

CANADA
PROVINCE OF NOVA SCOTIA
1999

IN THE PROVINCIAL COURT

HER MAJESTY THE QUEEN

VERSUS

CLINTON R. COSTAIN

DECISION

HEARD BEFORE: The Honourable Judge R. Brian Gibson, J.P.C.

PLACE HEARD: Dartmouth, Nova Scotia

DATES HEARD: September 30, 1999
November 26, 1999
December 1, 1999

DATE OF DECISION: December 7, 1999

SUBJECT: Entrapment - S. 8 of the Criminal Code

COUNSEL: Alonzo Wright, for the Prosecution
Christina Schulze-Allen, for the Defence

ORALLY:

I thank counsel for the cases. I have read them. I have reviewed the evidence in considerable detail. Ordinarily I think that I would prefer to take some time and deal with this in the nature of a written decision but I recognize that Mr. Costain is detained and it's not in his best interest that I do that so I'm going to give a decision from the bench. It's somewhat lengthy. I've made somewhat extensive notes.

The evidence establishes beyond a reasonable doubt that the accused sold a small piece of crack cocaine to the police agent, David Kelly on both March 2, 1999 and March 9, 1999. Each transaction was carried out for the price of \$20.00. The defence, however, alleges that these two transactions occurred as a result of police entrapment. The accused alleges that the police activity carried out through the police agent was an abuse of process and thus seeks a stay of proceedings pursuant to S.8 of the Criminal Code of Canada.

The accused alleges that the police neither had a reasonable suspicion that he was engaged in criminal activity nor were they acting on a bona fide inquiry when they presented him with an opportunity to traffic in cocaine on March 2 and 9, 1999. The accused further alleges that if the evidence establishes that the police had a reasonable suspicion or were acting in the course of a bona fide inquiry, the police went beyond providing an opportunity and induced the commission of the offences on March 2 and 9, 1999. I refer you to **R. v. Mack** (1988) 44 CCC (3d) at p.513 and **R. v. Amato** (1982) 69 CCC (2d) at p.31.

As a result of contact from David Kelly with the Halifax Regional Police Department in mid-January, 1999, Operation Northstar was set up. The general purpose of Operation Northstar was to identify and investigate individuals suspected of trafficking in narcotics.

The operation originally was targeted at the area of North Dartmouth and 25 named individuals.

David Kelly, who was an addicted user of cocaine, had made contact with the police for the purpose of assisting the police. His motivation, at least in part, was monetary. However, he also testified that he was tired of the drug scene and experiencing what it was doing to him and others as a reason for contacting the police. On February 8, 1999 David Kelly signed an agreement whereupon he became a police agent and source. He was to be paid \$50.00 per narcotics purchase in relation to purchases arranged through, and monitored by, the police. When making narcotics purchases as a police agent, Mr. Kelly worked with an undercover police officer. The undercover police officer involved in the two purchases from the accused was Constable Stephanie Venoit. Those purchases made on March 2 and 9, 1999 occurred at 146 Prince Albert Road in Dartmouth, being an address in the area of Central Dartmouth.

The targeted area of Operation Northstar was expanded during the month of February to include the former City of Halifax and the area of East Dartmouth. Other individuals, including the accused, were added to the target list during the course of Operation Northstar. The expansion of the targeted areas and individuals seems to have occurred at least in part as a result of the activities of police agent David Kelly.

Police agent David Kelly, throughout the duration of Operation Northstar, until at least March 9, 1999, continued to consume cocaine and to purchase cocaine for his own consumption. As an active participant in the drug culture he also shared his cocaine with others, including the accused.

David Kelly met the accused some time in January, 1999. The accused resided at 146 Prince Albert Road which was described in the evidence as a crack house. According to the evidence, the building at that address was a rooming house where most of the residents were users of cocaine. The evidence establishes that the police agent quite frequently went to this address at various times during the months of January, February and March, 1999 to consume cocaine. While attending at this address for the purpose of consuming cocaine, he testified that he was able to purchase cocaine through some of the residents, including the accused.

While the police were aware that their agent, David Kelly, was an active consumer of narcotics, it appears that the police were not fully aware of the extent to which he was also consuming and sharing narcotics with the accused. Generally the consumption of narcotics by the agent was not viewed as a problem by the police provided that he was not under the influence of narcotics while actively employed in a police operation to acquire narcotics on behalf of the police. Constable Waterfield, who was in charge of Operation Northstar, testified that it is difficult for the police to penetrate the drug culture. Furthermore, he testified that drug trafficking is widespread and all those involved in that activity are not known to the police.

The police agent, David Kelly, brought the accused's name forward to the police as a potential target on either February 24 or 25, 1999. David Kelly advised the police that he believed he could purchase cocaine from the accused. Constable Waterfield testified that he had a belief, arising from information provided by David Kelly, that Kelly had been both consuming crack cocaine with the accused and buying crack cocaine from the accused before the police added the accused to the Northstar target list. This belief and evidence

given by Constable Waterfield is, however, not the evidence given by the agent who testifies that he only informed the police that he believed that he could acquire crack cocaine from the accused. Thus, it's unclear whether Constable Waterfield simply inferred that the agent was likely using cocaine with the accused or whether, in fact, in the conversations with the agent, the agent so informed Constable Waterfield.

In any event, those conversations, if they occurred and if that information was imparted by the agent, related to the activities of the agent prior to the accused becoming a target. It does not appear that David Kelly informed the police that he continued to bring crack cocaine to the accused's residence and share the crack cocaine with the accused after the police had added the accused to the target list.

Essentially the police relied upon the representations made by David Kelly concerning the accused as a basis for adding him to the Northstar target list. A review of police records revealed that the accused had an extensive criminal record. However, only one conviction for a narcotics or drug offence was revealed being a 1977 conviction for simple possession under the provisions of the Narcotics Control Act. I accept the evidence of the accused that the conviction was in relation to the possession of marijuana.

I am satisfied from the evidence that when the police agent attended the accused's residence on March 2 and March 9, 1999 with Constable Venoit at the direction of Constable Waterfield, that the police had a reasonable suspicion that the accused was already engaged in the trafficking of cocaine. The evidence in this case does not establish that the request by Agent Kelly, in the company of Constable Venoit, to purchase cocaine from the accused on March 2nd and March 9th, amounted to random virtue testing. The fact

that 146 Prince Albert Road was not within the original target area of North Dartmouth is of no consequence.

What is of greater significance is the allegation that the accused was induced by the police through the activity of their agent, David Kelly, to commit the offences on March 2nd and 9th. According to the evidence of the accused, he at no time prior to March 2nd, sold cocaine to the agent. It is the accused's evidence that the agent would either bring cocaine to the 146 Prince Albert Road address or acquire cocaine at that address through others and smoke it there. The accused further testified that David Kelly would share his cocaine with the accused in exchange for use of his room for this purpose. The accused would also make his telephone available to the agent and others at 146 Prince Albert Road in exchange for sharing in the consumption of crack cocaine. I am satisfied from the evidence that the accused, at times material to these offences, was addicted to crack cocaine. This was a condition known to the police agent, David Kelly.

The evidence given by David Kelly would suggest that he had acquired narcotics through the accused on a number of occasions prior to February 26, 1999. While I am not prepared to accept the accused's evidence that he never sold cocaine to the agent prior to March 2nd, it seems likely from the evidence that the majority of the interactions between the accused and David Kelly at 146 Prince Albert Road involved the sharing of cocaine either brought to those premises by David Kelly or acquired by David Kelly through others at those premises. There is no doubt that the accused was able to acquire cocaine through a source identified as "Chuckie" and likely acquired cocaine for David Kelly prior to February 26th.

David Kelly had a monetary motivation to have the police add new targets to the Northstar target list as soon as possible. Therefore, it seems unlikely he would have delayed advising Constable Waterfield about his ability to acquire drugs from the accused for as long as his testimony would seem to suggest. In other words, I conclude that David Kelly, despite having become acquainted with the accused approximately six weeks prior to February 24th, likely only acquired cocaine through the accused a short time prior to February 24th. I conclude that their relationship during those two months or six weeks consisted mostly of the police agent bringing cocaine to the 146 Prince Albert Road premises and occasionally sharing the cocaine with the accused in exchange for the use of his premises for that purpose.

The evidence establishes that the police selected the occasions when David Kelly would be operational for purposes of attempting to acquire cocaine or other narcotics from those on the target list as well as those who would be targeted on each occasion. On February 26, 1999 Agent Kelly was operational at the request of Constable Waterfield. The accused was a target that evening. The accused, however, was not at 146 Prince Albert Road that evening and narcotics were instead acquired from another individual at that address. Between February 26th and March 2nd, being the next date upon which David Kelly was operational for the purpose of acquiring narcotics for the police, Mr. Kelly continued to consume cocaine and to do so at the 146 Prince Albert Road premises.

I accept the evidence of the accused that David Kelly brought a \$100.00 "rock", so-called, to the 146 Prince Albert Road premises on March 1st and shared its consumption with the accused and others. According to the accused, a \$100.00 rock is sufficient to get four or five people "high" from its consumption. The accused testified that the amount of

drugs that the agent had with him on March 1st was greater than usual. However, he testified that on two previous occasion the accused had brought \$50.00 rocks to the accused's premises.

As a result of sharing in the consumption of the agent's narcotics and, in particular, the \$100.00 rock on March 1st, the accused testified that he felt he owed the agent a favor on March 2nd when David Kelly arrived at the accused's residence seeking to acquire drugs. The evidence does establish that on both March 2nd and 9th the accused did not have any drugs on his person or premises for sale. Rather, it appears that he acquired the drugs on those dates for the police through "Chuckie", a person apparently unwilling to deal directly with the police agent.

The evidence establishes that the accused was neither the only nor the main source or contact at 146 Prince Albert Road through whom crack cocaine could be acquired.

According to the evidence of police agent Kelly, a crack addict always hopes that they'll get some drugs back or be able to share in their consumption in exchange for a favor such as assisting in the acquisition or providing a place for its consumption. The evidence discloses that the police agent, after successfully acquiring the cocaine through the accused on March 2nd, offered the accused a "toke" the next time he had drugs. The agent, while not actually admitting to having made this statement, indicated that he could well have made such a statement but only for the purpose of getting away from the 146 Prince Albert Road premises without having to consume the drugs there at that time and share them with the accused. The evidence would indicate that the police agent continued to attend the 146 Prince Albert Road premises for the purposes of consuming crack cocaine that he brought

to that residence and that he shared it with the accused. That is the evidence of the accused. It is not disputed by the police agent Kelly.

The evidence establishes that the trafficking carried out by the accused on March 2 and 9, 1999 was no more than an accommodation extended to an individual being the police agent, David Kelly, who over a period of approximately two months, had developed a relationship with the accused through which they shared in the use of crack cocaine. I conclude from the evidence that they were both addicted to crack cocaine during the times material to that relationship. The police agent, through his repeated visits to the accused's premises at 146 Prince Albert Road, likely developed at least a trust upon which the accused was willing to rely to satisfy the requests of the police agent Kelly on March 2nd and March 9th.

The issue is whether, in the course of developing this relationship, the police agent went beyond that of simply presenting an opportunity to commit the offence of trafficking in cocaine. The accused bears the burden of establishing on a balance of probabilities that this is the clearest of cases whereby the accused was induced into the commission of the offence of trafficking on March 2 and 9, 1999. Once again I refer you to the case of **R. v. Mack**.

I am satisfied that while the police may have believed that the police agent consumed crack cocaine with the accused prior to the agent identifying the accused as a possible target on February 24th or 25th, the police were unaware that their agent continued to share crack cocaine with the accused after the accused was added to the target list. The police agent simply did not see the continued use and sharing of crack cocaine with the

accused while he was under investigation as potentially problematic. He stated in his evidence that he was a crack user and that he had no reason not to participate and share in the use of crack cocaine with the accused. Obviously, once the accused became a target, there was a need for the police agent not to act in a manner that would raise suspicion from the accused or others at 146 Prince Albert Road. However, in so acting in a manner not to raise suspicion, the agent was bound not to go beyond that behavior which would be consistent with providing only an opportunity to engage in trafficking.

I am also mindful of the fact that the police agent was not a trained police officer. Nevertheless, the police agent chose not to disclose relevant information to the police which would have enabled them to assess the agent's conduct and provide him with guidance. Constable Waterfield, through the lack of full disclosure by the agent of his activities with the accused, particularly after he became a target, was left in a position where he lacked sufficient information to assess whether the operations on March 2nd and March 9th, relative to the accused, amounted to the presentation of opportunities to traffic or to entrap the accused.

As stated in **R. v. Amato** at pages 61 to 62 and quoted with approval in **R. v. Mack** at page 541:

"The character of the initiative taken by the police is unaffected by the fact that the law enforcement agency is represented by a member of a police force or an undercover or other agent, paid or unpaid, but operating under the control of the police."

I turn to **R. v. Mack** at pages 559-560 where it is stated by Lamer J., as he then was, as follows:

"Since I am of the view that the doctrine of entrapment is not dependent upon culpability, the focus should not be on the effect of the police conduct on the accused's state of mind. Instead, it is my opinion that as far as possible an objective assessment of the conduct of the police and their agents is required. The predisposition, or the past, present or suspected criminal activity of the accused, is relevant only as a part of the determination of whether the provision of an opportunity by the authorities to the accused to commit the offence was justifiable. Further, there must be sufficient connection between the past conduct of the accused and the provision of an opportunity, since otherwise the police suspicion will not be reasonable. While predisposition of the accused is, though not conclusive, of some relevance in assessing the initial approach by the police of a person with the offer of an opportunity to commit an offence, *it is never relevant* as regards whether they went beyond an offer, since that is to be assessed with regard to what the average non-predisposed person would have done.

The absence of a reasonable suspicion or a *bona fide* inquiry is significant in assessing the police conduct because of the risk that the police will attract people who would not otherwise have any involvement in a crime and because it is not a proper use of the police power to simply go out and test the virtue of people on a random basis. The presence of reasonable suspicion or the mere existence of a *bona fide* inquiry will, however, never justify entrapment techniques: the police may not go beyond providing an opportunity regardless of their perception of the accused's character and regardless of the existence of an honest inquiry. 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:

- the type of crime being investigated and the availability of other techniques for the police detection of its commission;
- whether an average person, with both strengths and weaknesses, in the position of the accused would be induced into the commission of a crime;
- the persistence and number of attempts made by the police before the accused agreed to committing the offence;
- the type of inducement used by the police including: deceit, fraud, trickery or reward;

- the timing of the police conduct, in particular whether the police have instigated the offence or became involved in ongoing criminal activity;
- whether the police conduct involves an exploitation of human characteristics such as the emotions of compassion, sympathy and friendship;
- whether the police appear to have exploited a particular vulnerability of a person such as a mental handicap or a substance addiction;
- 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;
- the existence of any threats, implied or express, made to the accused by the police or their agents;
- whether the police conduct is directed at undermining other constitutional values.”

Trafficking in cocaine is a serious matter. It is difficult for the police to detect those involved in that activity and thus the requirement to use agents who may be involved in that culture and activity. I am mindful, however, that the accused's involvement in trafficking seems only to have been that of an accommodator for those who lived in the rooming house at 146 Prince Albert Road and others with whom he became acquainted, such as the police agent, David Kelly. Such accommodation seems to have been motivated by his own desire to share in the consumption of the narcotics acquired for others. Profit does not seem to have been his motivation. This would have been obvious to the police agent, David Kelly.

I believe that the average person, with both the strengths and weaknesses in the position of the accused, would have been induced into the commission of the crimes on March 2nd and 9th. The accused was a crack addict who was provided with the opportunity by the agent to share in a \$100.00 “rock” the previous day. It is reasonable that the accused felt like he owed the agent a favor. The agent, an addict himself, should have

known this. The continued sharing of cocaine by the agent over the following days between March 2nd and 9th, together with the agent's offer to the accused to give the accused a "toke" the next time he had drugs, which offer was made on March 2nd after acquiring cocaine through the accused, are also consistent with the reasonable conclusion that a person in the position of the accused on March 9th would have felt like he owed the police agent a favor. I refer to the case of **R. v. Brown** (1999) SJC No.62, a decision of the Supreme Court of Canada dated October 15th reversing the decision of the Court Martial Appeal Court and upholding the decision of the President of the Standing Court Martial. In the **R. v. Brown** decision, the President of the Standing Court Martial found that the provision by the police of free liquor, contained in three 60 oz. bottles, to Brown, who was a known abuser of alcohol, was sufficient to amount to an inducement to Brown to involve himself in the trafficking of cannabis marijuana. The President of the Standing Court Martial found that the provision of the liquor put Brown in the debt of the police who, covertly, were seeking to acquire cannabis marijuana through Brown.

The inducement here was reward. The police agent knew that the accused was addicted to crack cocaine and exploited both this addiction and what might reasonably be seen as a friendship with the accused.

The evidence would seem to establish that the activities of the police agent through the sharing of crack cocaine with the accused and others at 146 Prince Albert Road was, in effect, the commission of the offence of trafficking. Compared to the activity of the accused as an accommodator to the police agent on March 2nd and 9th and seemingly to the agent and others at 146 Prince Albert Road on other occasions, seems not to be

significantly more serious, if more serious at all, than the accused's trafficking activity. Both the agent and the accused, in their trafficking activity, were motivated to acquire drugs for their own consumption and encouraged others to do so assist them in that regard by sharing the cocaine that they acquired with those who could assist them in obtaining more. Such sharing or acquisition enabling would put others in their debt.

I have considered the case of **R. v. Showman** provided to me by the Crown. The facts in that case, in my view, are far less serious than those in this particular case and are facts consistent with what one might find to have occurred with a police undercover operative or agent.

I conclude that the accused has shown this to be the clearest of cases where he was entrapped by the activities of the police into the commission of the offences on March 2 and 9, 1999. Such entrapment violated the fundamental principles of justice which underlie the community's sense of fair play and decency, thus amounting to an abuse of process. This application was brought pursuant to S.8 of the Criminal Code of Canada. A stay of proceedings is granted as a remedy pursuant to S.8 of the Criminal Code of Canada.

I should say that this was not my preliminary view as I listened to the evidence. However, after a careful review of the evidence, considering the credibility of the witnesses and, in particular, the inability of the police agent to give any detail and to be unable to refute the evidence of the accused with respect to the activities of the agent when he was not operational, leaves me to conclude that that evidence was not credible. A review of the relevant case law has also led me to this conclusion.



R. Brian Gibson
Associate Chief Judge of the Provincial Court