

R. v. Bessette, 2013 NWTSC 72

S-1-CR-2012-000089

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- v -

KYLE MATTHEW BESSETTE

Transcript of the Reasons for Judgement delivered by The Honourable Justice V. A. Schuler, in Yellowknife, in the Northwest Territories, on the 16th day of July, 2013.

APPEARANCES:

Mr. R. Carrier: Counsel on behalf of the Crown

Ms. C. Wawzonek: Counsel on behalf of the Accused

Charge under s. 5(1) CDSA

1 THE COURT: On April 17 of this year, Kyle
2 Bessette entered a plea of not guilty to a charge
3 that he trafficked in cocaine on or about
4 November 20, 2010, here at Yellowknife, contrary
5 to section 5(1) of the Controlled Drugs and
6 Substances Act. He admits, however, in the
7 Agreed Statement of Facts, filed as Exhibit 1,
8 that on that date just outside the Raven Pub here
9 in Yellowknife, he sold two packages, two grams
10 of cocaine to an undercover police officer for
11 \$200.

12 The sole issue before me is whether Mr.
13 Bessette was entrapped by the police. If what
14 happened falls within the legal definition of
15 "entrapment", then, despite Mr. Bessette's
16 admission that he sold cocaine to the undercover
17 officer, the charge should be stayed by the Court
18 and a conviction would not be entered.

19 The evidence heard from the undercover
20 officers is that they were told by their cover
21 officer to go to the Raven Pub on the night of
22 November 19, 2010, and to try to purchase cocaine
23 or drugs there. The Raven was described to them
24 as a location where drugs were sold. They went
25 into the Raven and raised the topic of drugs with
26 various people there, without any results. As
27 Mr. Bessette was walking by their table, one of

1 the undercover officers, Constable McAdam, asked
2 him "Do you have any party favours?"; "party
3 favours" being a term he had been told by his
4 cover officer was used for drugs in Yellowknife.
5 According to the other undercover officer,
6 Corporal Van Steelandt, the question asked was
7 whether Mr. Bessette could "help out" with party
8 favours. Nothing turns on the difference in what
9 was reported as said. There was further
10 conversation about what kind of party favours the
11 undercover officer wanted, and the deal was made
12 and completed.

13 I have reviewed all of the cases that
14 counsel submitted but will refer only to some of
15 them.

16 The Supreme Court of Canada has set out the
17 legal parameters of the doctrine of entrapment in
18 two cases: R. v. Mack, [1988] 2 S.C.R. 903, and
19 R. v. Barnes, [1991] 1 S.C.R. 449. There is also
20 a very clear summary of the doctrine in R. v.
21 Imoro, 2010 ONCA 122. When entrapment is found,
22 it reflects judicial disapproval of unacceptable
23 police or prosecutorial conduct in investigating
24 crimes. It recognizes two competing objectives:
25 One is that the police must have considerable
26 leeway in the techniques they use to investigate
27 criminal activity, especially in so-called

1 consensual crimes where there is no unwilling
2 victim as there is in most crimes so the crime is
3 not likely to be reported. Drug trafficking is
4 such a crime. The purchaser and the seller are
5 both willing and want the crime to take place.

6 The objective that competes with allowing
7 the police to use the techniques they think are
8 best is that the power of police to investigate
9 cannot be untrammelled. The police should not be
10 permitted to randomly test the virtue of citizens
11 to take steps just to see if they are willing to
12 commit crimes. The police should not be
13 permitted to offer citizens the opportunity to
14 commit a crime without a reasonable suspicion
15 that they are already engaging in criminal
16 activity, or to use tactics that are designed to
17 induce citizens to commit crimes. As a society,
18 we want the police to investigate crime that is
19 already happening, not to create crime by giving
20 people the chance to commit offences where the
21 police do not already have a reasonable suspicion
22 that they are being committed.

23 To strike a balance between these competing
24 objectives, the Supreme Court of Canada has said
25 that the police may only present the opportunity
26 to commit a particular crime to an individual who
27 arouses a reasonable suspicion that he or she is

1 already engaged in the particular criminal
2 activity. An exception to that is when the
3 police undertake a bona fide inquiry or
4 investigation directed at an area where it is
5 reasonably suspected that criminal activity is
6 occurring. When such a location is defined with
7 sufficient precision, the police may present any
8 person associated with the area with the
9 opportunity to commit the particular offence.
10 They need not have any suspicion that the person
11 is already engaged in criminal activity.

12 In the Barnes case, then Chief Justice Lamer
13 said that the notion of being associated with a
14 particular area does not require anything more
15 than a person being present in the area.

16 To establish entrapment the defence must
17 establish on a balance of probabilities that the
18 criteria that allow the police to offer someone
19 an opportunity to commit an offence are not
20 satisfied.

21 In this case Mr. Bessette does not argue
22 that the police induced him to sell the cocaine.
23 His argument is that the police did not have a
24 reasonable suspicion that he was engaged in
25 criminal activity and that they were not engaged
26 in a bona fide investigation. It is clear on the
27 evidence that the undercover officer did not have

1 a reasonable suspicion that Mr. Bessette was
2 already engaged in criminal activity. The Crown
3 conceded that. The undercover officer did not
4 know who Mr. Bessette was and did not have any
5 information about Mr. Bessette.

6 The issues in this case are therefore
7 whether the undercover officer was carrying out a
8 bona fide investigation and had a reasonable
9 suspicion that there was drug trafficking going
10 on at the Raven when he raised the subject of
11 drugs with Mr. Bessette.

12 I have already referred to the interaction
13 between the undercover officers and Mr. Bessette
14 in the Raven. The evidence as to why the
15 undercover officers were in the Raven in the
16 first place comes from Constables Lang and
17 Mounsey.

18 The evidence before me is that the RCMP drug
19 unit in Yellowknife developed an investigation
20 they called "Project Grapple" starting in
21 September 2010. Constable Lang, a member of the
22 drug unit of the RCMP in Yellowknife, was the
23 lead investigator. He testified that the purpose
24 of Project Grapple was to target street level
25 drug trafficking in Yellowknife. This was to be
26 done by bringing in undercover officers from
27 outside the Northwest Territories who would pose

1 as individuals looking to purchase drugs.

2 Dial-a-dope operations had become the main form
3 of street level drug trafficking in Yellowknife.

4 Constable Lang prepared the operational plan
5 for the project so as to obtain from his
6 superiors resources for the project, for example,
7 undercover officers. The main goal of the plan
8 was to dismantle and disrupt dial-a-dope
9 operations by investigating individuals and
10 making contact with them to purchase drugs. The
11 plan itself was developed by reviewing and
12 selecting information and debriefing reports from
13 the previous eight or nine months from RCMP
14 databases that contained intelligence
15 information. These, Constable Lang said, would
16 generally be debriefing reports from police
17 officers, for example regarding information
18 received from a confidential informant. From all
19 these sources, individual targets and locations
20 in Yellowknife were identified. The locations
21 were those where there was a prevalence of drug
22 activity.

23 Constable Lang was cross-examined
24 extensively on the plan. In the threat
25 assessment part of the plan, he wrote that the
26 investigation would target numerous street level
27 individuals involved in drug trafficking in

1 Yellowknife and that the undercover officers
2 would be tasked with making drug purchases from
3 identified individual targets and acting on
4 opportunity buys should they arise. He also
5 wrote that the undercover officers would partake
6 and socialize in the local bar and party scene
7 and portray themselves as fairly affluent
8 individuals who buy illicit drugs for recreation
9 or party purposes.

10 Constable Lang testified that there were 20
11 to 25 identified individual targets, in other
12 words specific people who were targets of the
13 investigation, some of whom were added along the
14 way. Mr. Bessette was not one of those targets.

15 Two locations were targeted although they
16 were not actually set out in the operational plan
17 and instead were added as the operation was
18 evolving. These were the Raven Pub and another
19 Yellowknife bar, Harley's. Constable Lang
20 testified that he chose those locations based on
21 his experience as a police officer in
22 Yellowknife, having been three years on patrol
23 and two years in the drug unit at that time.
24 Through that experience, his personal
25 observations and work with informants and through
26 reviewing intelligence reports, he had come to
27 know where drug activity takes place in the city.

1 Based on this, he was of the view that drug
2 activity in the form of cocaine, ecstasy, and
3 marihuana was prevalent at the Raven. He also
4 testified that many of the targeted individuals
5 were known to frequent the targeted locations.

6 Constable Mounsey was also involved in
7 Project Grapple. He was one of the cover agents
8 who directed the undercover officers and he
9 specifically directed them to go to the Raven on
10 the night in question. He testified that before
11 Project Grapple was put into operation, there
12 were what he called "open discussions" about
13 suitable locations to target, however he would
14 make the final decision and did so on the night
15 in question. He relied on his background
16 knowledge and experience in deciding to send the
17 undercover officers to the Raven. He described
18 the objectives of Project Grapple as being for
19 undercover officers to purchase drugs in
20 Yellowknife. Individual targets were selected in
21 consultation with the drug section.

22 Establishments were selected based on reasonable
23 submission that drug activity would take place
24 there. In the open discussions, two locations
25 were identified that he believed fell into that
26 category, the Raven Pub and Harley's.

27 I will note here that although Constable

1 Mounsey frequently made reference to having a
2 reasonable suspicion, it is obviously for the
3 Court to determine whether in fact he or any
4 other officer had a reasonable suspicion. The
5 witness' statement that he had is not
6 determinative.

7 I will note here that it was not clear on
8 the evidence when exactly prior to the night of
9 November 19th, 2010, discussions about the Raven
10 and Harley's took place, the "open discussions"
11 as Constable Mounsey described them.

12 Notwithstanding that, I am satisfied that there
13 was at least some discussion and that both police
14 officers Lang and Mounsey had the Raven in mind
15 for purposes of Project Grapple.

16 Constable Mounsey testified that at the time
17 in question he had lived in Yellowknife for 28
18 years, including living across from the Raven Pub
19 for a time. His 15 years in law enforcement
20 included investigations into drugs and drug
21 activity in and around the Raven Pub. This
22 involved trafficking of drugs inside and around
23 the Raven Pub, and he himself had arrested
24 individuals for drug activity and seized drugs in
25 and around the Raven.

26 Constable Mounsey was involved in at least
27 one other undercover operation involving the

1 Raven Pub. He testified that he had conducted
2 well over 100 hours of surveillance mainly for
3 the purpose of drugs, some of it on street patrol
4 on the street where the Raven is located and at
5 times that surveillance focused on drug activity
6 at the Raven. This was mostly in the time period
7 2006 to 2010.

8 He also reviewed police documentation about
9 drug activity in and around the Raven, much of
10 which was information from informants.

11 After Mr. Bessette's arrest, Constable
12 Mounsey did a count of the police intelligence
13 documentation relating to drug activity in and
14 around the Raven. In other words, as I
15 understand it, after the arrest he counted what
16 he had reviewed before the arrest. He found that
17 there were 107 reports from 1998 to October of
18 2010. He counted approximately 40 drug
19 investigations in and around the Raven found on
20 the RCMP investigation database from 2006 to
21 October 2010, the month prior to Mr. Bessette's
22 arrest. Constable Mounsey himself had drafted
23 seven of the intelligence reports, one in 1998,
24 and the others in the time period 2006 to 2010.
25 The majority of the seven he drafted identified
26 individuals trafficking drugs out of the Raven,
27 and he also said the majority were informant

1 driven.

2 The implementation of Project Grapple began
3 on November 17, 2010, and continued to the
4 evening of November 20. Constable Lang was on
5 surveillance. There were two undercover officers
6 and two covers whose job it was to direct the
7 undercover officers. The undercover officers
8 were to try to make contact with the targeted
9 individuals by phone to try to purchase drugs.

10 On November 19 at about 10 p.m. after the
11 undercover officers had been at Harley's,
12 Constable Mounsey called Constable Lang and said
13 he wanted to send them to the Raven Pub.
14 Constable Lang agreed. In his testimony, he
15 admitted that he had no specific information that
16 drug activity was taking place at the Raven at
17 that moment. However, as I have indicated, that
18 particular bar was known to him for that type of
19 activity and so he agreed with Constable
20 Mounsey's suggestion that the undercover officers
21 go there. One of the reasons he wanted them to
22 go there was to try to locate some of the
23 targeted individuals.

24 Corporal Van Steelandt, one of the
25 undercover officers, testified that they had
26 unsuccessfully looked for one targeted individual
27 in the Raven Pub.

1 Both Lang and Mounsey also testified that an
2 officer in uniform was sent into the Raven before
3 the undercover officers to see if any of the
4 identified targets of Project Grapple were in
5 there at that time. Neither, however, could
6 recall the result of the uniformed officer's
7 walkthrough.

8 Constable Mounsey also testified that in
9 sending the officers there he had in mind what he
10 knew of the Raven as a place of drug activity.

11 Mr. Bessette does not argue that the police
12 acted in bad faith. He argues that their
13 investigation methodology was faulty. He says
14 that they went outside the parameters of the
15 Project Grapple plan using resources, in other
16 words the undercover agents, that were obtained
17 for Project Grapple for purposes not contemplated
18 by Project Grapple. He says that in order for
19 the Raven Pub to fall within the Barnes criteria,
20 the officers had to have a reasonable suspicion
21 that at least one of the individual targets of
22 Project Grapple was in the Raven at the time the
23 undercover officers were sent there.

24 Going back to what was said in Barnes, the
25 first question is was there a bona fide
26 investigation. In my view there was. The
27 evidence is that the police were targeting,

1 investigating street level drug trafficking in
2 Yellowknife. The main focus of the investigation
3 was the use of dial-a-dope operations because
4 that had become the common method of trafficking.
5 The police wanted to dismantle and disrupt those
6 operations. I find that it is clear that their
7 motivation for sending the undercover officers to
8 the Raven Pub was to further the objective of
9 investigating and disrupting street level drug
10 trafficking by looking for individuals involved
11 in the drug trade in a place known to them for
12 drug activity. Although I do not understand
13 Barnes to require that there be a written
14 operational plan, in this case the operational
15 plan contemplated that the undercover officers
16 would socialize in the local bar scene to get
17 information about drug trafficking. They would
18 also buy drugs if the opportunity arose. Mr.
19 Bessette was approached in furtherance of these
20 objectives, not for some unrelated or
21 questionable motive.

22 Barnes requires that the investigation be
23 directed at an area or location defined with
24 sufficient precision where it is reasonably
25 suspected that drug activity is occurring. The
26 Raven Pub is defined with sufficient precision.
27 This is not like the cases where police were

1 targeting neighbourhoods or all the bars in the
2 city.

3 Did the police reasonably suspect that
4 criminal activity was occurring at the Raven?
5 Constables Lang and Mounsey used their background
6 knowledge and experience as the basis upon which
7 they formed the suspicion, and I find that it was
8 a reasonable one, that drug activity was
9 occurring or generally occurred at the Raven.
10 Both were closely cross-examined on this and were
11 not shaken. It was clear from their evidence
12 that they together held this view of only two
13 bars in the city, the Raven and Harley's, with a
14 third said by Constable Mounsey to possibly
15 qualify in his view.

16 The Barnes case is helpful on this issue.
17 In Barnes, the police were conducting a buy and
18 bust operation where they would attempt to buy
19 drugs from people. The operation was undertaken
20 in a six block section of Granville Street in
21 Vancouver known as the Granville Mall. There was
22 statistical evidence before the court from the
23 year preceding the date of Barnes' arrest. The
24 statistics showed the percentage of persons
25 charged with drug offences from incidents in the
26 mall area, the number of drug-related charges
27 resulting from arrests on the mall, the number of

1 charges resulting from arrests in buy and bust
2 operations. There was also evidence that
3 narcotic sales took place up and down the mall.
4 The majority of the court was satisfied based on
5 the evidence that the mall was a place where it
6 was reasonably suspected that drug activity was
7 occurring.

8 In *R. v. Faqi*, 2011 ABCA 284, the Alberta
9 Court of Appeal noted that although the evidence
10 in *Barnes* included statistics, the Supreme Court
11 of Canada did not mandate statistical evidence as
12 a prerequisite for finding that a location is one
13 where it is reasonably suspected that certain
14 criminal activity is occurring.

15 In *R. v. Sterling*, 2004 CanLii 6675, Justice
16 Laforme, when he was a trial judge, heard
17 evidence from police officers that their
18 reasonable suspicion that drug trafficking was
19 occurring on a certain stretch of a major street
20 in Toronto was based on information received from
21 confidential informants, the personal experience
22 of police officers investigating and performing
23 law enforcement duties in the area, written and
24 verbal complaints of drug activity from area
25 residents, and Crime Stoppers tips. There were
26 no formal records of the complaints or crime
27 activity or attempted drug buys. The court

1 accepted the evidence as establishing that the
2 police had a reasonable suspicion that drug
3 trafficking was occurring in the area in
4 question.

5 In Faqi, the case that I just mentioned from
6 the Alberta Court of Appeal, the trial judge had
7 made a finding that the police had reason to
8 believe that drug trafficking may be occurring in
9 the bar on the day they entered it.

10 In R. v. Eckert, [1991] Saskatchewan
11 Judgments number 481, a trial decision of the
12 Saskatchewan Court of Queen's Bench, there was
13 evidence that known traffickers were observed by
14 the police in the bar on the night in question.
15 However, Barnes does not say that the police must
16 have a reasonable suspicion that drug trafficking
17 is occurring at the very moment or within a
18 certain time frame prior to the police presenting
19 an opportunity to commit a crime to someone at
20 the location. In Barnes, the statistical
21 evidence was from the year prior to the offence
22 yet was still found to ground a reasonable
23 suspicion. How recent the information is and how
24 frequent the drug activity revealed by it will
25 have a bearing on the reasonableness of the
26 suspicion held by the police. However, what I
27 take from the cases is that the information

1 should not be dissected too finely. The court's
2 task is not to find whether the information is
3 correct or whether it would give the police
4 reasonable and probable grounds, just whether it
5 gives them reasonable suspicion, which is
6 something more than mere suspicion but less than
7 a belief based on reasonable and probable
8 grounds.

9 In this case the Raven was selected, as I
10 have said, based on the information gathered by
11 the police regarding drug investigations and
12 their own experiences in investigating drug
13 activity in and around the Raven. They did not
14 randomly select that bar out of all the bars in
15 Yellowknife.

16 Defence counsel pointed out that Constable
17 Mounsey was involved in only one undercover
18 operation prior to this and she argued that the
19 intelligence documents spanned too great a number
20 of years. However, Constable Mounsey also
21 testified about other personal experience,
22 surveillance and patrols that he did in the area
23 of the Raven. The fact that the intelligence
24 documents spanned ten years can indicate
25 consistency over time. It does not detract from
26 the reasonableness of the suspicion formed by the
27 police, nor does Constable Mounsey's evidence

1 that the drug scene in Yellowknife is fluid,
2 detract from the information he relied on. He
3 acknowledged that different crowds favour
4 different bars and that may affect where the drug
5 scene is focused, however he was clear that in
6 his view there was good reason to believe it was
7 focused, at least in part, at the Raven at the
8 time in question.

9 Defence counsel also argued that the police
10 used problematic methodology similar to what was
11 found to have occurred in R. v. Swan, 2009 BCCA
12 142. The factual context in Swan is somewhat
13 different because in that case the police were
14 calling numbers on a list that had been provided
15 to them for purposes of a dial-a-dope
16 investigation. On the list were cell phone
17 numbers provided from various sources and
18 suspected to be associated with people involved
19 in dial-a-dope trafficking. The officers would
20 not know who was answering the phone when they
21 called. According to the case report, it was
22 common ground that the mere fact that the officer
23 called a number from the list did not give him
24 anything more than mere suspicion that the person
25 he was talking to was engaged in drug related
26 activity. The police would simply keep calling
27 numbers on the list, engage in conversation about

1 drugs, and hope that the person they were talking
2 to would provide them with "something more" to
3 raise the level of suspicion to a reasonable one
4 and give them the legal basis to extend the
5 invitation to traffic in drugs. Swan argued that
6 because the police did not limit the target or
7 scope of their investigation to something less
8 than everywhere within the cell phones' reach or
9 every number on the police list, the police were
10 not acting in the course of a bona fide
11 investigation.

12 The British Columbia Court of Appeal held
13 that the police overstepped the bounds of a bona
14 fide investigation because they proceeded on a
15 bare minimum of information regarding the
16 telephone numbers compiled and with, as the court
17 said, a complete disinterest in distinguishing
18 between anonymous tips written on a match box or
19 napkin, and more reliable tips providing further
20 information about a particular suspect or
21 telephone number. There was no effort made to
22 verify the sources of the numbers. The court
23 held that more information was or could have been
24 available to the police but they chose to
25 disregard it for reasons of expediency. This
26 methodology casts doubt on the bona fides of the
27 investigation.

1 Defence counsel argues in this case that the
2 police wanted to make use of the undercover
3 officers who had been brought in from outside the
4 Northwest Territories and chose to do so by
5 sending them to investigate activity at the Raven
6 thus going outside the parameters of the
7 dial-a-dope investigation that was the subject of
8 Project Grapple. Therefore, counsel argues their
9 methodology was faulty and the investigation
10 cannot be said to be bona fide.

11 I do not agree that the evidence is that
12 dial-a-dope operations were the sole focus of
13 Project Grapple. They were its main focus or
14 primary objective, however the purpose of the
15 project was to investigate and disrupt street
16 level drug trafficking. The Raven was known to
17 police as a location at which drug trafficking
18 takes place and where their individual targets
19 might be located. Therefore investigating what
20 was going on at the Raven was not unrelated to
21 dial-a-dope operations and was not outside the
22 scope of Project Grapple. If I am wrong about
23 that and if it was outside the parameters set for
24 Project Grapple, then I would hold that it was
25 sufficiently related to Project Grapple because
26 the ultimate goal was to investigate and disrupt
27 street level trafficking, whether that

1 trafficking is accomplished through a dial-a-dope
2 operation or otherwise. The undercover police
3 were not used for a purpose unrelated to that
4 goal; they were used to get closer to that goal.
5 They were not sent to the Raven simply because
6 they were in town. I am satisfied that they were
7 sent there because the Raven was known to police
8 as a place where drug trafficking takes place and
9 where their targets might be located or
10 operating.

11 In Swan, the concern was the methodology
12 used by the police and how they approached, by
13 telephone, individuals they had nothing more than
14 mere suspicion about and hoped to raise that
15 suspicion to reasonable suspicion rather than
16 doing the homework that would tell them before
17 they made the call whether there were grounds for
18 reasonable suspicion. In my view that is quite a
19 different situation from Mr. Bessette's case.
20 Both Constables Lang and Mounsey had a reasonable
21 suspicion that drug trafficking was going on at
22 the Raven based on their own experience and
23 police reports and documentation. That
24 reasonable suspicion was communicated to the
25 undercover officers. They were in the course of
26 an investigation aimed at disrupting the drug
27 trade in Yellowknife. In my view, there is no

1 issue of methodology that would cast doubt on the
2 bona fides of the investigation that they were in
3 the course of at the Raven.

4 In Barnes, Chief Justice Lamer did not use
5 the term "investigation". He used the term
6 "inquiry," which I take to mean that a project
7 with a name and a plan is not necessarily
8 required in any event for the Barnes criteria to
9 be satisfied.

10 Because the police had a reasonable
11 suspicion that drug activity was going on at the
12 Raven and were conducting a bona fide
13 investigation, it was permissible for them to
14 present Mr. Bessette, who was present there, with
15 the opportunity to commit an offence
16 notwithstanding that they did not have a
17 reasonable suspicion that he was trafficking in
18 drugs.

19 Mr. Bessette has not discharged the burden
20 of establishing that the criteria that allowed
21 the police to do what they did are not satisfied.
22 I find that this is not a case of entrapment by
23 the police and therefore I convict Mr. Bessette.

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accurate transcript pursuant
to Rule 723 and 724 of the
Supreme Court Rules of Court.

Annette Wright, RPR, CSR(A)
Court Reporter