R. v. Takagishi

Between
Rex, and Takagishi

[1932] B.C.J. No. 91

46 B.C.R. 281

British Columbia Supreme Court
Vancouver, British Columbia

Macdonald J.

October 24, 1932.

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1 **MACDONALD J.**:-- The defendant, Takagishi, was indicted by the Grand Jury at the Fall Assizes of 1931. Upon the case being tried the jury disagreed, with the result that the case was traversed to the Spring Assizes of 1932. The indictment alleged a criminal libel, and when the case came on in due course for further trial, at such Spring Assizes, counsel for the Crown appeared and also counsel for the private prosecutor. The latter, addressing the Court, mentioned the facts, as I have shortly outlined them, and then was requested to state his position particularly, as to what he desired, in connection with the prosecution. He seemed to be rather undecided as to why he had made any application. Then upon the query being presented to him, as to whether he desired to have the case traversed, he said "I am asking to have it stayed." Mr. Craig, counsel for the defendant, stated he had no objection to that course being pursued. Counsel for the Crown gave a formal consent and the Court stayed proceedings.

2 Counsel for the defendant asked the Court whether there would be a discharge of the accused, which, after some discussion, was ordered by the Court, without any apparent objection by either counsel for the Crown, or for the private prosecutor. [46 BCR Page283]

3 Counsel for the defendant then applied for an order for payment of the costs under section 1045 of the Criminal Code. The Court desired to know if the proceedings, thus taken, were equivalent to an acquittal. Counsel for the defendant stated he had authority to that effect, and counsel for the private prosecutor in reply said that he considered it was not equivalent to an acquittal, as it was only a disagreement of the jury. The Court then took the position, which is now assumed by counsel for the defendant, that the case was withdrawn, stating that disagreement was not an acquittal, but that there has been a discharge of the prisoner out of custody without any comment. There was no doubt in this respect, and the order was made to that effect. The defendant was discharged and the costs were taxed. This discharge of the defendant was, to my mind, an important feature of the proceed-

ings and entitled to considerable weight in disposing of the present application. This all occurred during and shortly after the Spring Assizes of 1932.

4 Then at the present Fall Assizes an application is made to me, as the presiding judge, to have this indictment further proceeded with, it being stated by other counsel, engaged by the private prosecution, that the Attorney General was willing, as he expressed it, to lift his hand, or remove the stay of proceedings which already existed. Counsel thus making the application went to considerable trouble in the matter, and I intimated to him that it would be necessary, if his application were acceded to, that he should have a formal statement by the Attorney General, showing approval of the course he was pursuing with respect to the prosecution. Upon the assumption that such formal statement could be obtained I gave the matter consideration and allowed the argument to proceed.

5 Counsel supporting the application frankly admits that there was no case in point, in which an indictment thus stayed was proceeded with, in the manner he now seeks to have pursued. He referred to several judgments in which the matter received some consideration, but admitted that the result of those cases does not give him the support which he would desire. In order to succeed, he submits that I should deduce from some remarks in these judgments, a result that would bring this indictment into operation once more and require the accused party, who has [46 BCR Page284] already been discharged, to appear at the next Assizes and again be placed on trial.

6 Several cases have been cited in this connection, but it does not seem to me that they in any way controvert the conclusion reached in Archbold's Criminal Pleading, 28th Ed., p. 128, which I will read without discussion:

> A nolle prosequi puts an end to the prosecution ...; but does not operate as a bar or discharge or an acquittal on the merits ...; and the party remains liable to be re-indicted.

7 Then reference was made by the text-writer to the fact that a fresh process may be awarded on the same indictment. He then adds: "but this dictum appears not to be law." Several cases are then cited in support of the latter proposition. I might also refer to some Canadian cases, but, without further discussion, I may state that I have come to the conclusion that the application should be refused.

8 It would be establishing a new practice in criminal proceedings, without any warrant for so doing. It would be an anomaly, when you consider the fact that taxation of costs had already taken place, and if a new trial were held upon this indictment the benefit, thus obtained, under the order allowing the costs, might be affected and, in the result, be completely lost.

9 In conclusion, I might remark that there is no authority in the Criminal Code allowing the Attorney General to grant a stay of proceedings upon an indictment, or as it was formerly termed, to enter a nolle prosequi, and then to remove the stay and allow such indictment to be again proceeded with. The proper procedure would be for the Crown to prefer another "charge."

10 I do not think I have any jurisdiction, which will warrant me making any order for costs.

Application refused.