IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *R.* v. *Unterschute*, 2004 YKSC 07

Date: 20040121
Docket No.: S.C. No. 02-AP0016
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

Appellant

And:

KEVIN MICHAEL UNTERSCHUTE

Respondent

Appearances:
Mr. Zeb Brown — For the Appellant
Mr. Gordon Coffin — For the Respondent

Before: Mr. Justice R.S. Veale

REASONS FOR JUDGMENT

INTRODUCTION

[1] Kevin Unterschute was convicted of selling liquor to a plainclothes police officer on September 8, 2001, contrary to s. 22(4) of the *Liquor Act,* R.S.Y. 2002, c. 140. The trial judge subsequently stayed proceedings against Mr. Unterschute on the ground that Mr. Unterschute established that there was entrapment by the Crown. The Crown appeals.

THE FACTS

[2] The following facts are not in dispute:

1. Mr. Underschute was charged with selling liquor without a licence, contrary to s. 22(4) of the *Liquor Act, supra.* The offence occurred on September 8, 2001, in Pelly Crossing, Yukon Territory.

2. On April 29, 2002, counsel for Mr. Unterschute sent a disclosure request to the Crown.

3. On May 20, 2002, the Crown advised that it was not aware of any further disclosure.

4. The matter was set for trial in Pelly Crossing on August 28, 2002. A few days before that date, counsel for Mr. Unterschute advised the Crown that she would raise the issue of entrapment.

5. On August 28, 2002, Judge Lilles determined that Mr. Unterschute was not strictly required to give prior notice of his intention to raise entrapment, but he said the Crown would be permitted to bifurcate the proceedings to prepare to deal with the issue.

6. The trial was then adjourned, however, due to lack of Court resources.

7. A pre-trial conference was held before Judge Maltby in Whitehorse on October 9, 2002. At the conference, the Crown again confirmed that it had nothing further to disclose.

8. The trial was held before Judge Faulkner in Whitehorse on October 17, 2002.

9. The only Crown witness was Constable Mark Gabriel. He described the circumstances of the offence as follows:

(a) Dressed in plain clothes, Constable Gabriel went to Pelly Crossing on September 8, 2001. He checked into the only motel in town. He returned to the front desk about an hour later, at 7:30 p.m. Mr. Unterschute was the desk clerk on duty.

(b) Constable Gabriel asked “if someone wanted liquor, what would I do?” Mr. Unterschute replied, “Bootlegger. Maybe I can help you out when I get off work.”

(c) Shortly after 9:00 p.m., Constable Gabriel and Mr. Unterschute met in front of the motel. Mr. Unterschute offered to sell him a six-pack for $11. Constable Gabriel asked about hard stuff. Mr. Unterschute said he would check.

(d) Eight minutes later, Mr. Unterschute came to Constable Gabriel’s room with a bottle of vodka and sold it to him for $50.

10. Counsel for Mr. Unterschute called no evidence. He was convicted of the offence.

11. Counsel for Mr. Unterschute then moved for a judicial stay of proceedings on the grounds that Constable Gabriel entrapped him. Mr. Unterschute testified at this stage. He said that he had reluctantly succumbed to repeated efforts by Constable Gabriel to buy liquor from him.

12. Counsel for Mr. Unterschute called no other evidence in support of her entrapment application.

13. The Crown sought to call reply evidence to show that the undercover operation was a *bona fide* police operation. Counsel for Mr. Unterschute objected on the basis that the Crown had not previously disclosed this evidence.

14. The trial judge held that the Crown was obliged to gather evidence relating to the *bona fides* of the operation and disclose it, and that the Crown failed to meet its disclosure obligations.

15. The trial judge held that, due to the failure to disclose, the Crown would be prevented from calling evidence relating to *bona fides*.

16. The trial judge concluded: “The failure to lead any evidence that there was a *bona fide* inquiry leads to the irresistible inference that no such *bona fide* inquiry existed.”

17. The trial judge held that the respondent was entrapped and he directed a judicial stay of proceedings.

18. Constable Gabriel went to Pelly Crossing, a community of less that 300 people, because he was instructed by Whitehorse R.C.M.P. headquarters to attempt to buy liquor in the hopes of curtailing the bootlegging problem.

19. Mr. Unterschute testified that he knew quite a few bootleggers in town and couldn’t understand why Constable Gabriel was having a hard time finding one.

20. Constable Gabriel went to a hamburger stand as well as the convenience store/motel as they were the only two public places where he could make

inquiries. Otherwise, he stated he would have to make random inquiries by knocking on doors.

THE ISSUES

[3] The following issues are raised:

1. Did the trial judge err in refusing to allow the Crown to present evidence of a *bona fide* inquiry based upon its failure to disclose such evidence?

2. Did the trial judge err in entering a judicial stay of proceedings on the ground of entrapment?

THE LAW

[4] Although Mr. Unterschute was convicted of the offence of selling liquor without a licence, he had indicated prior to the trial that he would raise the issue of entrapment. As a result, the trial was in two parts. In the first part, the Crown led the evidence of selling alcohol without a licence and Mr. Unterschute did not testify. In the second part, Mr. Unterschute testified that he was induced by the police to sell the alcohol. He failed to persuade the trial judge on his evidence.

[5] At this stage, the trial judge did not allow the Crown to present its evidence of a *bona fide* inquiry to challenge the entrapment allegation.

[6] The law of entrapment has been set out by the Supreme Court of Canada in the case of *R.* v. *Mack,* [1988] 2 S.C.R. 903 (S.C.C.). At paragraph 126, the court states that entrapment occurs when:

> (a) the authorities provide a person with an opportunity to commit an offence without acting on a reasonable

> suspicion that this person is already engaged in criminal activity or pursuant to a bona fide inquiry;
>
> (b) although, having such a reasonable suspicion or acting in the course of a bona fide inquiry, they go beyond providing an opportunity and induce the commission of an offence.

[7] The court went on to explain that in an entrapment proceeding the guilt or innocence of the accused is no longer the issue. Rather than the accused being entitled to an acquittal, the focus is on whether the Crown has engaged in conduct that disentitles it to a conviction (para. 147).

[8] The court was very clear in setting out what police conduct would be permissible. It stated the following at para. 109:

> 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. This latter situation, however, is only justified if the police acted in the course of a bona fide investigation and are not engaged in random virtue-testing. While, in the course of such an operation, affording an opportunity in a random way to persons might unfortunately result in attracting into committing a crime someone who would not otherwise have had any involvement in criminal conduct, it is inevitable if we are to afford our police the means of coping with organized crime such as the drug trade and certain forms of prostitution to name but those two.

[9] Again at paragraph 111, the court said that it is not appropriate to plant a wallet with money in an obvious location in a park so that a policeman can increase his performance in court. However, where the police have received many complaints about the theft of handbags in a bus terminal, the police may, in the course of a *bona fide*

inquiry, plant a handbag in an obvious location and then arrest and charge the person who took the bag.

[10] The focus in this case is on the first breach of the law of entrapment. Has the Crown, in this case, provided Mr. Unterschute with an opportunity to commit an offence without acting on a reasonable suspicion that he is already engaged in criminal activity or pursuant to a *bona fide* inquiry? In other words, has the Crown arrested him on the basis of reasonable suspicion or simply conducted what is known as a random virtue testing?

[11] The Supreme Court of Canada placed the onus of proof on the accused on a balance of probabilities and stated the following at para. 149:

> In conclusion, the onus lies on the accused to demonstrate that the police conduct has gone beyond permissible limits to the extent that allowing the prosecution or the entry of a conviction would amount to an abuse of the judicial process by the state. The question is one of mixed law and fact and should be resolved by the trial judge. A stay should be entered in the "clearest of cases" only.

[12] The issue of "random virtue testing" arose in the case of *R.* v. *Barnes,* [1991] 1 S.C.R. 449 (S.C.C.). In that case, the police persisted in asking the accused if he would sell them marijuana in the Granville Mall area of Vancouver. The court concluded the police conduct was a genuine attempt to repress criminal activity. Further, they had "reasonable grounds" for believing that drug-related crimes were occurring in the Granville Mall area. The police provided statistics to demonstrate their grounds were based upon the significant number of arrests and charges in the Granville Mall area as a percentage of the entire city.

[13] The court was clear in stating that random virtue testing arises when a person is presented with the opportunity to commit an offence without reasonable suspicion that:

(a) the person is already engaged in the particular criminal activity, or

(b) the physical location with which the person is associated is a place where the particular criminal activity is likely occurring (para. 24).

[14] Finally, it is well established that a stay of proceedings is a discretionary remedy. As stated in *Elsom v. Elsom,* [1989] 1 S.C.R. 1367, at p. 1375:

> … [An] appellate court will be justified in interfering in a trial judge's exercise of his discretion only if the trial judge misdirects himself or if his decision is so clearly wrong as to amount to an injustice.

[15] This standard was confirmed in *Canada (Minister of Citizenship and Immigration)* v. *Tobiass*, [1997] 3 S.C.R. 391, at para. 87.

Issue 1: Did the trial judge err in refusing to allow the Crown to present evidence of a *bona fide* inquiry based upon its failure to disclose such evidence?

[16] There are two parts to this issue. Firstly, was there a failure of the Crown to disclose evidence? And secondly, if so, was the appropriate remedy refusing to allow the Crown to present such evidence?

[17] The general principle set out in *R.* v. *Stinchcrombe,* [1991] 3 S.C.R. 326, is that the Crown has a duty to disclose to the defence all material evidence whether favourable to the accused or not (para. 19).

[18] There is also discretion for Crown counsel as to the timing and information to be disclosed. However, information ought not to be withheld "if there is a reasonable

possibility that the withholding of information will impair the right of the accused to make full answer and defence (para. 22).”

[19] In the case at bar, the Crown acknowledged that it failed to disclose the evidence of the Crown on a *bona fide* inquiry. At trial, the Crown submitted that it had no obligation to disclose as the onus was on the accused to prove entrapment on the balance of probabilities. However, this argument had no merit given that the Crown wished to produce evidence which had not been disclosed.

[20] The Crown also argued that the defence counsel failed to bring the failure to disclose to the attention of the trial judge at the earliest opportunity (para. 24 of *Stinchcombe, supra).* I reject that argument, as there was no indication of such evidence until the Crown proceeded to call it. The defence cannot be expected to anticipate the evidence the Crown may call.

[21] Thus, I am in agreement with the trial judge that there was a clear obligation to disclose on the facts of this case.

[22] Defence counsel was not laying in the weeds with the non-disclosure issue. Rather, it was the Crown’s decision to proceed with further evidence in response to the allegation of entrapment that led to the defence’s objection to the Crown evidence.

[23] In my view, it was appropriate for the trial judge to refuse to allow the Crown’s evidence or an adjournment based on the fact that the Crown had knowledge of the defence of entrapment for a month and a half prior to the trial. This decision was further buttressed by the fact that an adjournment would be prejudicial to the accused in that he would have to retain new counsel.

Issue 2: Did the trial judge err in entering a judicial stay of proceedings on the ground of entrapment?

[24] The trial judge found that it was clear from Constable Gabriel's evidence that there was no reason to target the accused. He concluded that it could be inferred from the lack of evidence, that no *bona fide* inquiry existed. Thus, the trial judge based his judicial stay of proceedings on the ground of entrapment in that the police provided the accused with an opportunity to commit an offence without reasonable suspicion that the accused was already involved in any criminal activity. There was no evidence that the place of the offence was associated with the particular criminal activity.

[25] The Crown relied upon *R.* v. *Barnes, supra,* and submitted that Constable Gabriel was involved in a genuine investigation into bootlegging in Pelly Crossing. Mr. Unterschute testified that he knew quite a few bootleggers in Pelly Crossing. In my view, this evidence amounts to random virtue testing in that there was no evidence that Mr. Unterschute was already engaged in the activity and the location involved was not a specific place where the particular criminal activity was occurring. It is not sufficient to identify the entire community of Pelly Crossing, a village of some 300 people, where Mr. Unterschute was working, as qualifying for a physical location of such criminal activity, especially when there is no evidence of such criminal activity occurring before Mr. Unterschute was approached. Mr. Unterschute has met the onus of establishing a case of random virtue testing.

[26] The Crown, in effect, submits that the evidence surrounding this particular incident provides the reasonable suspicion of criminal activity. However, the accused's statement

that he knows a few bootleggers in Pelly Crossing is not evidence of criminal activity occurring in a particular area or being engaged in by Mr. Unterschute.

[27] I conclude that the trial judge did not misdirect himself in the exercise of his discretion to enter a judicial stay of proceedings.

[28] The appeal is dismissed.

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VEALE J.