Citation: *R. v. Private C.R. Taylor,* 2006 CM 38

Docket: C200638

STANDING COURT MARTIAL
CANADA
ONTARIO
CANADIAN FORCES BASE BORDEN

Date: 22 September 2006

PRESIDING: Lieutenant-Colonel J.-G. Perron, M.J.

HER MAJESTY THE QUEEN
v.
PRIVATE C.R. TAYLOR
(Accused)

CHARTER DECISION

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[1] The accused, R59 156 399 Private Taylor, is charged with having committed three offences punishable under section 130 of the *National Defence Act*. More specifically, he is accused of two charges of trafficking of cocaine contrary to section 5(1) of the *Controlled Drugs and Substances Act* and of one charge of possession of marijuana contrary to section 4(1) of the *Controlled Drugs and Substances Act*.

[2] The applicant, the accused, has made an application under paragraph 112.03 of the Queen's Regulations and Orders for the Canadian Forces requesting that the Standing Court Martial order the production of the name of the informer listed in the police plan as source 002. The applicant requested this information from the Canadian Forces National Investigative Service but was refused.

[3] The applicant submits that the innocence of the accused is at stake and that informant source 002 is required for the applicant's full answer and defence. The applicant submits that the procedure as set out in paragraph 33 of the Supreme Court of Canada decision in *R. v. Leipert* should be followed to resolve this matter.

[4] The evidence presented by the applicant consisted of the testimony of nine witnesses. The applicant also requested that this court take judicial notice under Military Rule of Evidence 16(1)(e) of the contents of the Military Police Policies and Technical Procedures Manual, and the court did take judicial notice of the contents of that publication pursuant to Military Rule of Evidence 16(1)(e).

[5] The respondent did not provide any evidence.

INFORMER PRIVILEGE

[6] Both the applicant and the respondent provided case law during their argument. The applicant and the respondent both quote from *R. v. Scott* and *R. v. Leipert*, two key Supreme Court of Canada decisions on the subject of the informer privilege. *Leipert* incorporates previous decisions on this privilege and provides lower courts with clear guidance on this matter.

[7] I will now elaborate briefly on the key issues pertaining to informer privilege that may be found in the relevant Canadian case law. When commenting on the importance of informer privilege the Supreme Court of Canada specified that, and I quote:

> A court considering this issue must begin from the proposition that informer privilege is an ancient and hallowed protection which plays a vital role in law enforcement. It is premised on the duty of all citizens to aid in enforcing the law. The discharge of this duty carries with it the risk of retribution from those involved in crime. The rule of informer privilege was developed to protect citizens who assist in law enforcement and to encourage others to do the same. As Cory J.A. (as he then was) stated in *R. v. Hunter* ... [an Ontario Court of Appeal decision of 1987]:
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> > The rule of non-disclosure of information which might identify an informer is one of long standing. It developed from an acceptance of the importance of the role of informers in the solution of crimes and the apprehension of criminals. It was recognized that citizens have a duty to divulge to the police any information that they may have pertaining to the commissions of a crime. It was also obvious to the courts from very early times that the identity of an informer would have to be concealed, both for his or her own protection and to encourage others to divulge to the authorities any information pertaining to crimes. It was in order to achieve these goals that the rule was developed.
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> The rule is of fundamental importance to the workings of a criminal justice system. As described in *Bisaillon v. Keable*, [1983] 2 S.C.R. 60 at p. 105 ... :
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> > The rule gives a peace officer the power to promise his informers secrecy expressly or by implication, with a guarantee sanctioned by the law that this promise will be kept even in court, and to receive in exchange for this promise information without which it would be extremely difficult for him to carry out his duties and ensure that the criminal law is obeyed.

In *R. v. Scott*, [1990] 3 S.C.R. 979 ... Cory J. stressed the heightened importance of the rule in the context of drug investigations:

> The value of informers to police investigations has long been recognized. As long as crimes have been committed, certainly as long as they have been prosecuted, informers have played an important role in their investigation. It may well be true that some informers act for compensation or for self-serving purposes. Whatever their motives, the position of informers is always precarious and their role is fraught with danger.
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> The role of informers in drug-related cases is particularly important and dangerous. Informers often provide the only means for the police to gain some knowledge of the workings of drug trafficking operations and networks. ... The investigation often will be based upon a relationship of trust between the police officer and the informer, something that may take a long time to establish. The safety, indeed the lives, not only of informers but also of the undercover police officers will depend on that relationship of trust.

[8] In *Leipert* Chief Justice McLachlin, speaking for the court, confirmed at paragraph 14 that:

> ... [the] informer privilege is of such importance that it cannot be balanced against other interests. Once established, neither the police nor the court possesses discretion to abridge it.

She added at paragraphs 17 and 18, when speaking on the scope of the informer privilege, and I quote:

> Connected as it is to the essential effectiveness of the criminal law, informer privilege is broad in scope. While developed in criminal proceedings, it applies to civil proceedings as well: *Bisaillon v. Keable* ... It applies to a witness on the stand. Such a person cannot be compelled to state whether he or she is a police informer: *Bisaillon v. Keable* ... And it applies to the undisclosed informant, the person who although never called as a witness, supplies information to the police. Subject only to the "innocence at stake" exception, the Crown and the court are bound not to reveal the undisclosed informant's identity.
>
> Informer privilege prevents not only disclosure of the name of the informant, but of any information which might implicitly reveal his or her identity. Courts have acknowledged that the smallest details may be sufficient to reveal identity....

[9] As stated previously, the informer privilege is subject to only one exception known as the "innocence at stake" exception. Chief Justice McLachlin, at paragraph 20 of *Leipert*, expanded on this exception by quoting a fundamental tenet of the Canadian criminal justice system as stated by Cory J. in *R. v. Scott*. And I quote:

> In our system the right of an individual accused to establish his or her innocence by raising a reasonable doubt as to guilt has always remained paramount.

She then explained, at paragraph 21:

> ... there must be an evidentiary basis for concluding that the disclosure of an informer's identity is necessary to demonstrate the innocence of the accused ...

She further stated:

> ... mere speculation that the information might assist the defence is insufficient....

[10] Should the informer be shown to be a material witness to the alleged crime, or have acted as an *agent provocateur* (or in other words, did the informer actively induce the accused to commit the crime (as described by Cory J. in *R. v. Scott))*, this evidence would establish a basis for the exception.

[11] Challenges under section 8 of the *Canadian Charter of Rights and Freedoms* to search warrants may also create an exception to the informer privilege. This last exception to the rule has not been argued before this Standing Court Martial and the court will not comment further on it.

[12] Chief Justice McLachlin described the procedure to be followed by courts when an accused seeks the disclosure of privileged informer information on the basis of "innocence at stake" in the following sequential steps: Firstly, the accused must show some basis to conclude that without the disclosure sought, his or her innocence is at stake; second, if such a basis is shown, the court may then review the information to determine whether, in fact, the information is necessary to prove the accused's innocence; third, if the court concludes the disclosure is necessary, the court should only reveal as much information as is essential to allow proof of innocence; fourth, before disclosing the information to the accused, the Crown should be given the option of staying the proceedings. If the Crown chooses to proceed, disclosure of the information essential to establish innocence may be provided to the accused.

[13] This Standing Court Martial must now examine the evidence presented during this preliminary application to determine if the accused has provided this court with the evidentiary basis needed to conclude that the disclosure of an informer's identity is necessary to demonstrate the innocence of the accused. More specifically, this court must determine whether the evidence demonstrates that the informer is a material witness to the alleged offences, or that the informer has acted as an *agent provocateur* in relation to these offences.

[14] The court notes that the evidence presented by the applicant focussed solely on the two charges alleging the accused did traffic in cocaine, and that no evidence was presented concerning the charge of possession of marijuana. Therefore, this decision will focus solely on the two charges of trafficking of cocaine.

REVIEW OF THE EVIDENCE

[15] A decision concerning an order to disclose the identity of a confidential police informer must be taken with the utmost care and requires a meticulous review of the evidence provided during the hearing of the application. This court has thoroughly reviewed all of the evidence. The testimony given by Sergeant McLeod, Sergeant Turner, Petty Officer 2nd Class Joanisse, and Private Taylor are deemed to be the most relevant testimony in this application.

Private Taylor

[16] The accused, the applicant, was the last witness to testify in this application. When asked by his counsel if he is a user of cocaine, the accused replied in the affirmative. Defence counsel then asked if Private Taylor if he had been "were you" a user of cocaine?" Private Taylor replied that he had used cocaine three or four times a month, but had since asked to be admitted into rehabilitation. On cross-examination, Private Taylor stated that he had just gotten out of rehab a few days ago and that his initial response on present use of cocaine was due to nervousness.

[17] Private Taylor testified that he was not a trafficker and that he had not given or sold steroids to Private Legresley, despite Private Legresley's request that Private Taylor provide him with steroids. Private Taylor stated that they, and I quote, "went back," and that they "were close." Private Taylor also testified that Private Legresley had introduced Private Taylor to drugs on base. Private Taylor testified that he believed that informant source 002 was Private Legresley.

[18] When first asked by defence counsel in examination-in-chief if Private Taylor knew the identity of source 002, Private Taylor replied Legresley. When asked why he thought it was Legresley, Private Taylor replied that, and I quote, "by going through the notes, and the last few days in court, I do believe it is Legresley."

[19] Defence counsel then asked him if there were any other reasons for this belief. Private Taylor then mentioned that Legresley had admitted to Private Taylor about two months ago that Legresley was source 002. When asked why Legresley would tell him that, Private Taylor stated that they "went way back" and that Legresley "felt bad," and that Legresley was emotional. Legresley would also have told Private Taylor that Legresley "did not know why he did what he did."

[20] During cross-examination Private Taylor could not recollect the exact date that Sergeant McLeod had moved into his room, but he did testify that they had a good relationship, that "they hit it off" and that "he considered him a good friend."

[21] During cross-examination, Private Taylor stated that his first answer during the examination-in-chief, pertaining to present use of drugs, was incorrect and caused by his nervousness, and that he did not presently use drugs and was "clean." When asked "Have you ever sold drugs before ", he replied no. But when asked that after knowing Private McLeod (Sergeant McLeod) for only approximately three days he would do something out of character and agree to provide him with cocaine, he replied in the affirmative by stating "Yes, ma'am."

[22] Private Taylor was asked in cross-examination if he had sold cocaine to Sergeant McLeod on the 3rd of April. Private Taylor testified that he was asked multiple times, by which he meant three or four times, and he did, and I quote, "he did favour for a friend".

[23] When asked about the alleged offence of the 5th of April, Private Taylor then testified that he "had no recollection of that sale." He was then asked if he remembered the sale on the third, and he replied "Yes, I do, ma'am."

[24] When asked by the respondent during cross-examination if source 002 was present when the first sale occurred on the 3rd of April, Private Taylor replied no. When asked by the respondent during cross-examination if source 002 was present when the second sale occurred on the 5th of April, Private Taylor replied that he didn't "remember the transaction that happened, the money being exchanged." He stated, and I quote, "I could have been stoned, high as a kite." He admitted that his memory was not great and that he "remembered bits and pieces."

[25] Further in the cross-examination Private Taylor could not state that cocaine had been purchased when he was driving around Angus with Private Legresley.

Sergeant McLeod

[26] Sergeant McLeod, or Private McLeod as he was known during OP BORGUS, was the undercover operator responsible to approach Private Taylor. During the portion of the examination-in-chief dealing with the alleged offence of the 5th of April, Sergeant McLeod was asked by the applicant's counsel if "it would be fair to say that Private Legresley is actively involved?" Sergeant McLeod testified that Private Legresley was not actively involved and that Private Taylor was Sergeant McLeod's focus. Sergeant McLeod testified that he had told Private Taylor that Sergeant McLeod would only deal with Private Taylor and that no deals were made in Legresley's presence. Although he testified that Private Legresley was, I quote, "hanging around the hallway," Sergeant McLeod did specify that he was discussing a purchase of cocaine with Private Taylor and that he had told Private Taylor that he did not want other people "to know his business."

[27] Sergeant McLeod also testified that Private Legresley was a target. He had been briefed in general about the pre-tech and of four targets identified by the preliminary investigation. Sergeant McLeod also testified that he had made "a couple of buys of cocaine from Private Legresley." On cross-examination Sergeant McLeod confirmed that he began his undercover work on 30 March ‘05.

Sergeant Turner

[28] Sergeant Turner was the lead investigator in OP BORGUS. He testified that he spoke with source 002 on 15 January ‘05 and prepared a source debrief report on that date. The report was shown to him to help refresh his memory, and he confirmed that Private Taylor’s name, and the names of three other people were in the report. He also read Private Skinner’s name as being present in the report. This source debriefing report contains information from source 002 that on 14 and 15 January, Private Taylor, Private Campbell and Private Turner had approached the source hoping to "score some cocaine".

[29] The investigation plan for OP BORGUS was prepared by Sergeant Turner on 17 February 2005. This plan indicated two sources of information. The plan contained the names of two people, Private Skinner and Private Roy. The plan also indicated that source 002 was the main trafficker of drugs at PRETC, but had ceased trafficking in drugs and "wanted to get his life back on track." This information was read by Sergeant Turner from his investigation plan.

[30] In the span of five minutes, Sergeant Turner was asked three times by the applicant’s counsel if source 002 was a target of opportunity in the plan, and twice if source 002 was a target in the plan. Also during this short time span, Sergeant Turner was asked twice who was a target of opportunity, and once who were the targets in the plan.

[31] Sergeant Turner testified that the targets in the plan were Private Roy and Private Skinner. When initially asked who was a target of opportunity, Sergeant Turner replied they were anyone identified by the undercover operator working in the operation. When asked if source 002 was a target of opportunity, Sergeant Turner testified that information from another source indicated that source 002 and Private Taylor were ingesting cocaine.

[32] In his briefing to the team, Sergeant Turner stated Private Taylor and Private Legresley had also become targets of opportunity. He was immediately asked by the applicant’s counsel if he remembered source 002 being a target of opportunity in the plan. Sergeant Turner replied that he was being asked to identify source 002. Applicant’s counsel suggested there were multiple targets in the plan, and Sergeant Turner concurred with that comment. Sergeant Turner was then asked by applicant’s counsel if

source 002 was a target in the plan. Sergeant Turner replied that this would lead to the identity of the confidential informant. Sergeant Turner then testified that source 002 was not listed as a target in the plan. Sergeant Turner was asked if Private Taylor's name was in the plan. Upon refreshing his memory by looking at the plan, Sergeant Turner confirmed that Private Taylor is not listed as a target in the plan.

[33] Sergeant Turner was asked who were the targets of opportunity in the plan. He responded by stating the two targets listed in the plan are Private Skinner and Private Roy. He was asked this question a second time and he provided the same reply. Finally, he was asked if it was possible if source 002 was a target, to which he replied he did not believe so "in that op plan".

[34] During cross-examination, Sergeant Turner explained that source 002 was an informer and not an agent. He explained the difference between an agent and informer. He testified that source 002 had stopped talking to the military police before the operation began. It was confirmed source 002 was involved in illegal activities during the operation, and he was then "treated like any other person." Sergeant Turner also testified that there were two sources for this operation, and that he relied on information from source 001.

Petty Officer 2nd Class Joanisse

[35] Petty Officer 2nd Class Joanisse was working within the criminal intelligence section of the military police in Ottawa during the relevant time period for this application. He described how he would draft the Criminal Intelligence Assessment. He specified that he relied on the source debriefing reports provided by the investigator and other relevant police files. He confirmed that the Criminal Intelligence Assessment is an investigation aid, done at the beginning of the investigation in support of an investigation because it is easier to read than the standard MP report. The Criminal Intelligence Assessment for OP BORGUS was printed on 17 March 2005.

[36] Petty Officer 2nd Class Joanisse looked at the OP BORGUS Criminal Intelligence Assessment to refresh his memory when answering the applicant's questions. Private Roy and Private Skinner were identified as the targets. He also testified that the assessment contained information provided by source 002 on Private Taylor. Source 002 provided information that Private Taylor was a dealer of steroids since source 002 alleged that Private Taylor had offered to sell source 002 ten vials of steroids.

APPLYING THE FACTS OF THE PRESENT CASE TO THE LAW

[37] What must this court now do? As stated in *Bisaillon v. Keable*, the onus rests with the defence to establish an evidentiary basis for breaching this formidable privi-

lege. In *R. v. Garofoli* (1990), 60 C.C.C. (3d) 161, Supreme Court of Canada, Sopinka J. concluded that a trial judge should balance the relevance of the identity of the informer to the accused's case, with the prejudice to the informer and to law enforcement interests.

[38] The applicant raises the "innocence at stake" exception and argues that the confidential informer was either a material witness or an *agent provocateur*. The most relevant evidence to this application was given by three witnesses, namely Sergeant McLeod, Sergeant Turner, and Private Taylor.

MATERIAL WITNESS TO THE OFFENCE

[39] Private Taylor explained why he thinks Private Legresley is the confidential informer 002. When asked by his counsel why he wants his identity revealed, he replied that he wants Private Legresley to tell the truth about the accusations. Evidence from Sergeant Turner and PO2 Joanisse indicates that source 002 had alleged that Private Taylor had tried to sell steroids to source 002.

[40] When asked in cross-examination if Private Taylor knew what source 002 would tell the court if his identity was revealed, he answered that he was not sure. Then, when asked in cross-examination if he is wondering what source 002 would say in court, he replied yes. Private Taylor has admitted that Private Legresley, or source 002 according to Private Taylor, was not present during the first alleged transaction of cocaine. Private Taylor has admitted to having almost no recollection of the second transaction because he was "stoned" or "high as a kite."

[41] Sergeant McLeod testified that he ensured that his transactions with Private Taylor were not done in Legresley's presence.

AGENT PROVOCATEUR

[42] In *R. v. Babes* (2000), 146 C.C.C. (3d) 465, the Ontario Court of Appeal distinguished agents from informers as follows:

> In general terms, the distinction between an informer and an agent is that an informer merely furnishes information to the police and an agent acts on the direction of the police and goes "into the field" to participate in the illegal transaction in some way....

[42] Cory J. in *R. v. Scott* described *agent provocateur* in the following manner: "the informer actively inducing the accused to commit the crime."

[43] In the present case, Sergeant Turner testified that source 002 was an informant and not an agent. Sergeant Turner defined each term correctly. Sergeant

Turner testified that source 002 had ceased to provide the military police with information before the operation started and source 002 became a target once it was known that source 002 was now involved in illegal activities.

[44] Private Taylor did not testify as to any involvement by Private Legresley in the first alleged offence. By his own admission, Private Taylor's recollection of the second alleged offence is "not great, only bits and pieces," because he "could have been high as a kite," and "stoned." Private Taylor did not testify that Private Legresley had played any role in the dealings that Private Taylor had with Sergeant McLeod. Private Taylor's credibility is not put in doubt on these statements.

DECISION

[45] The applicant, through the testimony of Private Taylor or by any other witness, did not provide any evidence that would make source 002 or Private Legresley an instigator or an active participant in any of the alleged offences of trafficking of cocaine. As stated in *R. v. Leipert,* speculation on the usefulness of the information is not enough; for, if speculation alone was sufficient to remove the informer privilege, little would be left of this privilege.

[46] The court disagrees with the argument of the applicant that this case is unique. The court finds that the applicant has not provided any evidence that demonstrates that source 002 is a material witness or has acted as an *agent provocateur* in either of the alleged offences of trafficking in cocaine. The court having made this determination, it is not necessary to proceed to the subsequent steps of the procedure provided in *Leipert*.

[47] For these reasons, the court denies the application for an order from this Standing Court Martial that the name of the informer listed in the police plan as source 002 be provided to the accused.

[48] These proceedings under article 112.03 of QR&O are terminated.

Lieutenant-Colonel J.-G. Perron, M.J.

Counsel:
Major J.J.L.G. Caron, Directorate of Military Prosecutions
Counsel for Her Majesty The Queen
Lieutenant Commander M. Reesink, Directorate of Defence Counsel Services

Counsel for Private Taylor