SC CR 87 033

SC 3756

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

B E T W E E N :

HER MAJESTY THE QUEEN

- and -

JOEMIE ASHOONA

Heard at Cape Dorset, N.W.T., 15 April 1987.

Judgment filed: 3 September 1987.

Reasons for Judgment of
The Honourable Mr. Justice T. David Marshall

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Ms. N. Doillat

Counsel for the Defence:

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REASONS FOR JUDGMENT

Mr. Ashoona was charged with trafficking in drugs under s.4(1) of the Narcotic Control Act. (A large number of young men were charged as a result of an undercover operation, and those charges have now been dealt with. Mr. Ashoona, because of the peculiar circumstances of his case, has been dealt with separately.)

The circumstances as regards Mr. Ashoona were somewhat different, the defence of entrapment being advanced by his counsel in his defence. Written arguments and a number of authorities were submitted by both the Crown and the Defence. I have now considered those authorities and submissions, and I

have concluded that the facts of this case are such that a judicial stay of the proceeding ought to be granted. My reasons for that decision follow.

As I have indicated, the charges arose in the course of an extensive undercover operation in the Inuit community of Cape Dorset, Northwest Territories. It is a small village ensconced in the mountains and on the sea at the southwest end of Baffin Island. It is a town widely known for its Inuit carvings and prints, and as a result of these the town has experienced a measure of prosperity, and notoriety. Perhaps because of this, and sadly, it has become as well a centre for drug traffic in the East Arctic.

The story that unfolded was that one Thomas Fitzsimmons had been a schoolteacher there but had become involved with the young people in the drug trade, and had then been charged. Apparently he was charged and found guilty in July of 1985, but before he was sentenced for this he had agreed to work with the police as their agent in finding others involved with drugs in the town of Cape Dorset.

To this end and to utilize Thomas Fitzsimmons, the police devised a scheme whereby they sent in an undercover agent by the name of Aitken, a 6-year veteran of drug investigations, in work clothes, heavy beard and shoulder-length hair, who would work with Fitzsimmons. Fitzsimmons was now working as a construction worker at the airport, apparently discharged as a

teacher, and the two of them were to penetrate and expose to charge the drug world of Cape Dorset. The fruits of the operation, in that a large number pleaded guilty and went to jail on narcotics charges, is a testimonial to the success of scheme that the police devised.

One further point I should make at this point was that the officer testified, and I accept his story, that it was made clear to Fitzsimmons that there was to be no illegal conduct, that is, either possessing or selling drugs on his part in the course of the undercover operation.

The intrigue then came upon the accused Ashoona in this way. At about midnight on November 20, 1985, Constable Aitken, undercover, and Thomas Fitzsimmons, now their agent, drove to the residence of Joemie Ashoona. They parked their vehicle about 100 yards from the house. Thomas Fitzsimmons went into the house to tell Joemie that his friend (Aitken) would be in to buy drugs.

It is at this point that the evidence given by the accused Ashoona differs from what the police would have us accept.

The accused, who took the stand in his own defence, testified that Fitzsimmons came in with three packages of hashish; 2 would be given to him if he sold the third to the friend. He was not to tell that the drugs had in fact come from Fitzsimmons. It is of significance that Fitzsimmons was

awaiting sentence on charges involving 295 grams of hashish--a large quantity and a serious charge. The accused testified that this is what happened. Fitzsimmons, the agent, who might cast light on this, was not profferred as a witness. Ashoona also testified that he was in bed about to go to sleep when the two arrived to buy drugs.

Put simply, those then are the facts as revealed in the evidence, and I turn now to the law.

The Law

In Canada, until the Supreme Court of Canada ruling in Amato v. R. (1982), 29 C.R. (3d) 1, courts had questioned the very existence of entrapment as an extant defence in Canada. The Amato case, however, made it clear that a defence of entrapment does exist, though the judges so holding did not entirely agree on its nature. A number of other aspects of the defence remain problematic in Canadian law, and I will refer to some of them in a moment.

Mr. Justice Estey, though actually in dissent, spoke for the majority on this question of law concerning the existence of the defence. He found it available.

Agreeing with Estey J. on this point were Laskin C.J.C., as he then was, McIntyre and Lamer J.J. Agreeing in this result was Ritchie J. However, his reasons again were

different--he took a subjective view -that is, that the defence rests on the fact that blameworthiness is reduced in these cases by a relative lack of mens rea, the initiative for the crime having in reality come from the police.

The other judges with Estey J. on this point took an objective approach, and based the defence on the inherent power of the Court to enter a stay as an abuse of process, that is, they considered the defence to rest on unacceptable police conduct.

The U.S. View

These two views of the defence comport to a large degree with the two predominant views taken in the United States--a subjective view based on reduced blameworthiness and an objective view based entirely on the necessity of the courts to control police conduct. The English view, in contrast to this, accepts neither of these and does not recognize the defence of entrapment at all. I will turn to that in a moment.

In the United States, the doctrine of entrapment was introduced early in the 19th century. An early decision from Texas in 1879, O'Brien v. State (1879), 6 Tex. App. 665, held that entrapment could lead to full acquittal. There the police "originated the criminal intent and actually joined the

the defendant in the illegal act."[1] The Court in O'Brien relied on the rationale that the defendant's action was outside the purview of the statutory prohibition, and this rationale has remained the basic or "majority" rationale in the American authorities since that time.

In the leading case of Sorrells v. United States, 287 U.S. 435 (1932), the Supreme Court settled the rationale of the doctrine and set out a majority and minority view. The majority view, as I have indicated, relied on the rationale of the situation being outside the purview of the statute. The Court said at para. 448: "We are not forced by the letter to do violence to the spirit and purpose of this statute."

The minority view in the Sorrells case departed somewhat from the earlier rationale of O'Brien, supra, in taking what has become known as the objective view of the police activity. The Court said at para. 457:

> The doctrine rests, rather, on a fundamental rule of public policy. The protection of its own functions and the preservation of the purity of its own temple belongs only to the Court.

In the leading cases of Sherman v. United States (1958) 356 U.S. 369, and United States v. Russell (1973) 411 U.S. 423, the majority view based on statutory construction in Sorrells was reaffirmed.

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1 See generally, "Entrapment and the Common Law," The Modern Law Review, vol. 41, May [1978] 266 at 268.

The majority view then is that the statute could not have meant to cover the situation where the police effectively create the crime, and hence the activity falls without the statute.

In Canadian law, it seems the second American rationale has had more thrust.[2]

There are perhaps more problems with the minority view in Anglo-Canadian law with our doctrine of parliamentary supremacy, stare decisis and the relevance of precedent.

This American rationale is very close in logic to the right of courts to nullify statutes. This view, promulgated by Lord Coke in Dr. Bonham's case,[3] is not part of our law, although vires and the subjects dealt with in the Charter clearly now stand as an exemption to this.

The ultimate arbiter of legal rules in a democracy is public policy even granting parliamentary supremacy. Professor R.M. Dworkin in "The Model of Rules,"[4] has pointed out that in certain circumstances judicial or statutory rules are set aside by overriding legal principles. These principles N.L.A. Barlow[5] has translated as public policy.

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2 See Amato, supra.

3 77 E.R. 638 at 652 and footnote.

4 (1967) 35 U. of Chicago Law Review 14.

5 See The Modern Law Review, supra, note 1.

He says at p. 274:

> Doctrines or principles of public policy are standards that are to be observed because they dictate a requirement of justice or fairness or some other dimension of morality arising out of the fundamental philosopher's assumption of the society to which they belong.

The example the author takes is again from Professor Dworkin and is the case of Riggs v. Palmer, 115 N.Y. 506, 22 N.E. 188 (1889), where a court prevented a murderer from inheriting from his victim even though the law would have given it to him.

Another doctrine that has been applied, this taken from Equity, supports the minority or objective rationale. This is the clean-hands principle that courts will not extend their jurisdiction to parties who come to court with unclean hands. Brandeis J., in the case of Olmstead v. United States, 277 U.S. 438, apparently first extended the principle to the criminal law. He equated the executive using entrapment, then coming to court with the celebrated suitor in equity with unclean hands. He said this at p. 470:

> The Courts aid is denied only when he who seeks it has violated the law in connection with the very transaction as to which he seeks legal redress. Then aid is denied in order to maintain respect of law: in order to promote confidence in the administration of justice in order to preserve the judicial process from contamination.

English Authorities

The English position on this issue of entrapment is the very contrary of the American and rejects the entire concept on either or any of the rationales the American courts have postulated. In the case of R. v. Sang, [1979] 2 All E.R. 1222 at 1223, Lord Diplock, referring to earlier English decisions, affirms that there is "no defence of entrapment known to English law." The rationale for the British position is disarmingly simple. "Many crimes are committed by one person at the instigation of others."[6] And as the Court points out, the fact that the instigator is the police is really of no consequence, since actus ren and mens rea are both present.

In the Sang case, supra, as well, at 1230, the British answer to the American rationale is tersely stated as follows:

> It is no part of the judge's function to exercise disciplinary powers over the police or prosecution as respects the way in which evidence to be used at the trial is obtained by them. If it was obtained illegally there will be a remedy in civil law; if it was obtained legally but in breach of the rules of conduct of the police this is a matter for the appropriate disciplinary authority to deal with. What the judge at the trial is concerned with is not how the evidence sought to be adduced by the prosecution has been obtained but with how it is used by the prosecution at trial.[7]

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6 See Sang, supra, at 1226.

7 Ibid., at 1230.

Or, as Viscount Dilhorne put the English position in the same case, at 1234:

> Evidence may be obtained unfairly though not illegally, but it is not the manner in which it has been obtained but its use at the trial if accompanied by prejudicial effects outweighing its probative value and so rendering the trial unfair to the accused will justiy the exercise of judicial discretion to exclude it.

Or, again, per Lord Salmon:

> My Lords, it is now well settled that the defence of entrapment does not exist in English law . . . A man who intends to commit a crime and actually commits it is guilty of the offence whether or not he has been persuaded or induced to commit it, no matter by whom.

The British courts deal with the lessened culpability purely as a matter for sentence.[8]

In the logic of entrapment, it seems there are in effect two rationales for excusing an accused. The first of these is the majority view in the United States Supreme Court, sometimes called the subjective or the creative activity rationale. The second is the objective, police conduct or the minority view, as it is called in American jurisprudence. These two rationales are often interwoven in the cases, so that some confusion results.[9]

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8 Ibid., at 1236.

9 See the judgment of Ritchie J., and that of Estey J., in Amato, supra.

In my view, the two rationales, though they might occur together in any particular case, should be kept clearly separate and distinct. This would become important when one considers the further points, such as standard of proof, onus of proof, and ultimate disposition, when the defence on either rationale is sought to be established.

On the first rationale then the issue can be considered to be one where the genesis of the criminal activity is in the police and the accused so lacked intent or necessary mens rea that he cannot be said to have committed the crime at all.

Under well-established principles of criminal law[10] on this rationale, the onus of proof will be on the Crown, and the standard of proof should be beyond a reasonable doubt. Entrapment under these circumstances will not differ from absense of mens rea for any other reason, and the defence, if successful, would in these cases lead to acquittal.[11] Professor Stuart, in a comment on the Amato decision in 29 C.R. (3d) 54, suggests that a proper juristic basis would be deciding that the conduct because of the police genesis was justified or excused, but the question of a reasonable doubt as to requisite mens rea, with respect, would seem a simpler way to arrive at the same conclusion under existing law.

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10 See Woolmington v. D.P.P., [1935] A.C. 462, 24 Cr. App. R. 72 (H.L.).

11 See Ritchie J. in Amato, supra.

The second distinct logical basis for the defence of entrapment is that primarily seized on by the Supreme Court of Canada in Amato, supra. The judgment of Estey J. (Laskin C.J.C., as he then was, and McIntyre and Lamer J.J. concurring) was that the Court accepted the defence of entrapment grounded on the Court's power to enter a stay for an abuse of process.

Here, it follows, I think, that the Court should act on its own initiative, and if the question or issue arises, in my view the Crown here again should have the onus of proof and the standard again should be reasonable doubt. The reason for this being simply, that the great power of the state and the danger of wrongly convicting an innocent citizen demand the higher standard of proof.

The rationale for the courts acting at all in entrapment and the rationale not accepted by English courts, but accepted in the Amato case, is now, I think, compelling. The Court, in taking the grave responsibility for punishing offenders and incarcerating citizens, must have the right and the power to oversee all aspects of the prosecution of those citizens from the beginning to the end of the criminal process.

Courts have traditionally played a part in protecting the rights of the citizens before them, and this must entail the power to ensure that citizens are not abused by state power at

any stage of this criminal process.

The development of Canadian law along the American path, as it were, began in the leading case of Kirzner (1977), 38 C.C.C. (2d) 131. In that case, the appellant to the Supreme Court of Canada had been convicted after a jury trial of two offences. His main defence was entrapment. The trial judge had withdrawn the defence from the jury in his charge to them. The Ontario Court of Appeal affirmed the conviction and held that the defence of entrapment was not open to the accused and that no such defence was available. Judgments of courts in the United States dealing with entrapment, they said, had not been applied in Canada.[12]

Laskin C.J.C., as he then was, reviewed the rationale and the authorities in detail, and concluded in the Kirzner case, supra, the question of entrapment should be left open. After outlining the many undecided and debated issues in entrapment, such as whether the question is on for the jury, the Chief Justice stated at 139:

> In short, there are difficult questions that arise in respect of entrapment which prudence dictates we should leave for consideration when a decision thereon is demanded by the record.

Clearly, that was a sage approach, and indeed it was followed in the later case of Amato, supra.

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12 See Kirzner, supra, at 133.

Following then on these authorities, in my view, in the case at bar the circumstances do establish that the matter should be stayed. Fitzsimmons, convicted but not sentenced, was acting as an agent of the police.

After hearing all the evidence, I was left with a distinct and reasonable doubt as to what took place when Fitzsimmons first approached the accused. There is no evidence contradicting the accused's rendition of what transpired, and though I might not accept that evidence totally, in the absence of other testimony, it does raise a reasonable doubt.

In a criminal prosecution, the standard of proof on this question, as I have said, should be beyond a reasonable doubt. To accept the civil standard of proof on a balance of probabilities would, I think, be unsafe and could lead, as on other issues in a criminal trial, to the conviction of innocent persons.

For those reasons then and on these particular facts and the issue of entrapment having been raised, I hold that the Crown has not shown beyond a reasonable doubt that there was not entrapment.

Here, if the evidence of the accused were accepted, the conduct of the police agent in going to the accused's home late at night and handing him 3 packages of drugs and inducing

him by telling him that 2 would be his if he dealt in the third, was an improper and illegal inducement.

Such a scheme, in my view, is not one acceptable to the Canadian public and would bring the administration of justice into disrepute. The actions of the police agent, or those alleged against him, were improper, and the fact that the police told Fitzsimmons not to do these things evidences, of course, their impropriety.

Under these circumstances then, in my view, it has not been necessary to consider the sections of the Charter that may proprio vigore decide the issue.

For all these reasons, I would stay the prosecution as an abuse of the Court's process.

T. David Marshall
J.S.C.

Yellowknife, N.W.T.,
2 September 1987.

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