

ONTARIO COURT OF JUSTICE

HER MAJESTY THE QUEEN

v.

ORETH BOWEN

BEFORE THE HONOURABLE JUSTICE CLEMENTS

On December 22, 2005, at Brampton, Ontario

P R O C E E D I N G S

Charges: Assault (2) – Section 270 (1)(b)
Possession – Section 4(1) c.d.s.a.

A P P E A R A N C E S:

Ms. N. J. Bridge

Counsel for the Provincial Crown

Mr. D. Humphrey

Counsel for Oreth Bowen

A. Grenville & William Davis Court House

Courtroom 302

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THE COURT: Ms. Bridge, is there anything I can help you with before we recess?

MS. BRIDGE: Good afternoon, Your Honour. I have a matter that – it's Mr. Bowen's matter. I brought it forward to be spoken to. I spoke to Mr. Humphrey, and I expect that he will be here at 2:15. It should be very brief.

THE COURT: Thank you.

MR. COUGHLIN: Thank you, Your Honour. What time shall we return?

THE COURT: 2:15, did you tell him?

MS. BRIDGE: I didn't tell him. He was not available this morning, so we arbitrarily selected two or 2:15 this afternoon.

THE COURT: What suits your convenience?

MS. BRIDGE: I am here now, I...

THE COURT: You're not sure when he's going to be here?

MS. BRIDGE: I'm not, but he knows – I mean, we spoke of 2:15, sort of, that way. I'm in Your Honour's hands.

THE COURT: Let's make it 2:15.

MS. BRIDGE: Thank you, Your Honour.

THE COURT: Thank you.

R E C E S S

Upon resuming...

THE COURT: Yes, good afternoon.

MS. BRIDGE: Good afternoon, Your Honour.

MR. HUMPHREY: Good afternoon, Your Honour.

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THE COURT: Ms. Bridge?

MS. BRIDGE: Yes, thank you very much, Your Honour. Your Honour, I, in the last two or three weeks, have had communication with Mr. Humphrey in relation to Mr. Bowen's matter. And I ask that the matter be brought forward before you this afternoon. I appreciate that you were not aware that this was going to happen. And Mr. Humphrey and I spoke yesterday, and I indicated before lunch that he and I had agreed that today was the first day that we were actually both able to come before you in relation to this matter. I hope that you will give us a few minutes to address it this afternoon.

THE COURT: Yes.

MS. BRIDGE: Your Honour, following the trial and the submissions in this matter information came to light regarding one of the police officers involved in the prosecution. The information came to light following this case and involves matters that arose following the close of this case. But, in any event, there's no question that the conduct of the officer could impact on his credibility in relation to the matters before Your Honour. And under the circumstances it would be my submission that the prosecution is flawed as a result, and I am asking leave today from you to withdraw these charges that are before you in relation to Mr. Bowen.

THE COURT: Thank you. Mr. Humphrey?

MR. HUMPHREY: Thank you, Your Honour. I ordinarily don't find myself in the circumstance of turning down a Crown's offer to withdraw charges,

but I must say, in the unique circumstances of this case, I'm asking Your Honour to do just that. And Your Honour can understand when I take this position I've reviewed the situation very carefully with Mr. Bowen, and I proceed with his instructions to, not only oppose, but to vigorously oppose the Crown's request to withdraw the charge.

I don't believe there's any disagreement between myself and Ms. Bridge with respect to the law in this area. I'll hand up to Madam Clerk two cases that bear on the issue, Your Honour. I think my friend and I would be in agreement that the law is thus, particularly if you take a look at the first case I've handed up, which is the decision in, re: **R. v. Blasko, [1975], 29 CCC, 2nd, at 321.** I don't propose to take Your Honour through the passages in the two cases, because, as I said, it's probably a matter of agreement between my friend and I that once the trial starts, the Crown cannot withdraw a charge as of right. Once the plea has been taken and evidence adduced, the court ceases jurisdiction and control over the charge, and the complete control that was previously enjoyed by the Crown is lost on the commencement of the trial.

And it's my respectful submission that once the trial starts Your Honour is properly vested with complete control over the process, and your function is, of course, to have a fair trial, hear the evidence and give an impartial verdict based on the evidence. Now, that is, of course, subject to

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the discretion Your Honour has to allow the Crown to withdraw a charge during a trial in an appropriate case. And of course the discretion would have to be exercised judicially, giving appropriate consideration to the relevant factors.

Now, I can advise Your Honour that, although I've provided you with two cases indicating that clearly it's within the discretion of the Court to allow or not allow the withdrawal of charges once the trial starts, I have not found any case that articulates with any precision what the relevant factors would be. Can I give it a go, Your Honour, and tell you what I think the relevant factors might be...

THE COURT: What are the relevant...

MR. HUMPHREY: ...and how they ought to be analysed in this case?

THE COURT: Yes.

MR. HUMPHREY: In my respectful submission, the first factor would be whether the accused opposes the request by the Crown. I can indicate, as I have already, that not only does Mr. Bowen oppose, he vehemently opposes the application. And then other considerations would be, in my respectful submission, those that arise from these questions. What stage is the trial at? Would the efficient use of judicial resources favour discontinuation, or would it favour completion? Does the trial raise issues of importance to the accused, or issues of importance to the community, so as to favour a determination by the court on the merits based on the evidence?

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5 And it's my respectful submission, Your Honour,
that all of those are appropriate factors to
consider, and I submit that each one of those
factors favours completion of the trial in this
case. So one of the questions to be asked is:
What stage are we at? And Your Honour appreciates
we're really at the very end. All that remains
essentially is for you to render judgment, render a
10 verdict on the merits based on the evidence that's
been presented.

15 And I should advise Your Honour that there was a
time when Mr. Bowen would not only have accepted a
withdrawal of the charges, but through me he
actually sought a withdrawal of the charges. And
that time came – Your Honour will remember how the
case unfolded. That time came after we had
finished the first two days of trial. And you may
recall that I was actually in the middle of my
20 cross-examination of Constable Cook at the end of
those first two days of trial, which were completed
on June the 14th.

25 But in my respectful submission, although I was
only half way through my cross-examination of
Constable Cook, we already had from him and
Constable Gervais the two areas I submitted fatal
conflict between their evidence. Fatal conflicts
30 with respect to the alleged dropping of the drugs,
fatal conflicts with respect to the alleged
recovery. And I submit that objectively there was,

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at that point, realistically and objectively, there was no longer any reasonable prospect of conviction.

5 And Your Honour should know that I said so in a letter I sent to Ms. Bridge, dated June the 20th of 2005. And I'm prepared – I've got copies. If Your Honour wishes, I'm prepared to hand up the letter. In fact....

10 THE COURT: I don't need to see.

MR. HUMPHREY: Okay. What I can advise you is this, that under the heading, "Lack of Reasonable Prospects of Conviction", I asked Ms. Bridge to conduct a review of the case for reasonable
15 prospects. And I said although it is rare for me to suggest that a Crown's case is fatally flawed before completion of the Crown's case I feel compelled to do so in this instance, and that I reviewed what I submitted were the fatal flaws in
20 the Crown's case, and I said in the end:

Continuation of these proceedings is not only contrary to the interests of justice, but to the interests of Mr. Bowen. He
25 should not be put to the unnecessary financial and emotional costs of having to wait for, to prepare for and participate in the balance of the trial.

30 And in my respectful submission that was a perfectly appropriate and well founded request by me on behalf of Mr. Bowen seeking discontinuation

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of the proceedings at that point. Now, I got a response back that the proceedings would continue, they did. And then remember how it went.

5 October the 3rd we continue. The Crown resists unsuccessfully. My disclosure application in relation to Mr. Poso's complaint that Constable Cook had cooked up a phoney dropsy scenario in that case, and had stolen some of his money, and then
10 had inexplicably not shown up for trial. The next day we had to deal with the balance of the evidence of Constable Cook, and then, in my respectful submission, a frivolous and engineered attempt to bring the proceedings to an end at that point
15 through a mistrial application that Your Honour readily dismissed.

 And then on October the 5th, the final day, we argued the case on the evidence, and in court on
20 the record the Crown took the position that the evidence in this case supports a conviction, supports a finding of guilt. And I vehemently took the opposite view, and that's where matters were left. All that remained was for Your Honour to
25 tell Mr. Bowen and to tell the public your objective, independent assessment of the evidence.

 And then you have to consider what has changed. Well, Constable Cook has now been charged, and this
30 is according to media reports – the only information I've received at this point is through media reports, but apparently reliable media

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outfits like the Toronto Star and the Mississauga News report that he has been charged with possession of cocaine in relation to the finding of 15 kilograms of cocaine, apparently in his residence, with indication that it was tracked there with a tracking device from the airport. I don't know the details, but he is charged with breach of trust by a police officer, indicating there is obviously some serious evidence that he has fundamentally breached his duties as a police officer.

And that precipitated a letter by me to Ms. Bridge, dated November the 23rd, requesting disclosure of the evidence respecting the charges against Constable Cook. Especially with respect to any evidence that might show that back in – I believe it's March of 2004, when Constable Cook was dealing with Mr. Bowen, whether there's any evidence to suggest that perhaps Constable Cook had access to illegal cocaine back then, or was fundamentally breaching his duties as a police officer back then.

And it's no stretch, it's no fishing expedition to suggest that that might be the case, given the nature of the charges, and given – Your Honour might be familiar with a case dealt with in this jurisdiction involving, I believe it was a Constable Kelly, who was charged with possession of cocaine. And part of the evidence in his defence was he'd become an addict and a user, and who knows, but it may well be that there's evidence of

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something similar in the case of Constable Cook.

5 And it was, in my respectful submission, only in
response to my request for disclosure, that the
Crown consider the case again, and suggested that
the Crown would be prepared to withdraw the
charges. That was communicated to me in a letter
of December the 8th, 2005, wherein the Crown
suggested that out of an abundance of caution the
charges should be withdrawn. And I communicated
10 back that Mr. Bowen was vehemently opposed, and
what he really wants at this very late stage is not
a withdrawal where the Crown leaves the suggestion
with the public that he just got lucky that this
officer got charged, and that just out of an
15 abundance of caution the Crown was going to be
magnanimous and withdraw the charge. His position
was:

20 No, you forced me through the complete trial.
You said at the end of the case there's
evidence there to support a conviction. You
know what? I want the impartial judge to tell
me and the public what the real reasonable
25 conclusions are at the end of the case based
on the evidence.

30 And all that's been communicated to Ms. Bridge.
And I should say that in our last correspondence
she wrote to me, Friday December the 16th, asking to
bring the matter before you today, and she was
aware today would be the earliest I would be

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available, given that I've started a trial that was supposed to go two weeks. I started it Monday the 12th. And so I told her that I thought I could attend today at the earliest, but that Mr. Bowen minimally, minimally would seek costs for this unnecessary appearance, and would have to give consideration as well to seeking costs in relation to some earlier appearances.

I don't argue, I don't seek to argue the issue of costs right now. I simply wish to put the Court on notice, as I've already put Ms. Bridge on notice, that costs may very much be in issue when the matter returns, again, before Your Honour. I believe we're scheduled for January the 31st. So in my respectful submission, for those reasons this application ought not to be allowed. Mr. Bowen, in my respectful submission, and the public, are entitled to Your Honour's final verdict.

Now, I might say, I don't know whether Your Honour wishes any further submissions on the issue. I have given you my submissions essentially with respect to the Crown's application for permission to withdraw the charge at this very, very late stage in the proceedings. Your Honour appreciates that I also do have an outstanding disclosure request to the Crown. In relation to that, I would say simply this: That the information being sought in my respectful submission is very much relevant, or potentially relevant to the issues for consideration by Your Honour. That said, given

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that so much time has passed since the completion of the trial, including final argument, Your Honour may well have, although you haven't released any decision, you may well have come to a decision.

And I would only continue pursuing that disclosure if it would make a difference. If it wouldn't make a difference in the final analysis, then I need not pursue it. If it might make a difference, then I think in good conscience I'd have to pursue it.

THE COURT: Ms. Bridge, is there any response to this?

MS. BRIDGE: No, I have no further submissions.

THE COURT: Well, I must confess that I didn't anticipate what might happen this afternoon when Ms. Bridge appeared before the Court at one o'clock prior to the noon recess, and it's obvious from the material that's been filed – although I haven't had a chance to really read it carefully, that it would appear that the Crown has no right to withdraw at this stage, except with the consent of the Court.

I am somewhat concerned about the basis upon which I ought to exercise my discretion. Mr. Humphrey, you've attempted to outline some of the areas that I might consider in determining whether or not I should exercise my discretion and permit the Crown to withdraw the charges at this stage. I might say that I am in the process, or have been in the process of writing my judgment on this matter. It's not complete, and I didn't anticipate it would be completed for some time, given the nature of my schedule and other commitments with respect to

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other judgments, that have some priority over this matter simply because they were tried before this matter was.

5 I think at this point, before I make any decision, I want to take a brief recess and collect my thoughts for a moment, and decide whether or not I am even prepared to deal with the question of exercising my discretion today on this point, given
10 the fact that Mr. Bowen has very strenuously argued that I ought not to exercise my discretion, and that the matter should proceed to judgment on the 31st of January. So I'm going to take ten minutes at this time, and I'll return and let you know
15 where we go from there.

R E C E S S

Upon resuming...

20 MS. BRIDGE: Your Honour, thank you for coming back. And I apologize that I asked you to come back before you were ready. I had some discussions with Mr. Humphrey, I did some thinking myself over
25 the recess, and I don't want to leave the impression with the Court that I think that a conviction would be an appropriate response in this case. There's no question my request to seek leave to withdraw the charges is because I firmly feel
30 that it would be improper that there could possibly be a miscarriage of justice, and I don't want to leave that impression with Your Honour. So under

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the...

THE COURT: Well, if it assists you, Ms. Bridge, I've already come to a decision on how I want to proceed this afternoon, and I don't think it's inconsistent with what I think you're about to tell me.

MS. BRIDGE: Okay. Do you want me to stop talking then?

THE COURT: Well, you can continue, but I propose to deny your request and give judgment this afternoon.

MS. BRIDGE: Okay. I was going to not take any position on the issue of dismissal.

R E A S O N S F O R J U D G M E N T

Clements, J. (Orally):

THE COURT: Thank you. May I have the information. Mr. Bowen, you appeared before this Court – I've forgotten the exact date, but it was in June of 2005, I believe, when the trial of this matter commenced. The evidence was not completed on the first trial date, and it went over for two or three days in October when I heard further evidence. The matter was adjourned once for judgment. I was unable to meet my commitment to give judgment on that first date. The matter, then, was remanded, I believe to January 31st for judgment.

Ms. Bridge, on behalf of the Crown, and your counsel, Mr. Humphrey, appeared before me this

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afternoon on this matter. They have brought the matter forward. I think it's appropriate in the circumstances that they have done so. Ms. Bridge has sought my permission to have the charges before the Court withdrawn. It's acknowledged that at this stage she has no automatic right to withdraw the charges, but she can only withdraw them with permission of the Court.

Your counsel has opposed, on your instructions, that request. Mr. Humphrey has submitted that I ought not to exercise my discretion and permit the Crown to withdraw, that there's a public interest in hearing my ruling with respect to the trial of this matter. I have decided that I am not going to accede to the Crown's request to withdraw charges against you at this time.

However, I am prepared to indicate as follows: Over a course of several days I heard evidence in this matter. I heard evidence from two police officers, Constable Gervais and Constable Cook. Both officers were extensively cross-examined with respect to the allegations against you and with respect to their role in the investigation. I have reviewed my notes, I have reviewed the transcripts in this matter, and I have reviewed the submissions about Ms. Bridge and your counsel, Mr. Humphrey, with respect to this matter.

I have concluded that with respect to the evidence of both officers there were internal

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inconsistencies, that is to say there were inconsistencies in their own evidence. Those inconsistencies existed, in my view, during direct examination and certainly were exposed and brought to light on cross-examination. I find, as well, there were inconsistencies and contradictions between both police officers as to the chronology of events. I find that their evidence was incredible and not worthy of belief, accordingly, I have no alternative but to acquit you of all these charges. You're free to go, sir.

MS. BRIDGE: Thank you very much, Your Honour.

THE COURT: Thank you.

MR. HUMPHREY: Thank you very much, Your Honour.

I did raise the issue of costs, and it's not something that obviously can be argued at this time. I just wonder if I can ask Your Honour to bear in mind that I have raised an outstanding issue of costs, and I don't want my thanking you for the acquittal right now to be taken as my acknowledging that the matter is complete for all purposes. I'd ask the indulgence that I be allowed the time to review the law in this area and give consideration to whether we'll appear before you again seeking costs.

THE COURT: I think the law is clear, is that you can bring an application before me. I don't know if there's a time limit on it, but certainly the practise seems to have developed that at the conclusion of a case costs maybe litigated, and I think on a notice to me and to the Crown, you can bring an application before me.

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MR. HUMPHREY: That's how it would be done. Thank
you, Your Honour.

THE COURT: Thank you.

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FORM 2
Certificate of Transcript
Evidence Act, Subsection 5(2)

I, Daniel S. Rosenberger, certify that this document is a true
10 and accurate transcription of the recording of R. v. Oreth
Bowen, in the Ontario Court of Justice, held at 7755 Hurontario
Street, Brampton, Ontario, taken from Recording No. 524/2005 and
525/2005, which has been certified in Form 1.

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February 14, 2006

(Date)

(Signature of authorized person)

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TRANSCRIPT HISTORY

Transcript Ordered
Order Received by Reporter
35 Transcript Required by
Transcript Completed
Reasons handed into Justice
Ordering Party Notified

January 17, 2006
January 17, 2006
No Date Provided
February 14, 2006
January 24, 2006
February 15, 2006