Wills v Trenerry [1999] NTSC 2

PARTIES:	SIMON WILLS
	v
	ROBIN LAURENCE TRENERRY
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising TERRITORY JURISDICTION
FILE NO:	232/1997 (9511867)
DELIVERED:	27 January 1999
HEARING DATES:	17 October 1997
JUDGMENT OF:	THOMAS J

REPRESENTATION:

Counsel:

Applicant:	R. Goldflam
Respondent:	A. Fraser

Solicitors:

Applicant:	NT Legal Aid Commission
Respondent:	Director of Public Prosecution

Judgment category classification:	C
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Wills v Trenerry [1999] NTSC 2
No. 232/1997 (9511867)

BETWEEN:

SIMON WILLS
Applicant

AND:

ROBIN LAURENCE TRENERRY
Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 27 January 1999)

THOMAS J*:*

[1] On 10 October 1997, Mr Goldflam, on behalf of the applicant, filed an application for a permanent stay of proceedings. The application was made pursuant to s339(1) of the *Criminal Code* or, in the alternative, pursuant to the inherent power of the Court.

[2] At the commencement of the hearing of this application on 17 October 1997, Mr Goldflam agreed with the submission made by Ms Fraser, counsel for the respondent, that the procedural requirements could be truncated under Order 56 of the *Supreme Court Rules* and the matter proceed to hearing forthwith.

[3] In view of the fact that the information laid in these proceedings was part heard before Mr Gillies SM to resume hearing in the Darwin Court of Summary Jurisdiction on 24 October 1997 and Mr Gillies' indication that he would abide the decision of this Court, I allowed the matter to proceed forthwith.

[4] Mr Goldflam also agreed with the submission made by Ms Fraser that s339(1) of the *Criminal Code* was not the appropriate basis for his application. Mr Goldflam amended the applicant's application to one for a permanent stay of proceedings pursuant to s14(1)(b) of the *Supreme Court Act* NT and under the Court's "inherent power to stay or postpone a trial where such is necessary to prevent an abuse of process or to ensure that an accused receives a fair trial" (*Breedon v The Queen* (1995) 124 FLR 328 at 332).

[5] Pursuant to the provisions of s80 of the *Supreme Court Act* I allowed the applicant to amend the application to one for an order for prohibition. This course was not opposed and in fact was suggested by Ms Fraser, counsel for the respondent, as being the appropriate procedure.

[6] The background to this matter is as follows:

[7] On 7 May 1995, Simon Wills, the applicant in this matter, was employed at the Beachcomber's night club as a security officer. On that date an incident is alleged to have occurred involving the applicant and Warwick Ian Bott.

[8] Arising from that alleged incident, an information was laid on 22 August 1995 against the applicant by Senior Sergeant Hayward charging the applicant with unlawful assault on Warwick Ian Bott, involving the circumstance of aggravation that the said Warwick Ian Bott suffered bodily harm, contrary to s188(2)(a) of the *Criminal Code*.

[9] The applicant was bailed to appear before the Court of Summary Jurisdiction of the Northern Territory in Darwin on 26 February 1997 for hearing.

[10] On 29 January 1997 the applicant was granted legal aid and the Northern Territory Legal Aid Commission assumed conduct of the matter.

[11] On 26 February 1997, the applicant appeared as defendant before his Worship, Mr Lowndes SM, who refused an application from the prosecution to adjourn the hearing of the matter and refused leave to withdraw the charge. The prosecutor advised that the prosecution would offer no evidence. The information was dismissed.

[12] On 5 March 1997, Senior Sergeant Trenerry laid an information against the applicant which stated, omitting some formal parts, as follows:

> "that Simon Wills on the 7th day of May 1995 at Darwin in the Northern Territory of Australia
>
> 1. unlawfully assaulted Warwick Ian Bott
>
> AND THAT the said unlawful assault, involved the following circumstance of aggravation, namely:
>
> (1) that the said Warwick Ian Bott suffered bodily harm
>
> Contrary to Section 188(2)(a) of the Criminal Code."

[13] On 14 July 1997, Mr Goldflam, counsel for the applicant, appeared before his Worship Mr Wallace SM, and applied on behalf of the applicant for the "Trenerry information" to be struck out, on the ground that the applicant was autre fois acquit. On 15 July 1997, Mr Wallace SM, ruled that the applicant was not autre fois acquit because issue was not joined on the information laid by Sergeant Hayward. Mr Wallace SM held that the order made by Mr Lowndes SM to dismiss the information was not on the merits and accordingly s133 of the *Justices Act* had no application to Mr Lowndes' order.

[14] On 11 August 1997, Mr Goldflam appeared on behalf of the applicant in the Court of Summary Jurisdiction before his Worship, Mr Gillies SM. On behalf of the applicant, Mr Goldflam applied for the proceedings pursuant to the information laid by Sergeant Trenerry to be permanently stayed, on the ground of abuse of process.

[15] On 3 September 1997, his Worship Mr Gillies SM, refused the application. Mr Gillies SM ruled that a magistrate did not have the power to stay the prosecution and adjourned the matter for hearing.

[16] The applicant then made his application to this Court.

[17] This Court "has the inherent power to stay or postpone a trial where such is necessary to prevent an abuse of process or to ensure that an accused receives a fair trial" (*Breedon v The Queen* (1995) 124 FLR 328 per Angel J

at 333; see also *Barton v The Queen* (1980) 147 CLR 75; *R v Haslett* (1987) 90 FLR 233).

[18] The decision whether or not to grant a stay involves balancing the interest of the accused with the interests of the community.

[19] Section 14(1)(b) of the *Supreme Court Act* 1979 (NT) provides as follows:

> " (1) In addition to the jurisdiction conferred on it elsewhere by this Act, the Court –
>
> (b) has, subject to this Act and to any other law in force in the Territory, in relation to the Territory, the same original jurisdiction, both civil and criminal, as the Supreme Court of South Australia had in relation to the State of South Australia immediately before 1 January 1911;"

[20] This in effect gives the Supreme Court a supervisory jurisdiction to prevent injustice in the Court of Summary Jurisdiction.

[21] In *Walton v Gardiner* (1993) 177 CLR 378 at 393 Mason CJ, Deane and Dawson JJ stated:

> "… Yet again, proceedings before a court should be stayed as an abuse of process if, notwithstanding that the circumstances do not give rise to an estoppel, their continuance would be unjustifiably vexatious and oppressive for the reason that it is sought to litigate anew a case which has already been disposed of by earlier proceedings. The jurisdiction of a superior court in such a case was correctly described by Lord Diplock in *Hunter v. Chief Constable of the West Midlands Police* as 'the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people'.
>
> In *Jago v. District Court* (NSW), at least three of the five members of the Court clearly rejected 'the narrower view' that a court's power

to protect itself from an abuse of process in criminal proceedings 'is limited to traditional notions of abuse of process'. Mason C.J. considered that a court, 'whose function is to dispense justice with impartiality and fairness both to the parties and to the community which it serves', possesses the necessary power to prevent its processes being employed in a manner which gives rise to unfairness."

[22] I adopt with respect the comments of Angel J in *Breedon v The Queen* (supra) at 333:

> "The power to grant a permanent stay of criminal proceedings is one to be exercised only in the most exceptional circumstances: *Barton* (at 95, 116); *Jago* (at 31, 34); *Williams v Spautz* (1992) 174 CLR 509 at 529. An applicant for a permanent stay must demonstrate more than a subjective sense of unfairness; he must show the prosecution is brought for a predominant ulterior or improper purpose: *Williams v Spautz* (at 529), or delay such that he can not receive a fair trial, that is, that any trial would necessarily be unfair: *Jago* (at 34, 49-50, 78), or that the continuation of the proceedings would be so unfairly and unjustifiably oppressive as to constitute an abuse of process: *Walton v Gardiner* (at 392, 395). In short, the applicant must demonstrate one of the statutory grounds set out in s339 of the *Criminal Code* or an abuse of the court's procedure by reason of the institution of the criminal proceedings or the taking of a procedural step in the proceedings."

[23] I also adopt the following principals a set out by Ormrod LJ in *R v Derby Crown Court; Ex parte Brooks* (1984) 80 Cr App R 164 and quoted by Priestley J in *Watson v Attorney-General for New South Wales* (1987) 8 NSWLR 685 (CCA) at 6999 referring to a decision of Ormond LJ in *R v Derby Crown Court; Ex parte Brooks* (1984) 80 Cr App R 164 at 168-169:

> "…. The power to stop a prosecution arises only when it is an abuse of the process of the court. It may be an abuse of process if either (a) the prosecution have manipulated or misused the process of the court so as to deprive the defendant of a protection provided by the law or to take unfair advantage of a technicality, …."

[24] The information laid by Sergeant Trenerry does not constitute an "autre fois acquit" at common law nor under the provisions of s18 of the Criminal Code. The dismissal of the original "Hayward" information was not "on the merits" after issue was joined between the parties (*Ward v Hodgkins* [1957] VR 715 at 719; *Potter & Potter v Liddy* (1984) 14 A Crim R 204 at 208.

[25] The applicant filed an affidavit sworn 17 October 1997 in support of his application. Mr Wills deposes to the fact that on the date he attended Court for the hearing of the charge on 26 February 1997 it was his intention to enter a plea of not guilty. He had in attendance at Court, three witnesses who were eye witnesses to the event and who he had asked to give evidence in the proceedings. Mr Wills provides details in his affidavit of the difficulty he would have in arranging for those persons to attend Court again. Ms Fraser, for the respondent, accepted that there is an obligation on the Crown to put all relevant evidence before the Court and accepted the Crown obligation to call the witnesses referred to by the applicant, provided they can give relevant evidence. The allegation is a serious one involving as it does an allegation that a security officer at a Darwin night club committed an act of assault upon a patron of the night club. In balancing the interest of the accused with the interests of the community, I do not consider there to be any unfairness in allowing the Crown to proceed with the information as laid by Sergeant Trenerry.

[26] I agree with the submission made by Ms Fraser, counsel for the Crown which is the respondent in these proceedings, that the relaying of the

information is a proper exercise of the prosecutorial discretion. It is the function of the executive to decide when a prosecution should commence, proceed and be terminated. It is not the function of the courts to interfere in the exercise of that executive function and such an interference is only justified in the most extraordinary and exceptional of cases (*Jago v District Court (NSW)* (1989) 168 CLR 23 at 36-39).

[27] I did not consider this to be an extraordinary or exceptional case such as to justify the interference of the Court in the exercise of the prosecutorial discretion.

[28] For these reasons I refused the application by Mr Goldflam on behalf of the applicant for either a prohibition under O56.01 of the *Supreme Court Rules* or an order for the stay of proceedings.

[29] Because the matter was listed before the Court of Summary Jurisdiction within a few days after the hearing of this application and the parties were anxious for an answer to the application before the Supreme Court, I announced the decision at the conclusion of the hearing of the application on 17 October 1997 and advised I was prepared to provide written reasons.

[30] Counsel for the respondent has now requested written reasons for decision which are provided herein.

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