IN THE HIGH COURT DIVISION OF THE GUN COURT OF JAMAICA

Inf #944-45/09

R v DELROY HENRY

IILEGAL POSSESSION OF FIREARM/SHOOTING WITH INTENT

August 19, September 18 and October 2, 2009

Miss Dianne Jobson for Delroy Henry
Mr. Loxley Ricketts, Crown Counsel (Ag), for the Director of Public Prosecutions

ABUSE OF PROCESS APPLICATION - WHETHER DEFENDANT SHOULD BE TRIED FOR FIREARM OFFENCES AFTER BEING ACQUITTED ON A CHARGE OF MURDER - CASE OF MURDER NOT PASSING EVIDENTIAL CRITERION FOR PROSECUTION - FIREARM OFFENCES ARISING FROM SAME INCIDENT THAT LED TO CHARGE OF MURDER - NO EVIDENCE TO PROVE MURDER - CROWN OFFERING NO EVIDENCE AFTER MURDER TRIAL COMMENCED - WHETHER ABUSE OF PROCESS TO COMMENCE TRIAL FOR MURDER WITHOUT EVIDENTIAL BASIS FOR THE CHARGE - WHETHER ABUSE TO CONTINUE PROSECUTION OF DEFENDANT FOR FIREARM OFFENCES AFTER ACQUITTAL ON MURDER CHARGE ARISING FROM SAME INCIDENT

SYKES J.

1. This is an application by Mr. Delroy Henry for a permanent stay of proceedings in respect of an indictment preferred in the High Court Division of the Gun Court against him. In this indictment, he is charged with the firearm offences of illegal possession of firearm and shooting with intent "(the Gun Court indictment").

Can the High Court Division of the Gun Court entertain an abuse of process application?

2. The question of jurisdiction to hear this application and to grant the remedy sought is an important issue to be determined because the High Court Division of the Gun Court is not a part of the Supreme Court which has a Circuit Court and which can grant the remedy prayed for.

3. The Gun Court was established by the Gun Court Act ("the Act') to adjudicate on offences involving the use of a firearm (see section 3). The Gun Court sits in three divisions. The three divisions are the Resident Magistrate's Division, the Circuit Court Division and the High Court Division (see section 4).

4. The jurisdiction of each division of the court is set out in section 5 of the Act. The jurisdiction of the Resident Magistrate's and Circuit Court Divisions is not in issue and so no more needs be said about them. In respect of the High Court Division, it has jurisdiction to try all firearm offences except murder and treason. Significantly, section 3 (2) of the Act states that when any division of the court is

presided over by a Judge of the Supreme Court, that is to say, a Judge appointed pursuant to the provisions of the Judicature (Supreme Court) Act, then the High Court Division becomes a superior court of record. Section 10 states that Judges of the Supreme Court shall be assigned to the Gun Court and when they are so assigned they shall have all the powers, privileges, immunities as "appertain to the office of Supreme Court Judge" (see section 10 (1)). Section 12 (3A) states that unless otherwise stated in rules or regulations made under the Gun Court Act, the High Court Division of the Gun Court "shall observe as nearly as may be the like process, practice and procedure as a Circuit Court." The Circuit Court, as already noted, is now a part of the Supreme Court and exercises criminal jurisdiction.

5. In light of the development of the law on abuse of process referred to above, there is no doubt that the Circuit Court can entertain abuse of process applications in criminal proceedings and also grant a stay of proceedings, if that is the appropriate remedy. Based on what has been said in paragraph four above, it necessarily follows that the High Court Division of the Gun Court can do likewise.

6. The assertion by the superior courts that they can stay a prosecution on the ground of abuse of process was not clearly and unequivocally accepted by courts until relatively recent times. Although the House of Lords in ***Connelly v DPP*** [1964] A.C. 1254 spoke of staying a prosecution on the grounds of abuse of process, courts were, and still are reluctant to exercise this extraordinary power. Even now, the Supreme Court of Canada says that the power should not be exercised except in the clearest of cases (see ***R v Keyowski*** [1988] 1 S.C.R. 657; ***R v Conway*** 49 C.C.C. (3d) 289).

7. I respectfully adopt the summary of the development of the abuse of process doctrine of Lord Hoffman found at paragraphs 38 - 41 in ***R v Loosely*** [2001] 1 W.L.R. 2060. This summary represents, in my view, an accurate statement of how the law developed in England which I believe can assist me in this case.

The basis of the jurisdiction to stay proceedings

8. In ***R v Mack*** 44 C.C.C. 513, although speaking in the context of an entrapment case, Lamer J. of the Supreme Court of Canada explained the basis of the jurisdiction. The jurisdiction, his Lordship stated, "is not the power of a court to *discipline* police or prosecutorial conduct but, as stated by Estey J. in *Amato* (at p. 461), 'the avoidance of the improper invocation by the state of the judicial process and its powers' " (see paragraph 77).

9. Woodhouse J. in ***Moevao v. Department of Labour*** [1980] 1 N.Z.L.R. 464, 475-476, which was cited in ***R v Horseferry Road Magistrates' Court, Ex p Bennett*** [1994] 1 AC 42, by Lord Bridge at page 67. Woodhouse J. is reported as saying:

> *It is not always easy to decide whether some injustice involves the further consequence that a prosecution associated with it should be regarded as an abuse of process*

> *and in this regard the courts have been careful to avoid confusing their own role with the executive responsibility for deciding upon a prosecution. In the Connelly case Lord Devlin referred to those matters and then, as I have said, he went on to speak of the importance of the courts accepting what he described as their 'inescapable duty to secure fair treatment for those who come or are brought before them.' He said that 'the courts cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the process of law is not abused' ([1964] A.C. 1254, 1354 . . .). Those remarks involve an important statement of constitutional principle. They assert the independent strength of the judiciary to protect the law by protecting its own purposes and function. It is essential to keep in mind that it is 'the process of law,' to use Lord Devlin's phrase, that is the issue. It is not something limited to the conventional practices or procedures of the court system. It is the function and purpose of the courts as a separate part of the constitutional machinery that must be protected from abuse rather than the particular processes that are used within the machine. It may be that the shorthand phrase 'abuse of process' by itself does not give sufficient emphasis to the principle that in this context the court must react not so much against an abuse of the procedure that has been built up to enable the determination of a criminal charge as against the much wider and more serious abuse of the criminal jurisdiction in general.*

10. This power in the court to prevent abuse of its process is an important one and cannot be left to any other institution but the courts. Lord Devlin in ***Connelly v DPP*** [1964] A.C. 1254 reminded us of this. His Lordship said at page 1354:

> *Are the courts to rely on the Executive to protect their process from abuse? Have they not themselves an inescapable duty to secure fair treatment for those who come or are brought before them? To questions of this sort there is only one possible answer. The courts cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the* ***process of law is not abused****.* (my emphasis)

The allegations

11. On November 3, 2004, at about 10:00 p.m., the prosecution alleges that Mr. Delroy Henry was the person who ran from a white Nissan Sunny station motor car after the police stopped the car. The prosecution say that Mr. Henry also pulled a firearm

and fired it at the police as he ran across the road and disappeared in the Mona Commons community.

12. The police gave chase but gave up and returned to the car from which it was said that Mr. Henry ran. In it, they found the body of one Mr. Leon Marcel Gayle. His hands were tied behind him. The post mortem examination showed that he died from a gunshot injury.

13. Mr. Henry, the police say, having displayed his Bolt-like athletic prowess by outrunning the police on November 3, 2004, was not able to reproduce his athletic wonder later in November 2004, when he was apprehended by the police.

14. Mr. Henry was placed on an identification parade on December 7, 2004 where he was identified by Constable Abebe Pitt. The other police officer, Constable Raelito Lafayette, claimed to know Mr. Henry before the incident and so did not attend the identification parade.

The court proceedings in respect of the murder

15. On December 22, 2005, over a year after Mr. Henry was identified on an identification parade, a preliminary enquiry was held. He was committed to stand trial in the Supreme Court.

16. The matter first came before the Supreme Court on January 9, 2006. It appears that between January 2006 and June 30, 2006, the matter was delayed because it was unclear which attorney would represent the defendant at the trial. The chronology produced by the prosecution allege that on April 21, 2006, Mr. Roy Stewart was assigned but it was not until June 30, 2006, that Mr. Stewart actually attended court for a trial date to be set and for papers to be served on him. The case was set for trial on October 25, 2006.

17. On October 25, 2006, the prosecution was ready to proceed but the matter could not be tried because of insufficient jurors and counsel's absence. The matter was set for November 20, 2006.

18. On November 20, 2006, both prosecution and defence were ready for trial but there were insufficient jurors from which a jury could be selected. The matter was set for February 26, 2007.

19. On February 27, 2007, counsel did not attend. Mr. Henry then indicated that Mr. C.J. Mitchell was being retained. The matter was mentioned on various dates between March 23 and June 25, 2007, which was a trial date.

20. On June 25, 2007, there were insufficient jurors and a critical witness was not available.

21. On October 10, 2007, Mr. Mitchell failed to attend court. The chronology provided by the prosecution is not very helpful on the point but it seems that the court was informed that Mr. Mitchell no longer represented Mr. Henry. This necessitated further mention dates for counsel to be assigned to represent Mr. Henry. This went on from October 2007 right through to April 2008, when a trial date was set for June 23, 2008.

22. On June 23, 2008, the matter was not tried.

23. On September 24, 2008, Miss Dianne Jobson appeared for Mr. Henry. On that date, which was a trial date, a part heard matter was in progress. Additionally, not all prosecution witnesses were present. This led to yet another adjournment. The next trial date was December 1, 2008.

24. On December 1, 2008, the Crown was ready but the matter could not be reached.

25. From the chronology, it seems that the first bail application was made on April 15, 2009 and bail was denied.

26. Mercifully, the trial commenced on July 1, 2009 and ended on July 6, 2009. The prosecution elected, after calling four witnesses, not to proceed any further; such was the hopeless nature of the prosecution case. I should add that the state of the prosecution case in July 2009 was the same as it was in November 2004. Mr. Henry's 4 $\frac{1}{2}$ year stay in prison to face a non-existent case of murder came to an end.

Proceedings in the High Court Division of the Gun Court

27. After his acquittal of murder, Mr. Henry was finally granted bail. He appeared in the High Court Division of the Gun Court to answer to the Gun Court indictment. These charges arose out of the same incident from which the charge of murder emanated.

28. Miss Jobson raised the issue of abuse of process. Let me say that when the issue was raised I was not quite taken with the submission but with time and some effort it appears that Miss Jobson seems to be saying that Mr. Henry should not be tried in the High Court Division of the Gun Court because there was delay and it would be unfair to try him again, relying on the same evidence put forward at the murder trial.

29. The submissions were adjourned to enable the court to examine the police statements, depositions and the transcript of the trial. An examination of all the documents reveals that the prosecution did not have any evidence on which they could rely to prove the offence of murder. In effect, there was absolutely no evidence, not even poor evidence, available to ground the charge.

The prosecution submissions

30. Mr. Loxley Ricketts, took the point that because of the Jamaican Court of Appeal's decision in ***Michael Heron v Director of Public Prosecutions*** S.C.C.A. No. 13/2000 (delivered December 4, 2000), the course adopted by the prosecution in the instant case was in accordance with established criminal practice and procedure. By this he meant that the prosecution had preferred the murder indictment and the Gun Court indictment against Mr. Henry at the same time, thereby giving Mr. Henry due notice that the prosecution may proceed against him on both indictments.

31. According to ***Heron***, the Gun Court indictment may be proceeded on if the murder trial ended in an acquittal. However, Mr. Ricketts overlooked the other important point made in the case. The Court of Appeal also said that where both indictments are preferred and the prosecution elects to proceed first on the murder indictment, the Gun Court indictment should be before the court of trial of the murder indictment and the trial judge invited to endorse the indictment, "Not to be proceeded with without the leave of the Court." The reason for this procedural requirement is too plain to require explanation. It is a practice designed to forestall the possibility of a prosecution on the stayed indictment being under taken, in possible breach of the rights of the defendant, without the sanction of the court. It is also to prevent the abuse of the process of the court.

32. The practical effect of this practice is that the prosecution is forced to consider carefully whether it ought to pursue the stayed indictment.

33. Mr. Ricketts submitted that because the Gun Court indictment could not be tried in the same indictment with the murder case, the prosecution was correct to proceed on the murder charge first, and if the defendant was acquitted and on further reflection and it was in the public interest to do so (assuming the evidential criterion for prosecution was met), proceed on the Gun Court indictment. It is said that the reasons why both indictments cannot be tried together are these: murder is tried by twelve jurors and all other offences by seven therefore both offences could not be in the same indictment. Second, it is not the practice in Jamaica to try place other offences on the murder indictment.

34. Mr. Ricketts also submitted that the delay in the murder trial, based on the prosecution chronology, showed that it was not until Miss Dianne Jobson took over representation of Mr. Henry in September 2008, that Mr. Henry's representation was finally settled, that is to say, she came into the case and remained until final disposition of the murder charge. Before Miss Jobson entered the case, he submitted, a number of lawyers represented Mr. Henry but none stayed the course.

35. Mr. Ricketts also submitted that Mr. Henry has not shown that he has been prejudiced in any way. He has not shown that a fair trial is no longer possible. Learned counsel submitted also that there was no evidence of prosecutorial malevolence and so, even if the prosecution of the murder charge was misguided, there was no abuse of process, or at the very least, the abuse, if any, was not so

egregious as to warrant a permanent stay of proceedings. It was also submitted that Mr. Henry delayed the eventual trial because his legal representation took a long time to be resolved. Finally, he said that the public interest in seeing that serious offences are tried should be given great prominence in this case, particularly, he said, given the absence of any affirmative evidence of, or presumptive evidence of prejudice to the defendant. I shall address each point raised by Mr. Ricketts in the analysis of the matter.

36. In support of his submissions, Mr. Ricketts relied on the cases of **Heron**, ***Flowers v The Queen*** [2000] 1 W.L.R. 2396, and ***R v Dalton Reynolds*** S.C.C.A. No. 41/97 (delivered January 25, 2007).

Analysis

37. In the ***Heron*** case, the defendant was charged with the offence of murder and after three trials at which the jury failed to agree, the prosecution elected to prosecute him on firearms charges in the High Court Division of the Gun Court. The defendant went to the Constitutional Court seeking a permanent stay of the indictment. He failed in the Constitutional Court but succeeded on appeal. The Court of Appeal held that a fourth trial was unacceptable and granted the remedy sought by Mr. Heron. It is to be noted that despite the fact that Mr. Heron was not convicted in any of the three trials, it was never suggested that the evidence was incapable of establishing the offence charged.

38. In ***Flowers***, the appellant sought to quash his conviction because, according to him, there was unreasonable delay between the time when he was charged with capital murder and his third trial. He was charged on April 6, 1991 and the third trial commenced on January 13, 1997. The appellant was convicted in the third trial and he argued that the remedy ought to be a quashing of the conviction. The Privy Council did not agree that the conviction should be quashed on the grounds of delay, oppression or abuse of process. Lord Hutton, speaking for the Board, took into account the fact that case for the prosecution was a strong one. The important point here is that Mr. Flowers was convicted on strong evidence. The evidence was therefore capable of supporting the charge.

39. In the case of ***Dalton Reynolds***, the defendant was convicted on March 20, 1997, but astonishingly, his appeal was not heard for nine years because the transcript could not be found. Counsel submitted that the length of the delay in hearing the appeal should result in the conviction being quashed. The Court of Appeal refused to grant this remedy but reduced the sentence. As in the ***Flowers*** case, Mr. Reynolds was convicted on strong evidence.

40. In all three cases, there was no suggestion there was insufficient evidence to establish the charge against the defendant. In two of the cases, ***Flowers*** and ***Reynolds***, the defendant was in fact convicted and the attack on the convictions, apart from the abuse of process and breach of section 20 (1) of the Constitution of

Jamaica, was based on alleged deficiencies in the summation as distinct from a complete lack of evidence capable of supporting the indictment.

41. The instant case is different from the three relied on by Mr. Ricketts. In the present case, it is clear that the prosecution did not have any evidence capable of proving the offence of murder. The transcript of the trial did not improve on what the prosecution had as of December 2004 when Mr. Henry was arrested and charged with the offence of murder.

42. Other than the fact of being in the car in which a body was found, there was nothing else being relied on by the prosecution to prove the charge. There were no admissions, no evidence of persons seeing the defendant in the company of the deceased shortly before his death, no scientific evidence raising the possibility of the defendant's criminal culpability in the murder, or even death of the deceased.

43. The issue, unfortunately, has become, whether it is an abuse of process to continue the prosecution of the defendant for the firearm offences after his acquittal of the offence of murder in circumstances where the murder prosecution was launched without any evidence capable of supporting the charge. Let me point out that this conclusion that the evidence could not prove the offence is not just mine but also that of the prosecutor who had conduct of the murder trial. She admitted this when she was explaining to the court why she was not proceeding any further and decided not to call any further evidence before reaching the end of the prosecution case. It was also the conclusion of the trial judge in the murder trial. The only point I have made, which was not made clear at the murder trial was that the evidence at the trial was the same as it was from November 2004. In short, no new information came to light.

44. The decision to prosecute is an executive function. It is the executive which decides whether they ought to invoke the criminal jurisdiction of any court. That decision is not, generally, subject to judicial control. This is consistent with the separation of powers doctrine which permeates our legal and political system. The court has no power to stop a prosecution because it thinks that the prosecution should not have been brought. The court does not supervise prosecutions and should not attempt to do so. As Viscount Dilhorne pointed out in ***Director of Public Prosecutions*** *v.* ***Humphrys*** [1976] 2 All E.R. 497, 511:

> *A judge must keep out of the arena. He should not have or appear to have any responsibility for the institution of a prosecution. The functions of prosecutors and of judges must not be blurred. If a judge has power to decline to hear a case because he does not think it should be brought, then it soon may be thought that the cases he allows to proceed are cases brought with his consent or approval.*

45. When an abuse of process application is made the court has to exercise great care so that it does not find itself approving or disapproving the institution of a prosecution. However, this does not mean that a court should refrain from examining the institution of a prosecution if the institution of the prosecution involved conduct which is an affront to the "community's sense of fair play" and such an examination is necessary in order to determine whether there has been an abuse of process.

46. As I understand it, there are two main criteria that are used when considering whether a prosecution should be undertaken. First, there is the evidential criterion, that is, whether the proposed evidence in possession of the prosecution shows that there is a realistic prospect of a conviction taking into account all legitimate defences, the quality of the proposed evidence and the quality of the witnesses. This list is not exhaustive but at the very least, the prosecution ought to give consideration to these matters. Second, there is the public interest criterion. This criterion assumes that the evidential criterion has been met and so the prosecuting authorities then go on to decide whether it is in the public interest that a prosecution should be mounted at public expense.

47. The Court is not usually involved in determining whether there is sufficient evidence to invoke the criminal jurisdiction of a court. An exception to this is where the Director of Public Prosecutions applies to a Judge in Chambers for process to issue to have a defendant brought before the court (see section 2 of the Criminal Justice Administration Act; ***Grant v D.P.P.*** (1980) 30 W.I.R. 246; ***Brooks v DPP*** (1994) 44 W.I.R. 332). In these circumstances, the Judge would have to be satisfied that the evidence presented to the judge when the process is being asked for is capable of sustaining the charge.

48. The fact that a court may look, after the fact, on the decision to initiate a prosecution is not judicial review of the executive decision to prosecute. This kind of examination is done frequently in false imprisonment and malicious prosecution actions. An abuse of process application is similar in that the court is called upon to look at the conduct of the police or prosecuting authority to see if the alleged abuse took place. If the abuse is established, then the issue becomes that of determining the appropriate remedy.

49. The abuse of process doctrine is not confined, as cases cited below will show, to the four walls of the forensic contest inside a court in the pending trial. The doctrine now permits antecedent conduct of the prosecuting authorities to be taken into account where that conduct is relevant.

50. It is always in the public interest that serious crimes should be properly investigated and prosecuted. This, however, is to take place within the boundaries of the law. It is also in the public interest that where the available evidence does not show that the defendant committed a particular offence there should be no trial of that individual. To mount a prosecution where there is no evidence capable of

supporting the charge must necessarily be an abuse of process. It is using the criminal process for something which was not intended.

51. I now address the first point made by Mr. Ricketts, namely, that the defendant must establish some prejudice to him in the pending trial before he can succeed on this abuse of process application. I do not agree. It has been the case in Jamaica that a defendant does not have to establish prejudice to him when he is complaining about delay in his trial. When a defendant complains of delay, he is saying that it would be an abuse of process and a breach of his rights if the trial were to proceed.

52. In ***Herbert Bell*** [1985] A.C. 937 the defendant complained about delay and that his rights under section 20 (1) of the Constitution of Jamaica had been breached. Lord Templeman had this to say at pages 950 - 951:

> *Their Lordships do not in any event accept the submission that prior to the Constitution the law of Jamaica, applying the common law of England, was powerless to provide a remedy against unreasonable delay, nor do they accept the alternative submission that a remedy could only be granted if the accused proved some specific prejudice, such as the supervening death of a witness. Their Lordships consider that, in a proper case without positive proof of prejudice, the courts of Jamaica would and could have insisted on setting a date for trial and then, if necessary, dismissing the charges for want of prosecution. Again, in a proper case, the court could treat the renewal of charges after the lapse of a reasonable time as an abuse of the process of the court.*
>
> ...
>
> *Their Lordships agree with the respondents that the three elements of section 20, namely a fair hearing within a reasonable time by an independent and impartial court established by law, form part of one embracing form of protection afforded to the individual. The longer the delay in any particular case the less likely it is that the accused can still be afforded a fair trial. But the court may nevertheless be satisfied that the rights of the accused provided by section 20(1) have been infringed although he is unable to point to any specific prejudice.*

53. If my premise that delay is one way in which abuse of process manifests itself then it would seem to me that this passage makes it too plain that either under the Constitution, or at common law, abuse of process did not require proof, by the defendant, of any specific prejudice.

54. There are two cases from the House of Lords that establish the salutary and sound principle that there might be instances where the conduct of the prosecuting authorities antecedent to the pending is such that despite the fact that a trial, on the merits, is still possible, there ought to be a stay of proceedings because the behaviour of the prosecuting authorities is so egregious that it can be said that "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" (per Dubin J.A. in ***R. v. Young*** (1984), 46 O.R. (2d) 520, 40 C.R. (3d) 289, 13 C.C.C. (3d) 1, 10 C.R.R. 307, 3 O.A.C. 254, para. 87). There is no logical or other reason why a previous trial cannot fall under the rubric of conduct antecedent to the pending trial and so can be examined by the court to see if there is an abuse of process.

55. In the case of ***R v Horseferry Road Magistrates' Court, Ex p Bennett***, Lord Griffiths, in the context of an extradition case, said at pages 61 – 62:

> *In the present case there is no suggestion that the appellant cannot have a fair trial, nor could it be suggested that it would have been unfair to try him if he had been returned to this country through extradition procedures. If the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law.*
>
> *My Lords, I have no doubt that the judiciary should accept this responsibility in the field of criminal law. The great growth of administrative law during the latter half of this century has occurred because of the recognition by the judiciary and Parliament alike that it is the function of the High Court to ensure that executive action is exercised responsibly and as Parliament intended. So also should it be in the field of criminal law and if it comes to the attention of the court that there has been a serious abuse of power it should, in my view, express its disapproval by refusing to act upon it.*

56. Lord Nicholls of Birkenhead in ***R v Loosely***, while not speaking in the context of delay but entrapment, stated this general proposition. His Lordship said at para. 1:

> *My Lords, every court has an inherent power and duty to prevent abuse of its process. This is a fundamental principle of the rule of law. By recourse to this principle courts ensure*

that executive agents of the state do not misuse the coercive, law enforcement functions of the courts and thereby oppress citizens of the state.

57. These cases have unambiguously established that the abuse of process doctrine is not confined in its operation to the period during which the trial actually takes place. The conduct of the executive before the actual proposed trial may be relevant and that conduct, if sufficiently egregious can amount to an abuse of process.

58. What is equally clear is that within the last twenty years some courts have overcome their reluctance to grant permanent stays on the ground of abuse of process. In the ***Horseferry*** case, the House of Lords allowed the appeal of the defendant and held that participation in illegality by the executive can amount to an abuse of process for which the remedy may be a stay of proceedings. In the end, the case was referred back to the Divisional Court to be considered in light of their Lordships' decision. In ***Loosely***, the House of Lords held that instigating a criminal act and then prosecuting the defendant is sufficiently abusive of the process to warrant a stay of proceedings.

59. There is no need for a defendant to try to fit his case in any previously existing set of circumstances that have been declared to be an abuse of process before he can get relief. Each case will have to be examined carefully.

60. In respect of the prosecutorial misconduct point, I respond in this way. To require the defendant to prove this as an aspect of an abuse of process is to miss the point of what the abuse of process doctrine is designed to prevent (see paras. 8 to 10, supra). It is not about punishing the prosecuting authorities. It is about protecting the integrity of the criminal process. The presence of malevolence would only strengthen the case for abuse but its absence certainly does not weaken it. To require bad faith would unduly restrict the law and there is no identifiable policy reason for this view. In any event, the Supreme Court of Canada gave the proposition a distinctly cool reception (see ***R v Keyowski*** [1988] 1 S.C.R. 657).

Disposition

61. Needless to say, it is not every abuse that will be held to attract a stay of proceedings. A balance has to be maintained. Guilty persons should be prosecuted and given their just punishment. Innocent persons and those not proven to be guilty should be set free.

62. If my understanding of abuse of process is correct, then it must necessarily be an abuse of process to commence a trial of a person for a crime that he could not be proved to have committed. If the defendant spends over 1,400 days in custody in circumstances where the case could not be proved, then the abuse is aggravated. It is one thing to have a weak case but quite another to launch a prosecution where no case exists. The latter is an abuse of process. The murder charge was not one of a

weak case but rather the case against Mr. Henry simply did not exist in the evidence gathered by the police.

63. The criminal process was never designed to facilitate the indictment of persons who could not be proved to have committed the offence charged. This very case demonstrates the importance of the point made by Lord Devlin in ***Connelly***. The courts must ensure that the criminal process is used for its roper and intended purpose.

64. It must follow also that there is further abuse when the prosecution having failed in its efforts in the murder trial, now wish to put Mr. Henry on trial for firearm offences, arising from the same circumstances, after more than 1,400 days in custody in circumstances where the murder prosecution was ill advised having regard to the evidence in possession of the prosecution.

65. It is true that Mr. Henry contributed to the delay in having the murder case tried because there was difficulty settling his legal representation. However, the decision to prosecute was not his. In these circumstances, therefore, the fact that Mr. Henry delayed the process by seeking to have counsel on private retainer represent him is not sufficiently strong to deflect the conclusion that a permanent stay should be granted.

66. For the prosecuting authorities to subject a defendant to the agony and anxiety of a criminal prosecution without any evidential foundation is an abuse of process.

67. It is not sufficient to say, as Mr. Ricketts did, that in the event of Mr. Henry being convicted of the firearm offences, his sentence could be reduced to reflect the fact that he spent over four years in custody. I respond in the same way Estey J. (dissenting) responded in ***R v Amato*** 69 C.C.C. (2d) 31, paragraph 97:

> *To participate in ... injustice up to and including a finding of guilt and then to attempt to undo the harm by the imposition of a lighter sentence, so far from restoring confidence in the fair administration of justice, would contribute to the opposite result. For the courts to acknowledge at the sentencing stage of the trial a sense of outrage at the position in which the accused and the court have been placed at the instigation of the [the prosecuting authorities] is a wholly unsatisfactory response to the realization that a flagrant abuse of the process of the court has occurred. The harm both to the accused and to the administration of justice is complete with the substantive determination of guilt.*

68. The real solution to this problem is to change the practice and procedure that prevent a defendant from being tried in one indictment, before a jury, for the

offence of murder and any other offence that might have been committed in the course of the same incident.

69. This case has not been an easy one to decide. I have fluctuated on the outcome but in the final analysis I have come to the reluctant conclusion that further prosecution of Mr. Henry would only serve to undermine public confidence in the administration of justice. To have a citizen in custody for over 1400 days to face a non-existent murder case, by any measure is an abuse of process. The abuse of process here is sufficiently egregious to warrant a permanent stay of proceedings in respect of the Gun Court indictment. I so order.