# Young v. Uchiyama

[1933] B.C.J. No. 11

48 B.C.R. 55

British Columbia Court of Appeal
Victoria, British Columbia

**Macdonald C.J.B.C., Martin, McPhillips and Macdonald JJ.A.**

Heard: June 14, 1933.
Judgment: October 3, 1933.

**Counsel:**

Sloan, for the appellant.

Tysoe, for the respondent.

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**1 MACDONALD C.J.B.C.**:-- It appears from the pleadings in this case that the defendant laid a charge against Kanetaro Takagishi for having published a defamatory libel against him, under the provisions of the Criminal Code; that the defendant prosecuted the charge before the deputy police magistrate who committed the said Kanetaro Takagishi for trial; that the defendant caused an indictment to be preferred against the said Kanetaro Takagishi on the said charge upon which he was tried in November, 1931; that upon the said trial the jury disagreed; that on the 20th of May, 1932, the Attorney General of British Columbia directed a stay of proceedings to be entered upon the said indictment, which said stay of proceedings was duly entered and thereupon by order of the Court the said Kanetaro Takagishi was discharged by the Chief Justice of the Supreme Court of British Columbia from custody under the said indictment; that on the same day the said Chief Justice made an order pursuant to section 1045 of the Criminal Code, whereby he ordered the defendant to pay to the said Kanetaro Takagishi his costs incurred by him by reason of the said indictment including the costs of the trial at which the jury disagreed and the costs incurred before the police magistrate, the said judge also directed the said costs to be taxed by the district registrar of the Supreme Court and the same were taxed at $2,417.95; that in November, 1932, the said Kanetaro Takagishi by legal assignment and due notice assigned the said costs to the plaintiff. The defendant having made default in payment of the said costs this action was commenced in the Supreme Court of British Columbia for the said stun of $2,417.95. At the trial the statement of claim was amended by setting up the said section 1045 and claiming to succeed thereunder. Counsel for the parties agreed during the said trial, as stated by plaintiff's counsel, as follows:

> My friend and I have agreed, subject to your Lordship's approval, as follows: If it shall be held that the plaintiff is not entitled to recover under the order of Chief Justice Morrison, but is entitled to recover without regard to that order, the bill shall be referred to the registrar to be taxed, at which taxation both sides shall be there to give evidence.

**2** The Court expressed its approval of this and defendant's counsel said:

> It is satisfactory to me, with this observation, that I am not receding from any position I have previously taken.

**3** To this Mr. Craig answered:

> That is all right.

**4** It seems to me that thereupon the claim of the plaintiff was an alternative one, first under the order of the Chief Justice and the certificate of the taxing officer and in the alternative a debt created by section 1045.

**5** The learned judge held that the plaintiff was entitled to succeed upon the order of the Chief Justice and of the certificate of the taxing officer and ordered judgment for the said sum of $2,417.95, the amount not being in dispute.

**6** Much confusion was created by the argument of counsel during the trial and up to the time of the said agreement. As I understand Mr. Sloan's argument for the defendant, he claimed that there was no judgment by the Criminal Court and that the alternative claim was not maintainable because there had been no assignment of the debt created by section 1045. I do not understand that the judgment of the Chief Justice who was the trial judge and who made the order for costs on the same day was not made in the Criminal Court. If it were made in the Criminal Court then there seems to be no point to the objection raised by defendant's counsel. I assume therefore in the absence of evidence to the contrary that the Chief Justice made the order of the 20th of day in the Criminal Court which would be in the Supreme Court of British Columbia exercising criminal jurisdiction.

**7** It was argued by defendant's counsel that the entry of a nolle prosequi was not a termination of the proceedings and that therefore section 1045 did not apply. I cannot agree with that submission. I think it is against the authorities and I refer particularly to the judgments of the Court of New South Wales consisting of the Chief Justice, Mr. Justice Windeyer and Mr. Justice Innes, in Gilchrist v. Gardner (1891), 12 N.S.W.L.R. 184, of which we have been supplied with a typewritten copy, the said report not being in our library. The question of the effect on the criminal proceedings of the entry of a nolle prosequi was fully considered and the authorities reviewed in that case and I agree with the conclusion at which the Court unanimously arrived.

**8** I would therefore dismiss the appeal.

**9** MARTIN J.A.:-- Under the circumstances before us, the order appealed from was, in my opinion, rightly made pursuant to the joint effect of sections 1045 and 1047 and all the costs allowed by the presiding judge of Assize, MORRISON, C.J., were those "incurred ... by reason of such indictment" under said section 1045, as interpreted by the cases relied on by my learned brothers, to which I add the recent decision of the King's Bench Division in Rex v. Essex Justices (1933), 49 T.L.R. 283; 148 L.T. 498; in support of the reasoning that the entry of the nolle prosequi under section 962 is, in this case, the substantial equivalent of a "judgment given for the defendant," within

the true meaning of that expression as employed in said section 1045, which, to cite Avory, J., is not to be taken in its "strict technical sense" but interpreted in a way which is "obviously necessary to give ... some meaning which will not render it nugatory" to cover such an ordinary situation as the present. This case, indeed, has even stronger grounds for such a view because the situation which has arisen here (far from an extraordinary one) must be taken to have been in the contemplation of Parliament in view of the wide power it conferred upon the Attorney General by said section 962.

**10** It follows that the appeal should be dismissed, but not without giving to the appellant's counsel, Mr. Sloan, that "commendation and gracing" which Bacon says (in his famous essay "Of Judicature") are due to counsel where the "Cause [is] well handled and fair-pleaded."

**11** McPHILLIPS J.A.:-- I would dismiss the appeal.

**12** MACDONALD J.A.:-- After perusal of the cases and statutes to which we were referred I think the judgment of Hall, J. in Rex v. Blackley (1904), 13 Que. K.B. 472, on similar facts, is sound. It disposes of this appeal. The discharge of the accused ordered by the Court following a stay constituted a "judgment" within the meaning of section 1045 of the Code. Although this discharge pronounced upon the formal declaration by the Crown of a nolle prosequi was not equivalent to an acquittal and a new indictment might be preferred still quad that indictment, as Hall, J. points out at p. 474 it is a judgment in defendant's favour. The case too covers the point that the costs of the trial in which the jury disagreed should be included. This appears clear from the phrase in section 1045 "costs incurred by him by reason of such indictment or information." The costs might be taxed by the presiding judge as in Rex v. Fournier (1916), 25 C.C.C. 430 at 439. They may also be taxed pursuant to section 1047, subsection 1 of the Code, as in this case. The Chief Justice of the Supreme Court, who discharged the accused, directed that the costs incurred by reason of the indictment should be paid by the defendant after taxation by the registrar. He had jurisdiction in respect to costs.

**13** I would dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: Farris, Farris, Stultz & Sloan.

Solicitors for respondent: Craig, Ladner, Carmichael, Tysoe & Downs.