IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Robichaud, 2009 NSPC 53

Date: 2009 September 4
Docket: C-1998194
Registry: Amherst

Between:

Her Majesty the Queen

v.

Trevor John Robichaud

Judge:	The Honourable Judge Carole A. Beaton
Heard:	September 4, 2009, in Amherst, Nova Scotia
Topic:	Defence Application for a Stay of Proceedings under the *Charter of Rights and Freedoms* (Entrapment)
Oral Decision:	September 4, 2009
Written release of Oral Decision:	October 23, 2009
Charge:	That, Trevor John Robichaud, on or about the 30th day of November, A.D., 2008, did traffic in a substance included in schedule 1 to wit: cocaine contrary to section 5(1) of the **Controlled Drugs and Substances Act**.
Counsel:	Douglas B. Shatford, Q.C., for the crown Jim O'Neil, for the defence

By the Court: (Orally)

[1] This is the matter of The Queen and Trevor John Robichaud concerning a charge of trafficking in cocaine contrary to section 5(1) of the **Controlled Drugs and Substances Act** as contained in Information No. 575671. Mr. Robichaud came before the court earlier this week and entered a guilty plea to that charge and pursued an application, supported by written materials previously filed, arguing that he is entitled to a stay of these proceedings on the basis that the events surrounding the trafficking offence support that he was entrapped into the commission of the offence.

[2] The undisputed facts are as follows:

Late on the evening of November 29th and the early morning hours of November 30th, 2008 Amherst police were conducting an undercover operation known as "operation dog house" using undercover agents to seek drugs from targeted individuals and to attempt to purchase illicit drugs, particularly cocaine. Two undercover agents, Cst. Michelle Doyle and Cst. Amanda Merrick, attended a local bar "Dooley's" and while there they were approached by Mr. Robichaud. During conversation that ensued the undercover agents indicated to Mr. Robichaud they were hoping to acquire drugs and he eventually offered to obtain the same for them. The officers gave him $110 and he left his identification with them, left the bar, and returned a short time later with a gram of cocaine for the officers. He also returned $15 in cash because he was unsuccessful in procuring ecstasy for the officers.

[3] I have been referred to a number of cases. The Applicant has referred me to **Mack** [1988 2 S.C.R. 903], **Smith** [C.A.C. No. 114290] a case of the Nova Scotia Court of Appeal and the **Perfect** [2001 N.S.J. 14] decision of the Nova Scotia Provincial Court. The Respondent has referred me as well to the **Mack** (supra) case and also to **Chu** [2009 BCPC 76] a decision of the British Columbia Provincial Court , **Collier** [2005 NBPC 28] a decision of the New Brunswick Provincial Court, **El-Sheikh-Ali** [1993 O.J. No. 2413] of the Ontario Court of Justice and the **Barnes** [1991 1 S.C.R. 449] decision of the Supreme Court of Canada. I have reviewed each of those cases in coming to my decision this morning.

[4] The **Barnes** (supra) decision sets out a very helpful and succinct reminder of what it is about the notion of entrapment that is offensive to our system of justice. At paragraph 14 of **Barnes** (supra), Lamer, C.J. said, in part:

> ...The defence of entrapment is based on the notion that limits should be imposed on the ability of the police to participate in the commission of an offence. As a general rule, it is expected in our society that the police will direct their attention towards uncovering criminal activity that occurs without their involvement.

[5] The remedy which Mr. Robichaud seeks, under section 24 of the **Charter**, can be a remedy effected only in the clearest of cases, as that principle is found in **Pearson** [1999 130 C.C.C. (3d) 293], referred to in the **Collier** (supra) decision relied upon by the Crown.

[6] The burden in this matter rests on the Applicant to demonstrate on a balance of probabilities that the evidence supports he was entrapped into the commission of the offence and therefore that an abuse of process has occurred. The law requires that the court conduct an objective assessment of the conduct of the police and their agents as that principle is discussed in the **El-Sheikh-Ali** (supra) decision. Ultimately, while there are guiding principles of law, it is clearly established by a reading of the cases to which counsel have referred the court, as well as any other of the cases on the issue of entrapment, that each situation will be fact driven, such that the conduct which may constitute entrapment in one case may not necessarily, depending upon the nuances of the situation, amount to entrapment in another case. Therefore the specific conduct of the police and the responses of the accused to that conduct must be carefully scrutinized.

[7] The **Mack** (supra) decision very succinctly sets out the law and both crown and defence have relied on it in this case to articulate the principles and the test that guides this court. To paraphrase **Mack** (supra), the court has to conduct a two part analysis: the first question is whether the police were acting on a reasonable suspicion that the defendant was already engaged in criminal activity or pursuant to a bona fide inquiry? If the answer is no - that is, that there was no reasonable suspicion that Mr. Robichaud was already engaged in criminal activity, and further the police were not acting pursuant to a bona fide inquiry - then at the time the police provided him with an opportunity to commit the offence he was entrapped. As Mr. O'Neil asserted on behalf of his client, if the crown can't fit within one of those two categories, then the analysis comes to an end. Even if the court accepts

on the evidence that the police did have a reasonable suspicion or acted in the course of a bona fide inquiry then the second question is: did the police go beyond merely providing an opportunity and actually induce the commission of the offence?

[8] As to the first question, it also requires consideration of what is meant by a "bona fide inquiry". The definition of a bona fide inquiry set out in **Barnes** (supra) is echoed in **Chu** (supra) and **Collier** (supra). At paragraph 23 of **Barnes** (supra), the court said as follows:

> ... The basic rule articulated in Mack is that the police may only present the opportunity to commit a particular crime to an individual who arouses a suspicion that he or she is already engaged in the particular criminal activity. An exception to this rule arises when the police undertake a bona fide investigation directed at an area where it is reasonably suspected that criminal activity is occurring. When such a location is defined with sufficient precision, the police may present any person associated with the area with the opportunity to commit the particular offence. Such randomness is permissible within the scope of a bona fide inquiry.

[9] The defence has asserted that this matter was not a situation in which Mr. Robichaud found himself the subject of a bona fide inquiry, nor was he a target or a suspect or within a targeted area.

[10] The evidence before me on this point came first from Cst. Merrick who testified that she was acting in an undercover role for the Amherst Police Department as part of addressing "a drug problem" in Amherst and she was to go to bars with Cst. Doyle. Cst. Merrick testified that she and Cst. Doyle were given direct targets, which I took to mean that there were specific individuals identified to them by the principals conducting "operation dog house" as being persons that those officers should contact. Cst. Merrick testified that the officers were also asked to go into Dooley's bar to speak to and engage with people selling drugs.

[11] Cst. Doyle testified that she was employed as an undercover officer along with Cst. Merrick and her task was to go to Dooley's bar and look for target dealers or traffickers of cocaine and to identify other people who would be present in the bar as dealers or traffickers.

[12] I might add as well that the evidence of the Applicant, Mr. Robichaud, was ironically enough corroborative of what the officers were tasked with doing when

he volunteered, in the course of his evidence, that it was his experience that "everyone knows that you can buy drugs in Dooley's".

[13] I am satisfied on the evidence of Cst. Merrick, Cst. Doyle, and Mr. Robichaud that he was present in Dooley's bar and I am satisfied on the evidence of the officers that it was indeed a location being targeted by them on that evening. The evidence before me supports that the police were acting pursuant to a bona fide inquiry at the time the Applicant encountered them in the targeted area.

[14] In **Barnes** (supra) the court found that the Granville Mall area of Vancouver was a "targeted area". At paragraph 18 the court said:

> Secondly, the police department directed its investigation at a suitable area within the city of Vancouver. As I noted in Mack (supra), the police may present the opportunity to commit a particular crime to persons who are associated with a location where it is reasonably suspected that criminal activity is taking place. I stated, at p. 956:
>
> > Of course, in certain situations the police may not know the identity of specific individuals, but they do know certain other facts, such as a particular location or area where it is reasonably suspected that certain criminal activity is occurring. In those cases it is clearly permissible to provide opportunities to people associated with the location under suspicion, even if these people are not themselves under suspicion.
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> In this case, I am satisfied that is exactly what was happening here: the officers were in a particular location that was under suspicion, it was a targeted area and as a result of encountering Mr. Robichaud, who was not himself specifically under suspicion, the police were nonetheless acting pursuant to a bona fide inquiry.

[15] That brings the court to the second and, in my view, more complicated question in this particular matter: whether the actions and the words of the police induced the commission of the offence to which Mr. Robichaud has entered a guilty plea? To assist in an objective assessment of the police conduct, which is the test, the **Mack** (supra) decision provides a helpful list of factors to be considered. Commencing at a portion of paragraph 138 the court said:

> 138 ...To determine whether the police have employed means which go further than providing an opportunity it is useful to consider any or all of the following factors:
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> 139 -- the type of crime being investigated and the availability of other techniques for the police detection of its commission;
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> 140 -- whether an average person, with both strengths and weaknesses, in the position of the accused would be induced into the commission of a crime;
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> 141 -- the persistence and number of attempts made by the police before the accused agreed to committing the offence;
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> 142 --the type of inducement used by the police, including deceit, fraud, trickery or reward;
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> 143 -- the timing of the police conduct, in particular, whether the police have instigated the offence or became involved in ongoing criminal activity;
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> 144 -- whether the police conduct involves an exploitation of human characteristics such as the emotions of compassion, sympathy and friendship;
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> 145 -- whether the police appear to have exploited a particular vulnerability of a person such as a mental handicap or a substance addiction;
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> 146 -- the proportionality between the police involvement, as compared to the accused, including an assessment of the degree of harm caused or risked by the police, as compared to the accused, and the commission of any illegal acts by the police themselves;
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> 147 -- the existence of any threats, implied or express, made to the accused by the police or their agents;
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> 148 -- whether the police conduct is directed at undermining other constitutional values.

[16] Within the framework of that roster, although it is not meant to be an exhaustive list, the whole of the evidence I heard in this matter does satisfy this court, and I find as a fact, the following:

(a) It was Mr. Robichaud who initiated contact with the officers when he approached them in the bar, and not a case of them approaching him.

(b) The undercover officers gave Mr. Robichaud what is pejoratively known as “the brush-off” and to that extent they declined his first overture to them by way of his offer to purchase them a drink.

(c) Mr. Robichaud later reinitiated contact with the officers when he delivered drinks to them, following which, by agreement of all three parties they secured a table in a more secluded area of the bar.

(d) Once seated, the officers and Mr. Robichaud exchanged names and learned one another’s “stories”.

(e) The officers were presenting to patrons and the Applicant as “bummed out”, as that terminology was used by Cst. Merrick in her evidence, because they had been “ripped off”. Cst. Doyle told the Applicant that the officers were “looking for a crazy time and got fucked over”. This was terminology that the constables deliberately used as they knew it would be recognized and understood by those familiar with the drug scene and the language was purposely employed by them to raise the subject of drugs with the Applicant and anyone in earshot.

(f) Mr. Robichaud, by his admission, was in the bar on that evening for the purpose of “picking up chicks” and Cst. Doyle agreed in her evidence that his goal was quite obvious to her.

(g) The main topic of conversation for the women, despite Mr. Robichaud’s efforts to steer it to other things, was that of acquiring drugs. It was clear from the nature of the conversation that he understood the undercover

> officers wanted drugs as a component of their evening. In a very short time, in his desire to advance his association with the officers and continue the fun of the evening, Mr. Robichaud offered to procure some cocaine and ecstasy being the drugs of choice identified by the officers.
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> (h) The Applicant and the undercover officers had less than five minutes together from the time they sat at a table with their drinks until he volunteered to procure the drugs.

[17] In relation to all of these facts, they are supported by the evidence of all three individuals who gave testimony in this matter, being the Applicant and the two undercover officers, and to that extent all three are corroborative - on some points to a lesser degree and on some points to a greater degree - one with the other.

[18] That brings me to the question as to who was "the aggressor" versus "the inducer" in this event? The facts in **Chu** (supra) were very similar to the facts in this case and concurrently because they are alike to some degree, the facts in this case as in **Chu** (supra) are markedly different from those in **El-Sheikh-Ali** (supra). In **Chu** (supra) the court said:

> 43 It is important to note that it was the accused who put dancing "on the table" so to speak, not the undercover constable. On his own evidence, he thought that if he could just keep dancing with her, he might, in the end, "get lucky". To the extent that a dance became a "reward" for the accused if he obtained the drug for the constable, it was a reward that he super-imposed upon the transaction. The constable simply played along with him. However, she reversed his plan, by saying, "No, I need it now. I want to be happy now." In doing so, the constable actually resisted the accused's effort to make her continue dancing with him before obtaining the ecstasy by implying that she needed the drug first. The accused readily complied with her request saying, "OK, wait here, don't move." There was no resistance or hesitation by the accused. He immediately went off to get the ecstasy for the constable.
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> 44 Defence counsel in the present case has directed my attention to the decision in *El-Sheikh-Ali*. In this latter case, the trial judge concluded that the officer's persistent flirtatious and seductive behaviour towards the accused, coupled with

> her suggestion to the accused that an intimate relationship between them was a possibility, was designed to and did in fact induce the accused to provide her with cocaine, something that he would never have done otherwise. The learned judge was of the view that this conduct by the officer offended "the basic values of the community". He directed a stay of proceedings.
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> 45 The facts before me are a far cry from those in the *El-Sheikh-Ali* decision. In the present case, the constable acknowledged that the accused was likely attracted to her. He obviously wanted to dance with her. His interest in the constable was confirmed by the fact that he did not charge her for the drug, telling her, "...for you free." However, the constable had no way of knowing the full extent of the accused's fantasy: If I can keep dancing with her, "I might get lucky". ... The constable did tell the accused that she wanted to "feel good" and that she wanted to be "happy". These words were not sexual in nature. They were clearly a reference to the effect of the drugs that she wanted. I have no doubt that the accused understood that this was so. When the constable indicated that she wanted to be happy "now", the accused's immediate response was to go off and get the ecstasy pill for her.

[19] I am certainly satisfied that the facts in this case mirror much more closely the facts in **Chu** (supra) than those in **El-Sheikh-Ali** (supra). A reading of **El-Sheikh-Ali** (supra) makes it clear the court there wasn't left in any doubt that the undercover operative held out to the defendant not only the prospect of a relationship but the prospect of going to the home of the defendant for an extended period of time as part of a sexual relationship. As in **Chu** (supra), the nature of Mr. Robichaud's contact with the undercover officers is markedly different, as is clear from his own evidence.

[20] In this case, the evidence as between the Applicant and the police diverged on several points. The defendant said the undercover officers were "relentless", and that was his word, used repeatedly in his evidence, to explain that the officers brought the conversation back to the matter of the acquisition of drugs five to six times during the brief conversation he had with them. Both officers testified that very quickly into the conversation the Applicant volunteered to go get them what they wanted. Mr. Robichaud, in his own evidence, indicated that once he finally determined he could not divert the officers' attention to another subject, started to discuss acquisition of drugs for them.

[21] The defendant also testified that he had eight beer before departing his home and going to the bar and he had four to five drinks while at the bar. So his

accuracy of recall may be somewhat suspect. It was put to him in cross examination that the officers initially told him they had been stood up while waiting for drugs and in response to that Mr. Robichaud agreed with the crown that there were aspects of the event he did not remember. Nonetheless, I am ultimately satisfied that Mr. Robichaud was a forthright and credible witness.

[22] Mr. Robichaud may very well have, and indeed in all likelihood it seems he did let his desires overrule his good judgment. However, I'm not persuaded on his evidence that the actions of the police were such as to clearly support that he was a hostage to some perceived potential reward, such as, at the very least continued contact with the women or at the very most that he would go home with them that night (which he frankly identified as a goal) to the extent that he was induced to make the purchase that he did. He clearly did so in an effort to impress the officers and gain advantage. The officers may have been persistent in their choice of topic but were in no way even suggesting, much less being plain or insistent, that any or all further contact with Mr. Robichaud was contingent on a drug purchase by him. Mr. Robichaud formed his own internal impression that his own aspirations would be accomplished if he got drugs for the women, but I'm not persuaded the officers made his acquisition of drugs a prerequisite to continued conversation or any particular act or event that would include him, although such was his hope. As in **Chu** (supra), the defendant here "superimposed upon the transaction" the advancement of his aspirations, which is, on an objective analysis, quite different than having had any conditions predicate imposed upon him by the police.

[23] In his evidence Mr. Robichaud described that he listed for the officers a number of options as to what activities the three could partake of that evening, including but not limited to some dancing, more drinks, or going partying, and in response to those offers, the officers kept coming back around to an expression of their choice of activity as, in the words of Cst. Doyle, to "get crazy", which the Applicant interpreted and understood was their desire to come under the influence of drugs.

[24] Mr. Robichaud says that but for the actions of the police the offence would not have occurred but, with respect, I have to disagree. The evidence clearly demonstrates that the Applicant made a choice, albeit a very unwise one.

[25] It was, according to the evidence of both Mr. Robichaud and Cst. Doyle, an encounter or conversation of several minutes before he left to buy the drugs. (I add

here, parenthetically, that I do not rely whatsoever on the evidence of Cst. Merrick with respect to the specifics of the length of the conversation and a detailed review of her evidence clearly illustrates that her evidence as to the length of time of the conversation was contradictory as between her direct and her cross and it was on more than one occasion internally contradictory in the cross examination itself.)

[26] By the defendant's own evidence he volunteered to the undercover officers that he was a former cocaine addict because he wanted to establish further credibility or rapport, all to further his goal of continuing the liaison. In his evidence on direct, Mr. Robichaud said he heard the officers say they wanted to have a good time and he realized what they meant. He told them he used to be a user but had been clean a long time. (At that point, in an aside to the court, he explained that at the time of the event it was his first year anniversary being clean from drugs.) He told the officers he was a coke addict. He testified that the officers really wanted to find "something" to party. He kept trying to get to "other stuff" like dancing but they kept coming back to drugs and so, in the words of Mr. Robichaud: "Finally, I said alright, I'll see if I can find some because I wanted to hang with them."

[27] On the evidence I am satisfied there was no trickery or reward held out by the undercover officers during their conversation with Mr. Robichaud. Indeed, the Applicant was so keen to maintain the rapport and accomplish the task that he left his identification with them in exchange for the cash provided to him to make the purchase, in, as he testified, a gesture of good faith and trust.

[28] There may indeed be sympathy for Mr. Robichaud's own subjective impression that he was taken advantage of or duped by feminine wiles, however an objective assessment of the conduct of the police, which is the test in law, does not in this case support the conclusion that the conduct of the police would have "induced the average person in the position of the accused, i.e. a person with both strengths and weaknesses into committing the crime" [per **Mack** (supra) at paragraph 140]. The evidence of the Applicant alone makes it clear that the police made quite plain what they were interested in and it was getting "crazy", or getting drugs. They never specifically or directly asked or encouraged the Applicant to purchase drugs. In repeatedly expressing their own intentions or goal for the evening they did not advance any conditions or contingencies to him. It was the Applicant who saw and seized upon the acquisition of drugs as a method to gain favour or advantage. The average person with both strengths and weaknesses

would not necessarily, in my view, have been induced by the actions of the officers to obtain the drugs they expressed a wish to have. Unfortunately, that is the route Mr. Robichaud chose in his quest to curry favour with them.

[29] I am not persuaded that the actions of the officers can be characterized as having exploited the defendant or entrapped him. The burden is on the applicant and he has not met that burden. The request for relief cannot succeed and the application is dismissed.

PCJ