NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. MacInnis***, 2006 NSCA 92

Date: 20060726
Docket: CAC 243431
Registry: Halifax

Between:

James Roderick MacInnis

Appellant

v.

Her Majesty the Queen

Respondent

Judge(s):	Roscoe, Saunders & Oland, JJ.A.
Appeal Heard:	May 30, 2006, in Halifax, Nova Scotia
Held:	Appeal against convictions dismissed. Leave to appeal sentence granted, but appeal dismissed, as per reasons for judgment of Saunders, J.A.; Roscoe & Oland, JJ.A. concurring
Counsel:	Lawrence O'Neil, Q.C., for the appellant David Schermbrucker, for the respondent

Reasons for judgment:

[1] A drug deal gone bad led to suspicions that a co-accused had arranged a sweetheart deal with authorities that was kept hidden from the judge, leading - so the appellant contends - to a miscarriage of justice which cries out for censure and a new trial.

[2] The appellant was charged with possession of marijuana for the purpose of trafficking contrary to s. 5(2) of the **Controlled Drugs and Substances Act**, [1996, c. 19], and dangerous driving contrary to s. 249(1)(a) of the **Criminal Code of Canada**. The offences were alleged to have occurred on July 12, 2002.

[3] On November 10, 2004, after trial in the Provincial Court, the appellant was found guilty on both charges. He was sentenced on January 25, 2005 to 20 months' in custody on the drug offence, to be served consecutively to time being served (on other offences) and to a ten year fire arms prohibition. On the dangerous driving charge the appellant was sentenced to four months' consecutive and a two year driving prohibition. On March 18, 2005 he filed an appeal against his convictions and an application for leave to appeal his sentences.

[4] The matter now comes before us in several parts. The appellant appeals both convictions. He seeks leave to appeal sentence. He seeks leave to adduce fresh evidence. He seeks an order from this court compelling disclosure from the Crown.

[5] The appellant has raised serious allegations which require very careful consideration. The Crown quite properly concedes that there are circumstances surrounding this case which raise legitimate suspicions and demand explanation. Accordingly the Crown supported the appellant's application to place fresh evidence before this court. That said, the Crown insists that when the entire record including the fresh evidence is properly scrutinized, one can confidently say there has not been any miscarriage of justice and nothing which would warrant sending it back for a new trial. As to the merits, the respondent argues that there were no errors by the trial judge which would require this court's intervention, either in setting aside the verdict(s) or in varying the sentence.

[6] I agree with the Crown's submissions. For the reasons that follow I would grant leave to adduce fresh evidence. However, after carefully considering that

evidence, together with the entire record, I would dismiss the conviction appeal, and while granting leave to appeal sentence, would dismiss the sentence appeal. It follows that I would deny the appellant's application to oblige the Crown to make further disclosure.

[7] To provide context and a better understanding of the many issues that arise in this case, I will start with a review of the material facts and unusual circumstances surrounding certain aspects of these proceedings.

Background

[8] On July 12, 2002 a call from a confidential informant caused police officers Gouthro and MacDonald to believe that a drug transaction was about to occur at 217 Dorchester Street, Sydney. Both were members of the Street Crime and Drug Section. They left separately, Constable MacDonald in an unmarked green van, and Constable Gouthro in a blue Ford Taurus, later positioning themselves to observe activities at the location and to prevent the departure of persons whom they might wish to detain.

[9] Constable Gouthro gave evidence that he saw a person arrive in a pick-up truck. The male driver took a "full" knapsack from the front seat of the pick-up truck. He put it over his shoulder, walked across the street and spoke with the appellant for about 30 seconds, whereupon both men entered the residence. Three or four minutes later the appellant and the unknown driver walked out of the house. Constable Gouthro noted that the knapsack appeared empty and was "all folded up." That man walked to his truck.

[10] The appellant, whom Constable Gouthro recognized from prior occasions, was seen carrying a Labatt's Blue box. He walked to a second vehicle described as a blue *Iroc*, said to be a "souped-up" high performance Camero and placed the box on the passenger side. The pick-up truck left. Constable Gouthro instructed his partner, Constable MacDonald, to pursue the truck. Seeing that the appellant was getting into the *Iroc*, Constable Gouthro raced for his unmarked police car and proceeded to follow the appellant. Shortly into the pursuit Constable Gouthro felt that the appellant had "made" him because "after he eyed the car he just took off like a bat out of hell." A highspeed chase ensued.

[11] Constable Gouthro switched on his siren and emergency lights. As the blue *Iroc* passed by, Constable Gouthro said he had a clear and unobstructed view of the driver and only occupant, whom he identified as the appellant, James MacInnis. Speeds exceeding 80 kms. per hour were reached as the vehicles raced along city streets. It was approximately 5:30 p.m. Traffic was moderate. There were many pedestrians about. The officer testified that the blue *Iroc* sped through several intersections on a red light, at a high rate of speed. At one point during the pursuit he looked at his speedometer and saw that he was driving 100 kms. per hour, yet couldn't keep up with the blue *Iroc*. The officer said it was a beautiful July day, the weather was clear and there was nothing to obstruct his visibility.

[12] As they proceeded north up the Esplanade, Constable Gouthro couldn't keep up with the *Iroc*. At that point he lost sight of the vehicle. The officer drove on but soon observed the *Iroc* on another city street. He continued his pursuit and found the car abandoned, on a city street, with the engine turned off. Constable Gouthro testified that the vehicle was only out of his sight during the entire car chase for "maybe 15-20 seconds."

[13] The registered owner of the vehicle was Ms. Natasha Fraser, a person known to the police and described as a frequent visitor at 217 Dorchester Street. The officer found a cell phone in the front of the vehicle. He was unable to verify the phone's owner. He found a receipt from Mr. Tire "made out to Jimmy MacInnis, 217 Dorchester Street . . . phone number 539-9925" on the front seat. Beside it the officer also found a Nova Scotia driver's licence with photo identification belonging to the appellant.

[14] He also seized a pager from the car. While he was searching the vehicle the pager went off. Constable Gouthro used the cell phone to call the number displayed. A male voice answered. Constable Gouthro said "Did you just page me?" and the male on the other end answered "Is that you Jimmy?"

[15] Meanwhile Constable MacDonald had pulled over the half-ton truck. It was driven by Jayson Deleski. Concealed under a blanket on the floor of the truck was a black backpack. The officer detected a strong odour of marijuana from the vehicle and asked Mr. Deleski to open the backpack. Inside he found three bags of marijuana. Mr. Deleski was searched. Another bag of marijuana was found in his pants. Twelve thousand dollars cash, made up of 600 twenty dollar bills, secured

by an elastic band, was also found in the vehicle together with a black pouch containing a mini-sized pocket scale.

[16] In all, approximately four pounds of marijuana were seized. Constable MacDonald testified that at the time marijuana was "going for roughly $3,000.00 a pound."

[17] Various citizens testified. They confirmed the high speed chase between the blue *Iroc* and the unmarked police car. The only person in the *Iroc* was the driver, a single male occupant. As the car shot by, the driver was observed grabbing a Labatt's Blue box in one hand. With a "hook shot" the driver threw the box over the roof of the car where it struck a curb and split apart, causing a black garbage bag to fall out. Moments later they saw the unmarked police car speed past. The citizens secured the garbage bag and the box. Soon these same citizens observed a small, beige coloured car "barrelling down the street towards them." The driver of that car was repeatedly looking on the ground, from side to side. As it passed by they made eye contact. These citizens identified the driver as Mr. Gary MacInnis, the appellant's brother.

[18] Once that car left the scene these citizens felt that they were in a potentially dangerous situation. They decided to put the garbage bag, which they discovered contained marijuana, into their own vehicle and leave in search of the police. They found an officer within minutes and turned the drugs over to him. The broken Labatts Blue box was also seized.

[19] Later a third citizen picked out the appellant from a photo line-up and positively identified him as being the driver of the blue *Iroc*.

[20] Mr. Jayson Deleski gave evidence at the appellant's trial. He was a very important Crown witness. When testifying he also stood charged with possession for the purpose of trafficking contrary to s. 5(2) of the **CDSA**. The charge arose out of the same set of circumstances that gave rise to the charges against Mr. MacInnis, and which are the subject of this appeal.

[21] The Crown applied to re-open its case so that Mr. Deleski could give evidence. Mr. Deleski had been identified as a defence witness but was not called by the defence at trial. When offered as a Crown witness it was on the basis of "new" evidence. In explaining why his evidence was new, the Crown

acknowledged that Mr. Deleski's first account of events was in conflict with what the Crown believed had happened.

[22] In its summation the Crown described Mr. Deleski as a person who would not receive a benefit for coming forward to give evidence against the appellant. Mr. Deleski was also questioned on both direct examination and cross-examination as to whether he would receive a benefit for testifying or hoped to receive a benefit. He swore that he had not received a benefit and did not expect to receive one.

[23] Mr. Deleski's charge remained outstanding for a lengthy period of time. He was sentenced in Vancouver on October 20, 2005, for a crime he committed July 12, 2002. He received a suspended sentence.

[24] These circumstances lead to a host of issues, and distinct applications, brought on behalf of the appellant. For convenience I will list them now and, where appropriate, later refer to additional information which affects their consideration.

Issues

[25] The principal issues that must now be addressed are as follows:

(1) application to adduce fresh evidence;

(2) application to order further disclosure by the Crown;

(3) the merits of:

(a) Appeal against convictions

(i) *Vetrovec* warning
(ii) identification evidence
(iii) adequacy of reasons
(iv) findings unreasonable and not supported by the evidence
(v) disposition

(b) Leave to appeal sentences

(i) whether a fit and proper sentence
(ii) disposition

Application to Adduce Fresh Evidence

[26] The appellant has applied pursuant to s. 683(1) of the **Criminal Code** for leave to introduce fresh evidence, specifically:

(i) two letters authored by Sgt. Rutherford of the Cape Breton Regional Police and identified at the sentence hearing in the case of **R. v. Jayson Deleski**, File No. 157984-I-T held in the Provincial Court of British Columbia at Vancouver on October 20, 2005;

(ii) a transcript of the proceedings in the **Deleski** sentencing hearing;

(iii) the decision of the learned judge, the Honourable Judge Warren following the **Deleski** sentencing hearing;

(iv) a letter from Federal Crown Attorney David Iannetti to Nova Scotia Provincial Crown Attorney Kathy Pentz, dated February 7, 2005, and a letter from Ms. Pentz to Federal Crown Attorney David Schermbrucker dated November 28, 2005; and

(v) an email from Sgt. Rutherford to Mr. Schermbrucker dated November 29, 2005.

[27] At the hearing before us Mr. Schermbrucker agreed that this fresh evidence ought to be admitted. As already explained in these reasons, Mr. Schermbrucker properly acknowledged that certain circumstances surrounding this case were awkward such that the Crown "should be embarrassed." They were of a kind that "demands explanation." In Mr. Schermbrucker's submission these circumstances went to "the very integrity of the process" and therefore did not invite too strict an application of the test in **R. v. Palmer**, [1980] 1 S.C.R. 759.

[28] I agree. Section 683(1) of the **Criminal Code** provides that the court may receive fresh evidence where it is "in the interests of justice." The criteria to be

addressed when deciding whether fresh evidence should be admitted are well known. **R. v. Palmer**, supra. As was pointed out by LeBel, J. in **R. v. Taillefer**, 179 C.C.C. (3d) 353, the strict test set out in **Palmer** does not apply to the admission of fresh evidence in the context of a breach by the Crown of its duty to disclose (at ¶ 75). For fresh evidence to be admitted under **Palmer**, supra, it must "be expected to have affected the result"; whereas "a reasonable possibility that the Crown's failure to disclose evidence affected the overall fairness of the trial" is sufficient to require a new trial. Accordingly, Justice LeBel observed:

> I think that the **Palmer** test must be modified when the fresh evidence sought to be entered on an appeal relates to non-disclosure of relevant information. The test to be applied should be whether the right to a fair trial may have been affected. (at ¶ 75)

In my opinion the particular evidence I just described meets all necessary requirements in the leading jurisprudence for the introduction of fresh evidence, and ought to be admitted on that basis for our consideration.

[29] As well, and on the same basis, I would also direct that we receive two affidavits: the first sworn jointly on May 25, 2006 by Messrs. Allan Stanwick and Tony Mozvik, both lawyers in Sydney, Nova Scotia; the second, sworn May 18, 2006, by Frank Polak, a lawyer practising in Vancouver, British Columbia. The Stanwick/Mozvik affidavit was introduced by the appellant on consent of the respondent. The Polak affidavit was introduced by the respondent, on consent of the appellant. These affidavits offer further relevant and important information regarding the unusual circumstances surrounding certain aspects of these proceedings.

[30] I will now consider the impact of this fresh evidence on the appellant's principal objective to compel further disclosure from the Crown; to set aside the verdicts and the sentences imposed; and to order a new trial. In this segment of my reasons I need not deal with the appellant's various other grounds alleging error of law on the part of the judge in the manner in which he conducted the trial, or reached a verdict, or imposed sentence. I will address those points later.

[31] At the heart of Mr. MacInnis's appeal lies the submission that the judge who presided at his trial, the Honourable David Ryan, Prov. Ct. J. was misled with

respect to Jayson Deleski's "true" "standing" before the court and that as a consequence the appellant's constitutional right to a fair trial was violated. In order to understand the appellant's complaint I will have to delve further into certain aspects of his trial and the events that followed.

[32] As noted earlier in these reasons, the appellant was charged in separate Informations with offences alleged to have occurred on July 12, 2002. The first offence was for dangerous driving, the second for possession of 3 kilograms of marijuana for the purpose of trafficking. On September 10, 2002 he entered a not guilty plea to each charge. His trials were eventually scheduled for August 22, 2003. On that date the trial judge ordered a joint trial. Thereafter, the pace of these proceedings was hardly laudatory. Adjournments and continuances meant that the trial was spread over eleven separate days lasting more than a year. The record consists of approximately 800 pages of transcript. On November 10, 2004 the appellant was found guilty of both charges by Ryan, Prov. Ct. J. He was sentenced on January 25, 2005.

[33] Given the nature of the charges against Mr. MacInnis, two Crown attorneys were involved in his prosecution: Mr. MacPherson, for the provincial Crown with respect to the dangerous driving charge, and Mr. Iannetti, for the federal Crown with respect to the drug offence.

[34] On November 28, 2003 Mr. Iannetti completed his evidence and advised Judge Ryan that he was closing the Crown's case. There is then an exchange between the provincial Crown attorney and the trial judge. The state of the trial transcript here is awful. One would hope that the quality of recording and transcription has improved substantially since these proceedings were heard at the Provincial Court in Sydney. Unfortunately, the transcript indicates that portions of that exchange between Crown counsel and Judge Ryan were "inaudible - both speaking." It would appear that a Ms. MacInnes (apparently an associate of Mr. MacPherson and attending that day as the provincial Crown attorney) indicated that she too was closing her case, and that her remark was acknowledged by the trial judge. Immediately thereafter the appellant's trial lawyer, the late Mr. Blaise MacDonald, informed the court that he would be calling evidence on behalf of the defence, but would require an adjournment to locate that individual. Counsel then agreed to adjourn to January 9, 2004. Before adjourning, defence counsel MacDonald informed the court that he also had another witness under subpoena, Mr. Jayson Deleski, who had called the Crown office to say that he was home sick

and would be unable to attend court that day. That fact was confirmed by Ms. MacInnes for the provincial Crown. Judge Ryan ordered that the subpoenas would remain in effect for all witnesses and adjourned the case to January 9, 2004.

[35] On that date counsel for the appellant and counsel for both the provincial and federal Crown appeared. The appellant's lawyer advised the court that he had only just become aware of "some new developments" as a consequence of which he required an adjournment. Both Crown attorneys consented to that request. They also served notice that they would seek the court's leave "to re-open the Crown's case because of fresh evidence." June 4, 2004 was chosen as a suitable date to resume the trial.

[36] On that morning the Crown applied to re-open its case so as to call one witness, Mr. Jayson Deleski. The Crown attorney explained the basis for the application and wishing to place Deleski's evidence before the court. Counsel advised the court that late in December 2003 Mr. Deleski had contacted the police and subsequently provided them with a "KGB statement" wherein he deposed that he had been approached by the appellant as well as the appellant's father and brother who demanded that he concoct a story swearing that he had <u>not</u> purchased drugs from the appellant, but had in fact purchased a sweater; and that the incident never involved James MacInnis, but rather his brother Gary. Deleski told the police that when he failed to attend court to provide such perjured testimony, he had been taken to the MacInnis' residence where he was severely beaten by the appellant for not showing up in court and doing what he was told.

[37] The Crown explained that Mr. Deleski had not been called at the outset to give evidence for the prosecution because he had provided an initial statement that was extremely vague as well as being in conflict with other Crown witnesses. Consequently the Crown elected not to call Mr. Deleski, not realizing until closing its case that the appellant and his cohorts had obstructed justice by attempting to intimidate Mr. Deleski.

[38] There then ensued detailed submissions from Crown and defence, the substance of which is not important for our purposes. Suffice it to say that Judge Ryan ruled in favour of the Crown permitting it to re-open its case and call Mr. Deleski. That decision has not been appealed.

[39] The case was then adjourned to September 13, 2004. Mr. Deleski took the stand and was examined by the federal Crown and vigorously cross-examined by Mr. MacInnes' trial lawyer.

[40] Mr. Deleski testified that on July 12, 2002 he went to the house at 217 Dorchester Street to see if anybody was interested in buying marijuana. There were 6 to 8 persons present including the appellant and the appellant's brother Gary. Deleski said he showed them a pound a marijuana he had in his knapsack. He and the appellant agreed on a price of $3,000.00 per pound. Deleski left the single pound there in the residence and then drove his truck to pick up the additional 3 pounds. But first he said that he and the appellant went to a house next door where the appellant paid him $12,000.00, that is $3,000.00 for the initial single pound and the balance of $9,000.00 for the 3 other pounds that Deleski promised to get. They both left the house at the same time, the appellant in the blue *Iroc* and Deleski in his half-ton truck. He was later stopped and arrested by Constable MacDonald who was driving a green unmarked van. He said that minutes later when he was sitting in the van being questioned by the police officer, Gary MacInnis, who was driving a beige coloured sedan, pulled up along side the van, looked at Deleski and gestured at him by drawing his finger across his throat.

[41] Mr. Deleski was vigorously cross-examined by the appellant's trial lawyer who repeatedly challenged him on the differences between his evidence at the preliminary inquiry and his testimony at trial. Towards the end of the cross-examination Deleski was asked:

> 2548 - Q. . . . did any policeman, ah, make any suggestive comments to you that lead you believe that you're going to be dealt with easier than you would have otherwise been dealt with on, ah, in December of 2003?
>
> A. No.

[42] Shortly thereafter, in re-direct examination by the federal Crown attorney, these questions were asked and answers given:

> 2558 - Q. Mr. MacDonald was asking you before the break with respect to, ah, perhaps, ah, favour from the police in terms of your testimony, and I think your answer was a pretty emphatic "no", but has there been in fact any suggestion from the Crown or police with treating

you with any type of favour in relation to your charges coming up in December?

A. No.

Q. Okay, and ah, with respect to the delay, there have been a couple . . . there have been a number of adjournments and your trial is set in December. Was any part of that due to any other matters before the Court presently?

A. Believe so.

Q. Pardon me?

A. Believe so, cause of matters that are in Court right now.

Q. And when you say that, can you . . . perhaps you can just expand on that a little bit?

A. Ah, the trial that we're in right now.

Q. Yeah, okay, alright, and Mr. MacDonald has suggested to you through several questions that perhaps your motivation in coming forward to the police was, ah, with respect to $12,000.00 that your parents had to pay out for you. Was that your motivation for bringing . . . coming forward to the police, in fact . . .

A. No.

Q. . . . was the money?

A. No.

Q. What was it?

A. Ah, just the fact that my life is threatened, from the beating and . . .

Q. I'm sorry, what?

A. Ah, from the beating and when I was confined, basically.

Q. Okay, by whom?

A. By, ah, James.

Q. By James who?

A. James MacInnis.

[43] During final argument, Mr. Iannetti for the federal Crown said this:

> . . . and that the Crown has proven its case beyond a reasonable doubt, both from the evidence of Cst. MacDonald and Cst. Gouthro especially, the eye witness testimony of both Tara Camus and Sonya Steele. And I again I say the overwhelming . . . even without just Jayson Deleski's testimony, I would suggest that the evidence is overwhelming. And I don't know what Jayson Deleski had to gain by coming to Court, perhaps to save his life, I don't know. But his motivations for coming to Court and answer questions Mr. MacDonald will propose (sic) to you . . . <u>but he had nothing to gain in my view in coming to Court and testifying about his involvement in the offence</u>, and I quite clearly stated that, again, as I say, it was the gentleman, ah, Mr. MacInnis was the gentleman he dealt with, and in fact confirms in some respects the evidence of Cst. Gouthro. . . .
>
> [underlining mine]

[44] I felt it necessary to address the background to Mr. Deleski's testimony and the manner in which it came to be introduced, so as to lend proper context to the appellant's present complaints. To support the credibility of Mr. Deleski, the Crown attorney told the court that Deleski would not receive a benefit for coming forward to give evidence against the appellant. Deleski was questioned closely during both direct and cross-examination on whether he would receive a benefit for testifying, or hoped to receive a benefit. Deleski stated that he had not received a benefit for doing so, and he did not expect to receive one. For example, during his cross-examination he was asked:

2477 - Q. Okay, now I also suggest that you told Jim MacInnis Senior on two occasions . . . on two occasions that you told him that the police had offered you a deal and that you were go . . . that they wanted the two MacInnis boys off the street and you were thinking of cooperating?

A. No.

The denials by both Dekeski and the Crown were strenuous.

[45] The Notice of Appeal was filed in March 2005. The appellant's factum was filed that September. Beginning at ¶ 27 ff. it was observed by the appellant that the Provincial Court office in Sydney was unable to tell him what sentence Mr. Deleski had received because the Information against Deleski had been "transferred" and had not yet been returned. The appellant's continuing interest in the disposition of the charge against Deleski is obvious from the content of his factum. Notwithstanding that Deleski's charge was then more than three years old, no record of it being concluded could be found. The appellant argues that this is especially relevant, given the specific grounds of appeal raised. Among them the appellant argued that the trial judge failed to give adequate reasons, and more particularly failed to instruct himself on the basis of **R. v. Vetrovec**, [1982] 1 S.C.R. 811. The appellant argues than an essential and relevant consideration as to the need for such a warning is knowledge of the benefits contemplated or promised to a co-accused in return for the evidence of that co-accused.

[46] Unable to locate any information concerning the disposition of the case against Mr. Deleski from Provincial Court officials in Sydney the appellant's counsel faxed a letter to the federal Crown requesting details of Mr. Deleski's situation. A response was received on October 24, 2005. The facts then revealed that:

- Dekeski was sentenced in the Provincial Court of British Columbia, at Vancouver, on October 20, 2005;
- Deleski received a suspended sentence;
- The Crown position at the sentencing hearing was to recommend that Deleski receive 3 - 4 months in custody;
- The sentencing judge, Warren, Prov. Ct. J. considered two undated letters from Sydney Police Sgt. Walter Rutherford. In one letter Mr. Deleski's cooperation in the prosecution of Mr. James MacInnis was confirmed.

The appellant argues that the correspondence raised an implicit suggestion that Deleski should receive a benefit for having done so. Sgt. Rutherford's second letter was in the nature of a general letter of recommendation. Judge Warren described the letters as "unusual."

[47] The appellant says this information was highly relevant at his trial and remains so on appeal. Absent his counsel's persistence he says it is unlikely that the disposition of Deleski's charge would have ever come to light. The appellant says that Deleski received a significant benefit for the evidence he gave in the appellant's prosecution. Yet Judge Ryan was assured - both in Deleski's testimony and in Crown counsel's summation - that Deleski had not and would not receive any benefit for having testified against MacInnis. Further, the appellant complains that this non-disclosure resulted in a serious limitation on his right of cross-examination. Credibility was a central issue. Judge Ryan was obliged to exercise particular caution when called upon to assess the credibility of a co-accused testifying for the Crown. In cases where it is said that a benefit is to accrue to a co-accused for his cooperation with authorities, significant concerns arise. Where, as here, Deleski's evidence contradicted evidence he first gave to the police, and was at variance with evidence he had given under oath at a previous proceeding, those concerns are magnified. Thus, the appellant complains that Judge Ryan did not have a complete picture with which to assess Deleski's evidence, and the defence was denied the opportunity to fully test his credibility at trial.

[48] As well, the appellant says the actions of Sgt. Walter Rutherford are very odd. It is most unusual for a senior police officer to submit two letters of recommendation in support of a co-accused involved in serious charges of drug trafficking. Thus - so the appellant argues - not only was the trial judge misled causing him to fall into error in failing to instruct himself with a **Vetrovek** warning when considering Deleski's testimony, but these new revelations ought to give him the opportunity to examine the "true relationship" between the police, the Crown, and Deleski. Whether the evidence points to deliberate concealment; ignorance; negligence; "a systemic failure to understand disclosure obligations on the part of local police" or some other critical failing, the appellant insists that his counsel ought to be entitled to explore a variety of important questions including such things as:

- Was Sgt. Rutherford present in court on September 13, 2004 when Deleski was cross-examined by the appellant's trial lawyer and denied receiving any benefits for testifying?

- Was Sgt. Rutherford present in court when the Crown attorney represented to Judge Ryan that no benefit would accrue to Deleski in return for his testimony?

- Why did Sgt. Rutherford write his two letters?

- Who authorized those letters?

- The letters provided at Deleski's sentencing hearing in Vancouver are undated. Why is that?

- What discussions arose among the police or the Crown about Deleski and benefits accruing to him in return for his evidence?

- When did such discussions occur?

- Did the police decide not to disclose their "negotiations" with Deleski?

- If so, are the police not aware of their on-going disclosure obligations?

[49] Despite Mr. O'Neil's valiant efforts on behalf of the appellant, I am not persuaded that there are sufficient reasons to warrant our intervention.

[50] Mr. Deleski testified on September 13, 2004. That is more than a year before he was sentenced in Vancouver. When questioned closely by counsel he insisted that he neither had received, nor anticipated receiving any benefit for his cooperation and testimony. There is nothing in the record which would suggest that those answers, when given, were false. Similarly, the assurances given by the federal Crown attorney all reflected counsel's belief, at the time those assurances were given.

[51] In my opinion the only individual who provided a "benefit" to Deleski was Warren, Prov. Ct. J., when he sentenced him in Vancouver on October 20, 2005. Before quoting from Judge Warren's decision I will first refer to a portion of the submissions made at the sentence hearing by Deleski's lawyer, Mr. Walsoff, following his client's guilty plea that afternoon:

> . . . just by way of some background about Mr. Deleskie, (sic) . . . He's 25 years of age . . . moved to British Columbia right after this incident. . . . He has Grade 12 education. He's presently working . . .
>
> Now, what happened and sort of gets to the crux of this matter is Mr. Deleskie (sic) with respect to the offence was the middle person, which is significant in this. It turns out, and where I'm going with this is Mr. Deleskie (sic) became a witness in all of this, and he was unfortunately dealing with a very bad individual who was the purchaser, Mr. MacInnes, (sic) who ended up receiving a two-year custodial sentence, as I understand it, as a result of him giving evidence.
>
> As a result of him agreeing to be a witness he was confined and beaten up and etcetera, which led to some other charges, and there were other witnesses, but unfortunately because of the reputation of these individuals the other witnesses slowly disappeared over time, and so Mr. Deleskie (sic) consulted with the police and with the Crown counsel in Sydney, Nova Scotia, and it was decided they would not proceed any further on the unlawful confinement, etcetera charges, but he did give evidence which led to a conviction with respect to the drug charges.
>
> So he has provided me -- I've spoken to the police officer who was involved in this, and he's provided a couple of letters which I have provided to my friend, and I can provide those to Your Honour to review. The letters are fairly skeletal in their – what they say, but I think the point is there.
>
> THE COURT: Okay.
>
> MR. WALSOFF: Just sort of going back to the circumstances just again briefly, as I understand it what happened was he had a friend of his who left Sydney, Nova Scotia, moved out west, moved back and was in possession of the -- it turned out the quantity was four pounds; he gave evidence to all of this-- was four pounds of marihuana. The friend asked him if he could assist him in getting rid of this four pounds of marijuana.

He agreed, which obviously was probably one of the biggest mistakes if not the biggest mistake of his life. He was to be paid, he estimates, about $400 for this transaction.

What happens is obviously this transaction goes very bad, and there -- Your Honour heard the number $12,000. Well, that was seized by the police, so no money ever changed hands. He received many threats, and the threats were coming from an unknown source from his friend where the source of that marihuana came from. He ended up via his family, paying his friend $12,000 to protect him and to protect himself, so there -- so he and his family is out $12,000. I understand a loan had to be taken out to do that, and obviously he never got his $400 which was to be his remuneration.

So he's a negative $12,000 on this transaction, plus he's not able to go back to Sydney, Nova Scotia, to live. He's not able to be -- for whatever reason, and I just think it's just resources, he was not put in any witness protection plan or program, and the problem is that he now, (blacked out), which one can imagine lots of people from the Maritimes come out there to work and especially in the industry he's working in, which is the restaurant/hotel business, he comes across people, and this is obviously very unsettling in that -- not that he's fearful of these people, but them passing word back to Nova Scotia that he has been seen, and obviously this person is going to get out of jail at some time, and he expects there to probably be some consequences. He's obviously very fearful of that, in any event.

So he's got himself in a very big pickle, to say the least, and obviously his family still lives in Sydney, Nova Scotia, and he's put them at risk too. And part of the reason, by the way, to not to testify -- and again as I understand it, this was a decision that he didn't make unilaterally, it was made in conjunction with the Crown and the police -- was he puts his family at great risk, so he chose -- so it was decided by everybody that they would not proceed with the case, and again there were witnesses who were not -- who were out of the country and were not prepared to come back. So he finds himself in a very difficult situation.

With respect to his character, he advises me obviously he wants no criminal record. He enjoys writing on the side. He enjoys writing poetry. He's learning to play the guitar. He's trying to write some music. He tells me as sort of part of his daily ritual now in (blacked out) -- every day after work he buys a meal and goes out and gives away that meal to a homeless person, so I think again speaks of his character. . . .

> . . . At the end of the day it is marihuana. He has provided a great deal of assistance to the Crown as a result the troubles he's got himself into, and obviously bought himself into a lot of trouble himself.
>
> I don't know that there's much the court can do in terms of the punishment aspect of it that he isn't already experiencing and had experienced, so it's really the other issues, looking at certainly deterrent. I think he's been deterred. I think that's fair to say, that he's never going to be involved in the drug trade again after this experience.

[52] The Crown was represented by Mr. Frank Polak. After briefly describing the circumstances which led to Mr. Deleski's arrest, Mr. Polak concluded his remarks:

> There is no record that the Crown is alleging. By way of sentence, the Crown respectfully submits that a period of jail might be warranted and suggests three to four months and a forfeiture of $12,000.
>
> (underlining mine)

[53] We have the reasons for sentence provided by Judge Warren. With respect they are very complete and instructive. I quote in part:

> . . .
>
> [3] The Crown seeks a four-month jail sentence for Mr. Deleskie (sic), a 25-year-old first offender. Jail is the usual sentence for drug trafficking, even for those who are trafficking in marihuana, which is considered to be a softer drug and perhaps less harmful generally to the society than cocaine and heroine.
>
> [4] The defence asks the court to impose a fine. It is an unusual submission in the circumstances, but this is an unusual case. It is unusual in that, according to the defence, Mr. Deleskie (sic), a resident of Nova Scotia, turned to the police and facilitated, and assisted the Crown with their prosecution against Mr. MacInnes (sic) He had found himself involved with some very bad types, one of which was Mr. MacInnes. Mr. MacInnes ultimately went to jail for two years as a result of this incident.
>
> [5] The Crown today was unaware of the quantity of marihuana involved, but Mr. Deleskie through his counsel told the court it was four pounds. For Mr. Deleskie's part in this transaction, he was to receive $400.

> [6] Since he agreed to testify against MacInnes Mr. Deleskie has been living in fear. He has not been offered a witness protection plan and he and his family, who still reside in Nova Scotia, are at risk of harm as a result of his cooperation with the police and the Crown. Additionally, as the $12,000 which was to be paid for these drugs was never paid and Mr. Deleskie's friend therefore received threats, Mr. Deleskie and his family ended up taking out a loan for $12,000 to avoid retaliation.
>
> . . .
>
> [8] Despite the fact that the drug involved was marihuana and not cocaine, the court would still have considered a jail sentence, perhaps to be served as a conditional sentence. However given the cooperation of Mr. Deleskie with the police and Crown which has led to the conviction of Mr. MacInnes; and given the repercussions that that choice made has had on his own safety and the safety of his family since no witness protection was offered; given the financial repercussions, a $12,000 loan; given his guilty plea; his youth; his lack of record; given the lack of any suggestion of any problems in the past three years since this offence took place; and finally, given the presentation of two very unusual letters, both from the Cape Breton Regional Police Service Major Crime Unit, which indicate that Mr. Deleskie is an honest and forthright person and whose role is recognized as instrumental in obtaining a conviction against Mr. MacInnes, I am satisfied that an appropriate sentence is to suspend the passing of sentence.
>
> [9] I am satisfied that this sentence would adequately protect the public. It is perhaps light on the principle of denunciation, but I think what has happened in the past with Mr. Deleskie and his having to attend to these charges and all the other repercussions, have certainly addressed the issues of general and specific deterrence.
>
> [10] I am going to order, Mr. Deleskie, that you be subject to a period of probation for one year.
>
> . . .
>
> [12] Finally, I am going to order that you complete 75 hours of community work service within the first six months of your probation, . . .

[54] Obviously the unique circumstances of Mr. Deleski's case weighed heavily on Judge Warren. It was only through the acknowledgment made by his own counsel that the amount of contraband - four pounds of marijauna - was disclosed.

The severe beating he sustained; the peril he and his family suffered; the cooperation he provided to the police and the Crown which led to the conviction of the appellant; the letters of support he received from the investigating police department; his youth; his lack of any criminal record; and many other positive features were obviously considered very persuasive by Judge Warren in ultimately deciding that a fit and proper punishment would be to suspend the passing of sentence and place Deleski on probation.

[55] The affidavit sworn by Frank Polak on May 18, 2006 is also important in my assessment of the circumstances. Mr. Polak swears that Deleski's lawyer at the sentencing hearing, Mr. David Walsoff, had attempted to negotiate a plea agreement with Mr. Polak based on information that Deleski had been severely beaten by the appellant after Deleski refused to 'alibi' him, and for Deleski's subsequent cooperation with authorities in testifying against the appellant. Mr. Polak discloses that he was able to confer with the federal Crown in Sydney, David Iannetti and confirm those details. Mr. Polak swears that Mr. Iannetti advised him that there was no "deal" with Deleski, whereby Mr. Polak ought to extend any "benefit" to Deleski in disposing of his charge in Vancouver. As a result, Mr. Polak swears that he declined to enter into any plea agreement with Deleski's lawyer in Vancouver. Accordingly, Mr. Polak's recommendation of three to four months' incarceration was based on his own assessment of what Deleski should receive for that offence under prevailing case law in British Columbia. In no way did it reflect any "deal" for Deleski on account of anything he had done with respect to the charges against the appellant.

[56] The email correspondence from Sgt. Walter Rutherford to Mr. Schermbrucker dated November 29, 2005 and included within the fresh evidence I would admit is also highly relevant. I quote it here *verbatim*:

> From: Walter Rutherford
>
> Sent: November 28, 2005 2:52 PM
>
> To: Schermbrucker, David
>
> Subject: Jayson Deleskie
>
> Dear David:

> Regarding Jayson Deleskie I cannot anser any questions regarding the issue of any benefits towards Mr. Deleskie. I became involved in the matter in January 2004 and was to coordinate any court appearances and any other matters that might have come up after that date. I can assure you that since my involvement I am unaware of any benefit afforded to Mr. Deleskie in any way. Prior to January of 2004 I have no knowledge of anything to do with Mr. Deleskie. I can provide you with the names of the investigating officers should you wish to contact them. Please advise me of your wishes and anything further you can contact me at 902-563-5125 or 902-565-4954
>
> Regards
>
> Sgt. Walter Rutherford/

[57] Having regard to this information I am satisfied that the unusual circumstances surrounding Mr. Deleski have been answered satisfactorily and that our initial suspicions - which certainly called for an explanation - have been allayed. Accordingly the cases relied upon by Mr. MacInnis such as **R. v. Trotta** [2004] O.J. No. 2439; **R. v. Taillefer**, supra, **R. v. Dixon**, [1998] 1 S.C.R. 244; and **R. v. Ahluwalia**, 149 C.C.C. (3d) 193 (Ont. C.A.) are all easily distinguishable and of no assistance to the appellant.

[58] For these reasons the appellant's application to set aside his convictions and order a new trial based upon his assertion that the integrity of the trial was compromised and the validity of proceedings against him thereby impugned, is denied.

Application to Order Further Disclosure by the Crown

[59] In view of my proposed disposition in ¶ 58, supra, there is no basis for ordering the Crown to comply with further disclosure. I am satisfied that the efforts of Mr. Schermbrucker on behalf of the respondent provided any relevant information related to the issues that arose on this appeal and fulfilled the Crown's continuing obligation to disclose. Nothing further is required.

[60] I will now go on to consider the merits of the appeal against conviction, and sentence. Each of the appellant's submissions can be answered summarily.

The merits of the appellant's:

(a) Appeal against convictions

(i) *Vetrovec* warning

[61] There is no merit to the appellant's complaint that Judge Ryan failed to properly instruct himself concerning the care that must be taken when weighing and relying upon the evidence of an accomplice (**Vetrovec**). A careful review of Judge Ryan's reasons satisfy me that in convicting Mr. MacInnis, he subjected the evidence of Mr. Deleski to an appropriate degree of scrutiny. I would dismiss that ground of appeal.

[62] It is clear from the trial judge's reasons that he was acutely aware of the factors tending to detract from Mr. Deleski's credibility, which included the fact that he had given inconsistent statements and testimony. While it is true that Judge Ryan did not give himself a formal "*Vetrovec* warning," that is a discretionary matter and does not, in these circumstances, amount to an error of law. See, for example, **R. v. Campbell**, 2002 NSCA 35, citing **R. v. Vetrovec**, supra, and **R. v. Brooks**, [2000] 1 S.C.R. 237.

(ii) Identification evidence

[63] There is no merit to the appellant's complaint that the trial judge erred in law with respect to his assessment and treatment of the identification evidence at trial. On the contrary, Judge Ryan was obviously alert to the fact that identity was a primary issue at trial. Judge Ryan recognized the weaknesses in the photo line-up identification evidence. He carefully considered the discrepancies in the evidence and took such matters into account before deciding on the basis of the evidence he did accept that the appellant's identity had been established beyond a reasonable doubt.

[64] Throughout his submissions the appellant places great weight on the well known frailties of eyewitness identification. However, unlike the situation in many eyewitness identification cases, Mr. MacInnis' convictions did not rest solely upon the eyewitness identification of a single witness. Rather, the evidence called by the Crown relating to the sequence of events of July 12, 2002 included identification eyewitnesses, recognition evidence, witnesses to surrounding events, physical

evidence, and very convincing circumstantial evidence. The appellant was identified by four witnesses, Mr. Deleski, Constable Gouthro, Ms. Camus, and Ms. Steele, each of whom testified about his or her role in the sequence of events. Their evidence, on important matters, including identifying the appellant, was consistent, and was corroborated by each other's testimony, and the physical evidence presented at trial. Seen from this perspective, the inherent frailties in eyewitness identification evidence are well compensated for by other strong, persuasive evidence. Judge Ryan was alive to all of that.

(iii) Adequacy of reasons

[65] There is no merit to the appellant's complaint that the trial judge failed to give adequate reasons. **R. v. Sheppard**, [2002] 1 S.C.R. 869. On the contrary, Judge Ryan's decision comprises some thirty typed pages. They demonstrate a thorough understanding of the law and careful consideration of the material evidence. His reasons provide for meaningful appellate review and certainly inform Mr. MacInnis as to the basis for his convictions. **Sheppard**, supra; **R. v. Braich**, [2002] 1 S.C.R. 903.

(iv) Findings unreasonable and not supported by the evidence

[66] There is no merit to the appellant's complaint that the trial judge's findings were unreasonable and not supportable by the evidence. The proper test under s. 686 (1)(a)(i) is whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered. To the extent necessary I have re-examined the evidence and having done so I am well satisfied that these verdicts were reasonable. **R. v. Yebes** (1987), 36 C.C.C. (3d) 417 (S.C.C.); **R. v. Burke**, [1996] 1 S.C.R. 474; and **R. v. Biniaris**, [2000] 1 S.C.R. 381.

(v) Disposition

[67] In conclusion, I am not persuaded that Judge Ryan erred in law; or that his decision is unreasonable or cannot be supported by the evidence; or that there was any miscarriage of justice. Accordingly there is no basis for us to set aside these verdicts. The appellant's appeal against his convictions ought to be dismissed.

(b) Leave to appeal sentence

(i) Whether a fit and proper sentence

[68] Mr. MacInnis seeks leave to appeal the sentences imposed following his convictions for dangerous and possession for the purpose of trafficking.

[69] There is no merit to the appellant's submissions. Judge Ryan was alert to the circumstances of the offence and the offender and imposed a fit and proper sentence. Comparisons between the sentence imposed on Mr. Deleski in Vancouver in 2005 serve no useful purpose here. Mr. Deleski's situation was entirely different, for reasons that were obvious to Judge Warren of the British Columbia Provincial Court, and to which I have already paid considerable attention.

(ii) Disposition

[70] While I would grant leave to appeal, I would dismiss Mr. MacInnis' appeal against sentence.

Conclusion

[71] For all of these reasons I would receive the fresh evidence proffered by both the appellant and the respondent, but having thoroughly reviewed that evidence together with the entire record in these proceedings, I would deny the appellant's applications for an order directing a new trial, or obliging the Crown to disclose further information.

[72] With respect to the merits, I would dismiss the appeal against convictions, grant leave to appeal sentence, but dismiss the sentence appeal.

[73] Before concluding these reasons I would be remiss if I did not extend my appreciation to counsel. Mr. Lawrence O'Neil, Q.C. should be commended for his dogged pursuit of the facts and spirited representation of the appellant throughout these extended proceedings. Mr. David Schermbrucker, on behalf of the Department of Justice (Canada) is to be commended for the concerted and timely efforts he made to assist the appellant's counsel, and for the candid and proper positions he took on behalf of the Crown in this appeal. Their conduct exemplifies the finest traditions of the Bar.

Saunders, J. A.

Concurred in:

Roscoe, J.A.

Oland, J.A.