournment and insisting on continuing with the trial on the lesser charges, that is not an error which should be visited upon these defendants. And it was always open to the Crown to seek a review of their decision and bring the matter before this court. That would have brought into effect a stay of the proceedings before the justices.

In any event, what information was before the justices? They asked whether there were other charges, presumably they meant already laid or imminent, and the facts before them were that the defendants had not even been arrested for drugs-related offences. Reasonable suspicion relating to the more serious offences existed in the minds of the police officers at that stage, for the defendants were arrested immediately following the hearing before the justices and before the bales of cannabis were raised from the sea. Yet no arrests had been made in connection with cannabis by the time of the defendants' appearance in court. Furthermore, neither Crown Counsel nor the clerk of the court informed the justices of the state of the law which put the more serious charges in jeopardy if they were to deal with the charges before them. Had the defendants been under arrest for the drugs offences and had the justices been warned of the dangers of their dealing with the charges before them they might well have come to a different decision and adjourned the case.

It could be argued that in his address to the justices, the prosecutor left the court and the defendants in no doubt that if bales of cannabis were recovered from the depths the defendants would have to face charges in connection with its importation and possession. However, defence counsel was entitled, on the authorities set out above, to advise the defendants that if they were dealt with for the charges they then faced, the Crown would not be entitled to bring the more serious charges. There is evidence that the defendants, once dealt with for the offences before the justices, thought that that was the end of the matter.

Mr. Trinidad has told the court that there will be no prejudice to a fair trial of these defendants on the charges they now face by their having pleaded guilty to the charges of jettisoning cargo, because the Attorney-General will give an undertaking not to refer to the pleas and convictions in the trial before the jury. However, it has been pointed out that there has been publicity in the press of the proceedings before the magistrates' court which may prejudice a fair trial. Be that as it may, the following passage from Rose, L.J. in *Beedie* (2) answers the argument ([1997] 2 Cr. App. R. at 175):

> "Mr. Smith's final submission was that the judge was wrong to conclude that the trial process was, in itself, capable of curing any risk of oppression or prejudice if evidence of the appellant's summary convictions and his admissions in evidence at the inquest were excluded from the jury's consideration under section 78 of the Police and Criminal Evidence Act 1984. This was to ignore the advantage to the prosecution of having a transcript of the appellant's evidence at the inquest on which cross-examination of him could be based. In any event, consideration of whether or not the appellant could have a fair trial, which would have been material to an application to stay for abuse of process because of delay, was inappropriate. A stay on such a ground is an exceptional course (see *Attorney-General's Reference (No. 1 of 1990)*…) and the *onus* is on the defence to show that, on the balance of probabilities, no fair trial can be held; whereas the general rule presently under consideration is that there should be a stay, and it is for the prosecution to show that, for special circumstances, there should not be."

I find that there are no special circumstances for not exercising my discretion in favour of the defendants and I order a stay of the proceedings against each of them on the charges for which they were committed for trial.

Order accordingly.