



COURT MARTIAL

Citation: *R v Vezina*, 2013 CM 3014

Date: 20130612

Docket: 201264

Standing Court Martial

Canadian Forces Base Borden
Borden, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Private A.L. Vezina, Accused

Before: Lieutenant-Colonel L.-V. d'Auteuil, M.J.

REASONS FOR DECISION ON ENTRAPMENT APPLICATION

(Orally)

[1] On 10 June 2013, this court concluded, having regard to the evidence as a whole concerning all the essential elements on the four charges before this court, that the prosecution had proved beyond a reasonable doubt that Private Vezina committed four service offences punishable under section 130 of the *National Defence Act* for trafficking contrary to subsection 5(1) of the *Controlled Drugs and Substances Act*.

[2] Immediately after the finding of guilt by the court concerning Private Vezina on the four charges before this Standing Court Martial, Private Vezina's defence counsel brought an application for a stay of the proceedings on the basis that his client was entrapped into committing these offences by the military police.

[3] The evidence concerning this application is made of all the evidence presented during the trial. During the hearing, both parties declined the opportunity to present any

additional evidence on the specific matter. Then the evidence is composed of the following elements:

- a. the testimony of five witnesses heard in the following order: Sergeant Chapdelaine, Sergeant Janes, Master Corporal Krull as the lead investigator on this matter, Mr. Daily, and Petty Officer 2nd Class Clowe as the undercover operator for this investigation;
- b. a number of exhibits going from pictures of small bags with substances in it, the substance itself, two certificates of analyst, documents in relation to the handling of the substances for analysis, and documents in relation with the undercover operation; and
- c. the judicial notice taken by the court of the facts in issues under Rule 15 of the Military Rules of Evidence, and more specifically, the content of the Annex D of the publication, A-SJ-100-004/AG-000, Technical Manual of the Military Police, and specifically entitled "Use of Informers and Agents."

[4] PRETC is a platoon at Canadian Forces Base Borden where candidates who went through their basic training are waiting to get on their trade courses. Private Vezina was a member of that platoon.

[5] Between the period of 14 November 2011 and April 2012, the military police gathered different information concerning the use of drugs by some members of the PRETC. Master Corporal Krull, the lead investigator on that specific matter, learned during that period of time through three different confidential informants, the Ontario Provincial Police, and the Barrie Police Services that:

- a. some members of the PRETC would use cocaine;
- b. Private Vezina was a member of the PRETC;
- c. Private Vezina would use cocaine;
- d. Private Vezina would have used cocaine during her basic training;
- e. Private Vezina has a girlfriend, Elizabeth Smith;
- f. Private Vezina was living at her girlfriend's apartment located in Barrie, which is a city in the area of CFB Borden;
- g. Private Vezina had a room located at building A-79 on CFB Borden and where all female members of the PRETC were also temporarily accommodated;

- h. it would have been confirmed that three CF members living at building A-79 would use cocaine;
- i. a cleaning lady at the building A-79 would be associated with those CF members using cocaine;
- j. the Crossover's strip club was a place where CF members from CFB Borden would go to get drugs;
- k. there was a gang doing drugs at the housing where Private Vezina was living with her girlfriend;
- l. Elizabeth Smith would be a former stripper and would have some involvement as a drug supplier;
- m. Elizabeth Smith would be known as a drug dealer in Barrie and would supply all kinds of drugs; and
- n. Elizabeth Smith would have provided drugs to some CF members identified as users and temporary living at building A-79.

[6] Most of the information gathered from those three confidential informants was qualified by the military police as "believed reliable," and some of it was qualified as "confirmed reliable." As a matter of facts, according to military police policy, believed reliable means that "the present knowledge of the informer is favourable and suggests that he or she will prove to be reliable."

[7] Master Corporal Krull made an investigation plan on 16 December 2011, where he considered a surveillance operation of Private Vezina in order to confirm that Elizabeth Smith was trafficking. Also he planned an undercover operation in order to confirm confidential sources' information.

[8] However, only an undercover operation was approved by his superior in order to confirm the use of drugs in building A-79. Also it was planned to conduct a test for cause on some CF members in that building, but because of the lack of reasonable grounds to proceed it was never done.

[9] On 30 January 2012, an undercover operation request was submitted in order to achieve two objectives:

- a. to confirm sources' information and secure narcotic purchases from three CF members, which included Private Vezina and also her girlfriend, Elizabeth Smith; and
- b. to conduct a probe into the scope of the drug use at building A-79 among female occupants.

[10] On 15 April 2012, the undercover operation started. Sergeant Janes was the undercover handler and Petty Officer 2nd Class Clowe was the undercover operator.

[11] The main purpose of the operation at that time was to try to purchase cocaine from Private Vezina in order to confirm that she was involved with trafficking in drugs. Five other targets were identified for that undercover operation, including Private Vezina's girlfriend, but those CF members had moved to another location from building A-79, except for the accused that still held a room there. Then, while keeping on her mind that she could try to check on other targets, Private Vezina became the main and only target of the undercover operator.

[12] Petty Officer 2nd Class Clowe arrived at CFB Borden on 15 April 2012. She got a room at building A-79 on that same day. Some of the PRETC members were used as mentors for the Aboriginal Mentor Programme, which is a pre-recruitment programme used for familiarizing Aboriginals interested in a military career with basic requirement on the basic training programme. Some CF members of the PRETC were tasked to help out and act as mentors for Aboriginals on this programme. Private Vezina was tasked as was Petty Officer 2nd Class Clowe, who was for the purpose of the undercover operation, Private Samson, as a mentor on that programme, so both would be in the same working environment.

[13] Petty Officer 2nd Class Clowe made her first contact with Private Vezina on 16 April 2012. Both got acquainted with each other throughout the next days, and on the evening of 18 April 2012, Petty Officer 2nd Class Clowe asked during a conversation she had with Private Vezina, after the latter was telling her that her girlfriend was working at the Crossover's strip bar, "Can you get me some coke?" Private Vezina then asked her, "You don't do that, do you?" Petty Officer 2nd Class Clowe replied, "Yes, why not?" Private Vezina then confirmed that she would be able to get her some stuff.

[14] On that same night, the undercover operator got a ride back to her room with the accused and confirmed that the latter would be good to provide her the drug.

[15] On the next day, through text messages that she initiated, Petty Officer 2nd Class Clowe confirmed with Private Vezina that she won't get her drug before the next day because the accused had to get back home and talk with her girlfriend about it on the night.

[16] On the morning of 20 April 2012, Petty Officer 2nd Class Clowe received a phone call from Private Vezina. They agreed on a place to meet. An exchange of money took place at lunch time in Private Vezina's car, in front of the mess hall on CFB Borden. Petty Officer 2nd Class Clowe paid for one gram of cocaine. She paid in advance \$80, which is four times \$20, to Private Vezina.

[17] On the evening of that same day, Private Vezina came on the base to deliver the drug. Private Vezina texted to the undercover operator to know where she could meet

her. Petty Officer 2nd Class Clowe then set up the drug exchange. It took place in the parking lot of building T-115 on CFB Borden. Private Vezina was in her car with another female person sitting in the passenger seat. Petty Officer 2nd Class Clowe went on the driver's side; the driver's window was half down. She gave \$20 to Private Vezina for gas fees, which was agreed prior to the exchange, and Private Vezina gave her a small bag with a white powder in it. Petty Officer 2nd Class Clowe discussed briefly with Private Vezina. She went back to work and Private Vezina left.

[18] Further to her work shift, Petty Officer 2nd Class Clowe gave the small bag to her handler, Sergeant Janes, who then gave it to Master Corporal Krull. The latter secured it in a temporary evidence locker.

[19] Things went on normally between Petty Officer 2nd Class Clowe and Private Vezina. On 20 April 2013, Petty Officer 2nd Class Clowe approached Private Vezina in order to get some cocaine again. Private Vezina responded positively and confirmed that she needed to be paid in advance as it was done last time.

[20] On 24 April 2012, Petty Officer 2nd Class Clowe paid \$100 to Private Vezina. The amount represented \$80 for the cocaine and \$20 for the delivery. The exchange of money took place around two o'clock in the afternoon in the female bathroom of building T-83 on CFB Borden.

[21] It took some time for Private Vezina to find somebody to supply the drug and Petty Officer 2nd Class Clowe communicated with her once in a while to know when she could get the drug. Finally, the exchange took place in front of building A-79 around 11:30 p.m. Petty Officer 2nd Class Clowe exited the building and she went on the driver's side of Private Vezina's car. They had a short conversation. Private Vezina gave her a small bag with a white powder in it. Private Vezina, who was alone that time, left and Petty Officer 2nd Class Clowe went back inside the building.

[22] Later on that night, Petty Officer 2nd Class Clowe gave the small bag to her handler, Sergeant Janes, who then gave it to Master Corporal Krull. The latter secured it in a temporary evidence locker.

[23] On 27 April 2012, Petty Officer 2nd Class Clowe proceeded with her out clearance of CFB Borden and left the base.

[24] When an application for a stay of proceedings is made, the burden of proof belongs to the accused to prove on a balance of probabilities that the conduct of the police, here the military police, amounted to an abuse of process in the form of entrapment. If the accused succeeds in proving entrapment, a stay of proceeding is an appropriate remedy, but only in the clearest of cases. The law of entrapment has been described in *R v Mack*, [1988] 2 S.C.R. 903, where the two principal basis for the test of entrapment, set out at pages 964 and 965, are as follows:

(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, and

(b) although having such a reasonable suspicion or acting in the course of a *bona fide* inquiry, [the authorities] go beyond providing an opportunity and induce the commission of an offence ...

[25] In *R v Kang-Brown*, 2008 SCC 18, reasonable suspicion was described by Judge Binnie, at paragraph 75, in the following terms:

.... "Suspicion" is an expectation that the targeted individual is possibly engaged in some criminal activity. A "reasonable" suspicion means something more than a mere suspicion and something less than a belief based upon reasonable and probable grounds.

[26] The accused is taking the position that her application raised only the first branch of the test. According to her, the police had no reasonable suspicion that she was already engaged in trafficking in cocaine when it provided her an opportunity to commit the offence of trafficking. In addition, the police were not proceeding with a *bona fide* inquiry when it gave her such opportunity.

[27] The accused also told the court that, pursuant to the Supreme Court decision in *R v Barnes*, [1991] 1 SCR 449, and in *R v Brown*, [1999] 3 SCR. 660, confirming the decision of the Standing Court Martial delivered by the Military Judge Barnes, the police must have a reasonable suspicion that she was engaged in the specific offence of trafficking prior to presenting to her with the opportunity to traffic.

[28] The prosecution submitted that the accused failed to meet her burden of proof and that further to a lengthy investigation the police came to the conclusion that the accused was the link between a trafficker and some CF members, allowing it to have a reasonable suspicion that Private Vezina was trafficking in cocaine prior to providing her an opportunity to traffic. In response to the accused's argument, the prosecutor suggested that as established by the Quebec Court of Appeal in *R v Lebrasseur*, (1995) CCC (3d) 167, while it exists for a person a reasonable suspicion of possessing illegal drugs, the context may justify without being disproportionate to present to that same person with the opportunity to traffic.

[29] It is clear for this court that this case is not about a *bona fide* inquiry or inducing the commission of an offence. The key issue is about the existence or not of a reasonable suspicion. The police were not engaged in a *bona fide* investigation of a targeted place or it was not trying to induce the commission of an offence of trafficking.

[30] Then the question to be answered by this court is the following one: Has the accused established on a balance of probabilities that the police were not acting with a reasonable suspicion when it provided her with an opportunity to commit the offence of trafficking?

[31] In order to answer that question, the court must determine at what point the undercover operator provided the accused an opportunity to commit the offence. It appears from the facts of this case that when the undercover operator, Petty Officer 2nd Class Clowe, had the first conversation on having the accused providing her cocaine, the police had reasonable suspicion that Private Vezina was using cocaine. However, I accept, as mentioned by the defence counsel, that the police had no reasonable suspicion at that point. At best, it had mere suspicion that the accused was trafficking in cocaine.

[32] The content of the information provided to the police at that point and its degree of reliability made, from an objective perspective, reasonable that Private Vezina was engaged in the criminal activity of possessing or using cocaine. I conclude also that the lead investigator on this matter, Master Corporal Krull, did not embellish or exaggerate the information received. It is true that his own inference led him to conclude that because Private Vezina was living with somebody that would be involved in drug trafficking and that the accused had a room where it was confirmed users of drugs were living there too, that those people would get it from that person living with Private Vezina, and finally that Private Vezina would be using drugs, then the accused would be involved in trafficking. However, as mentioned by defence counsel, having the accused involved in trafficking was not the only possibility for having CF members getting drugs.

[33] As described in *R v Imoro*, 2010 ONCA 122, at paragraph 16, confirmed by the Supreme Court of Canada at 2010 SCC 50, when the undercover operator asked the question to the accused, "Can you get me some coke?", it was a step in the police investigation to confirm some logical inference from the information known by the police at that time. It did not amount to giving an opportunity to Private Vezina to traffic in cocaine. This step was given two days later when the exchange of money took place for getting the cocaine. As said by the Ontario Court of Appeal in *R v Bayat*, 2011 ONCA 778, at paragraph 19, it was "the equivalent of a knock on a door." Also as mentioned by the British Columbia Court of Appeal in its decision on *R v Olazo*, 2012 BCCA 59, which considered the decision of *Imoro*, the court said at paragraph 25:

By this approach, police can achieve a level of reasonable suspicion by engaging in the preliminaries of a drug transaction without risking entrapment.

[34] It is clear from the information obtained by the undercover operator during the two days prior to the first exchange of money that the police had reasonable suspicion at that point that Private Vezina was engaged, from an objective perspective, in the criminal activity of trafficking with cocaine.

[35] As mentioned by Judge Corrick in its decision of *R v Stubbs*, 2012 ONSC 1882 (CANLII), at paragraph 13:

The rationale for the doctrine of entrapment was well described by Justice Sharpe in *R. v. Townsend*, [1997] O.J. No. 6516 (Gen. Div.) when he said the following at paragraph 41 of the judgment:

The evil to be avoided here as indicated by *Mack* is whether the conduct of the police creates an unnecessary risk of attracting innocent and otherwise law-abiding individuals into the commission of an offence.

[36] Then it is the conclusion of the court that the accused has not established on a balance of probabilities that the military police were not acting with a reasonable suspicion when it provided her with an opportunity to commit the offence of trafficking.

[37] The entrapment application made by Private Vezina is accordingly dismissed.

Counsel:

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