Citation:*R. v. Ennis,* 2005CM3026

Docket: S200547

STANDING COURT MARTIAL
CANADA
NOVA SCOTIA
CANADIAN FORCES BASE HALIFAX

Date: 15 December 2005

PRESIDING: COMMANDER P.J. LAMONT, M.J.

HER MAJESTY THE QUEEN
v.
ex-ORDINARY SEAMAN S.D. ENNIS
(Accused)

DECISION ON *CHARTER* APPLICATION FOR ENTRAPMENT
(Rendered orally)

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[1] On 4 November 2005, I found ex-Ordinary Seaman Ennis guilty of three charges of trafficking in a controlled substance. By counsel he now applies for a stay of proceedings based upon an allegation of entrapment. The Supreme Court of Canada defined entrapment in the case of R. v. Mack, (1989) 44 C.C.C. (3rd) 513: Entrapment occurs when: (a) the police provide the opportunity to commit the offence without acting on a reasonable suspicion that the accused is already engaged in criminal activity or pursuant to a bona fide enquiry; or (b) although having such a reasonable suspicion or acting in the course of a bona fide enquiry, the police go beyond providing an opportunity and induce the commission of an offence.

[2] The focus of the court's enquiry is on the conduct of the police, not on the subjective character or predisposition of the accused. It is essential to assess the conduct of the police and their agents on an objective standard. The question to be answered is: Having regard for the conduct of the police or the prosecution authorities, can it be said that the guilt of the accused was uncovered in a manner that shocks the conscience and offends the principle of decency and fair play?

[3] Thus, entrapment is not related to the moral innocence of the accused but rather focusses upon the faulty conduct of the state. Once the accused is found guilty of the offence, he bears the burden of establishing, on a balance of probabilities, that the conduct of the Crown and/or the police amounted to an abuse of process deserving of a stay of proceedings; a standard that the Supreme Court of Canada has held will arise only in the clearest of cases.

[4] In the course of this hearing the court heard the evidence of ex-Ordinary Seaman Ennis. The prosecution called the evidence of Master Seaman MacDonald who was the investigator in charge of this investigation, as well as the evidence of former Ordinary Seaman Saunders—former Able Seaman Saunders who acted as a police agent in this undercover operation. In addition to the evidence of these witnesses, I have considered the evidence heard in the course of the trial on the issues that arise in this entrapment proceeding.

[5] On all the evidence I have heard I am not persuaded to the required standard that either branch of the test in Mack has been met by the accused and, accordingly, the application for a stay of proceedings based upon entrapment is dismissed for the reasons that follow.

[6] One, did the military police act upon a reasonable suspicion pursuant to a bona fide enquiry?

> Master Seaman MacDonald testified that Ordinary Seaman Ennis became a person of interest to the military police on 4 August 2004. On that date, Master Seaman MacDonald learned that Mr Ennis—as he is now entitled to be called—spoke to his supervisor Chief Todd. When Chief Todd confronted Mr Ennis with information he had that Mr Ennis was using drugs, Mr Ennis confirmed that he was using cocaine and had an addiction problem.
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> Later in August, Master Seaman MacDonald learned from Leading Seaman Brown that Mr Ennis was still using and also selling drugs.
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> On 4 September 2004, Master Seaman MacDonald learned from Corporal Quesnel that he had information that Mr Ennis was using and selling drugs in the "A" block quarters on the base. Corporal Quesnel is a general investigation service's member then posted at the Guardhouse in Halifax.
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> The evidence of what these persons' said to Master Seaman MacDonald is not admissible to prove the truth of those statements. Such a use of the evidence would infringe the rule against hearsay. But the evidence is admissible for a non-hearsay purpose; that is, to show the state of knowledge of the military police at the time they elected to target Mr Ennis in this investigation.
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> The next development in the investigation occurred when Master Seaman MacDonald met then Able Seaman Saunders. This occurred on the 20 and 21 October 2004. At that time, Master Seaman MacDonald

> wished to confirm information that he apparently understood Saunders to have given. Saunders stated that Mr Ennis was still using and selling drugs; that he had seen Mr Ennis sell on one occasion; and that Saunders himself had purchased drugs from Mr Ennis.
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> In the course of these interviews, Saunders agreed to act as a police agent. He understood that this would involve him introducing Mr Ennis to a military police member, acting in an undercover capacity, in order to have Mr Ennis sell drugs to the undercover operator.
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> On 27 October 2004, Master Seaman MacDonald drew up a document, called an Investigation Plan, to be submitted to his superiors for approval. The document recites some of the information I have already referred to above, and specifically names Mr Ennis as one of the targets of the investigation. The document is Exhibit M1-2 on this proceeding.
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> The plan contemplated that Able Seaman Saunders would introduce an undercover operator to Mr Ennis and someone called Nick in order to, quote, have the operator conduct a number of drug purchases from both targets and further attempt to identify any external/civilian drug threat to Canadian Forces members in the CFB Halifax area, unquote. The operation was scheduled to begin the middle of November and conclude by 6 December 2004. The Canadian Forces Provost Marshal, Colonel Cooper, approved the operation on 10 November 2004.
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> During this period, Master Seaman MacDonald continued to receive information from Saunders. He prepared documents, called Source Debriefing Reports, on three occasions: 20 October, 3 November, and 12 November, containing the information he received from Saunders concerning Mr Ennis. The reports are in evidence before me. The information in the reports contains some detail; for example, on 20 October Saunders reported that Mr Ennis, "deals in cocaine at $270 an 8-ball; ecstasy at $15 a pill; and marijuana at $10 for three grams to servicemen within "A" block."

[7] I accept the evidence of Master Seaman MacDonald as to the information he received concerning Mr Ennis. It is true, as counsel for Mr Ennis points out, that in his evidence before me, Saunders did not confirm substantial parts of the evidence of Master Seaman MacDonald, and, indeed, contradicted the evidence of Master Seaman MacDonald in several important areas. But I am satisfied, having observed Mr Saunders giving his evidence, that his memory is defective, perhaps as a result of his use of drugs. His evidence does not cause me to doubt the accuracy and reliability of the evidence of Master Seaman MacDonald.

[8] Does this evidence amount to reasonable suspicion? I agree with the statement of Justice Wood, giving the judgment of the British Columbia Court of Appeal in R. v. Cahill, (1992) 13 C.R. (4th) 327, when he stated at paragraph 32:

> I agree with the trial judge that, as a matter of abstract theory, a reasonable suspicion means something more than a mere suspicion and something less than a belief based upon reasonable and probable grounds. To impose on the police a standard of "suspicion" equivalent to a belief based on reasonable and probable grounds, before they could provide a suspect with an opportunity to commit a crime, would seriously impede their ability to combat certain types of crime effectively.

[9] I focus on the state of knowledge of the military police at the time in late October of 2004 when Mr Ennis was targeted by the investigators. At that time there was much more than mere suspicion on the part of Master Seaman MacDonald that Mr Ennis was involved in criminal activity. He had specific information from several sources that confirmed the detailed information he had from Saunders. He was in possession of no information that contradicted the information from Saunders and others. There was a substantial basis upon which to recommend that police resources be devoted to an undercover investigation of Mr Ennis.

[10] In my view, there was reasonable suspicion on the part of Master Seaman MacDonald that Mr Ennis was implicated in the supply of illicit drugs to members of the Canadian Forces at CFB Halifax, and the targeting of Mr Ennis was a good faith exercise of police investigative discretion and authority.

[11] Two, did the military police go beyond simply providing an opportunity and actually induce the commission of the offences?

> Counsel for Mr Ennis argues that the military police targeted Mr Ennis at a time when he was particularly vulnerable because he had recently been removed from a rehabilitation course after admitting his drug use, and having been put on counselling and probation for drug use a mere two days before the first sale of drugs to the undercover operator.
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> Counsel says that the timing and actions of the police are questionable. They proceeded with an undercover investigation when other investigative avenues were open to them but were not explored.

[12] On all the evidence I have heard, I cannot find that the investigators acted in bad faith either in their decision to target Mr Ennis with the assistance of a civilian police agent and an undercover operator or in the timing of the investigation. I find that the military police were aware that Mr Ennis had failed to complete his rehabilitation course because of failed urine testing for drugs. But I cannot find that the investigators took advantage of the addiction Mr Ennis apparently suffered.

[13] This is not a case like R. v. Brown, a decision of the Court Martial Appeal Court reported at (1998) 139 C.C.C. (3rd) 493, reversed on appeal to the Supreme Court of Canada without reasons at 139 C.C.C. (3rd) 492, where the police investigators induced the accused to traffic in narcotics by supplying him with bottles of liquor when the accused was known to abuse alcohol.

[14] The evidence is clear that Mr Ennis was dealt with administratively by being put on counselling and probation two days before he first sold cocaine to the undercover operator. I am not satisfied that the police were aware that the accused was on counselling and probation at the time of the sales of cocaine and ecstasy on 18 and 22 November 2004. But even if the police were aware of this, I do not consider their decision to proceed with the investigation to be improper.

[15] Finally, I do not accept the submission of counsel that other investigative avenues should have been followed. It was suggested that the police should have interviewed Mr Ennis, presumably to confront him with the information the police had about his drug selling activities and perhaps to prosecute him for those instances. I agree with counsel for the prosecution that the information available to the police at that stage was merely source information and provided no evidentiary basis upon which to mount a prosecution. But in any event, the use of a civilian agent and an undercover operator are not investigative methods of last resort. There is no burden upon the prosecution authorities to show that other methods of investigation would have failed before they can resort to the methods employed in this case.

[16] Counsel for Mr Ennis also points out that Mr Ennis firmly stated to Saunders that he would not sell drugs, but Saunders persisted in his request to Mr Ennis to sell drugs to the undercover operator. The evidence of Mr Ennis was that he received a threat of harm, even death, if he did not sell drugs to the undercover operator. The threat originated with Saunders but was passed on to Mr Ennis by one Ordinary Seaman Griffith.

[17] As regards the death threat, I have reservations about the evidence—about accepting the evidence of Mr Ennis on this point. On all the evidence it is difficult to see why Saunders would have uttered or communicated such a threat either directly to Mr Ennis or through the intermediary Ordinary Seaman Griffith. It must be recalled that Saunders was asking Mr Ennis to supply drugs not to Saunders but to a stranger whom Saunders knew to be an undercover operator. I can see no motive for Saunders to threaten Mr Ennis if he did not supply the drugs to the operator. Saunders was not being rewarded by money or drugs or anything else of value to him if the deal with the undercover operator was consummated. I accept the evidence of Saunders that his motivation in cooperating with the police was a genuine attempt to assist the police in dealing with a serious problem of cocaine use amongst the junior ranks in the navy at CFB Halifax. I do not believe that he threatened Mr Ennis.

[18] I find that the evidence of Master Corporal McComb, the undercover operator, as to the circumstances surrounding the drug transactions themselves is the best evidence as to the motivation of Mr Ennis in selling the drugs.

[19] During the transaction of 18 November, Mr Ennis assured his purchaser, the undercover operator, that he, Mr Ennis, was a reliable supplier when he stated, referring to Saunders, quote, You can ask Matt, I don't fuck people around. unquote. Mr Ennis admitted in his evidence that he told the undercover operator that it was he who got Matt Saunders started on taking ecstasy. There was discussion about a larger purchase in the future. Then Mr Ennis took a small portion of the cocaine back for his own use. He testified that he later threw this quantity of cocaine away. But whether that is true or not, I infer that on 18 November, he was attempting to cultivate the undercover operator as a customer.

[20] After the transaction on 22 November, Mr Ennis advised the undercover operator that he would be out of commission for a short period as he was confined to barrack's and would not have access to drugs. On this occasion he was paid $40 out of the purchase money for his services in arranging to find a supplier, negotiating the deal, and delivering the drugs to the undercover operator.

[21] These facts belie the suggestion that Mr Ennis was motivated to sell cocaine and ecstasy to the undercover operator because he was persistently importuned, or even threatened, by Saunders.

[22] In addition, in the statements Mr Ennis made to the investigators after his arrest, recorded on videotape, Mr Ennis does not suggest that he acted as he did because he was unable to resist the persistent requests of Saunders or because of any threat that Saunders may have made.

[23] The question the court must answer, though, is not whether the accused in this case, Mr Ennis, was induced by improper methods to commit the offences of trafficking in a controlled substance? The test is whether an average non-predisposed person would have been induced by the actions of the police or their agents in this case to commit the crime.

[24] I have considered the ten factors enumerated by Justice Lamer, as he then was, in delivering the unanimous judgment of the Supreme Court of Canada in Mack. In my view it cannot be said that the actions of the police in the present case would have induced an average person to traffic in controlled substances. Indeed, the actions of the police and their agents in this case appear to be no more open to criticism than the actions of the civilian police agent and authorities in R. v. Showman [1988] 2 S.C.R 893. The police did nothing more than offer the opportunity to Mr Ennis to sell

controlled substances. They did so upon a reasonable suspicion that he would indeed do so.

[25] The defence of entrapment fails. In this circumstance it is not necessary to consider whether this is the clearest of cases that would justify the remedy of a stay of proceedings.

COMMANDER P.J. LAMONT, M.J.

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