IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Tremblett, 2012 NSPC 118

Date: April 10, 2012
Docket: 2288101/102/103
Registry: Sydney

Between:

HER MAJESTY THE QUEEN

v.

AUGUSTUS CLARENCE TREMBLETT (No. 2)

Judge: The Honorable Judge A.P. Ross

Heard: April 10, 2012, in Sydney, Nova Scotia

Charge: Section 5(2) Controlled Drugs and Substances Act x 2
Section 4(1) Controlled Drugs and Substances Act

Counsel: Mr. Wayne MacMillan, Federal Crown Attorney
Mr. Matthew MacNeil, Defense Attorney

Summary

Six police officers, under authority of a Controlled Drugs and Substances Act warrant, executed a forced entry into the residence of the accused. They entered with firearms drawn, hollering orders to "get down." The accused, who was taken by surprise, was immediately arrested and handcuffed. While lying on the floor he was read his Charter rights and a standard police caution, after which he made a verbal utterance admitting his involvement in cocaine trafficking.

At trial Crown omitted to ask a witness about certificates of analysis which, prior to trial, had been prepared and marked for introduction as exhibits. Before closing its case Crown applied to recall the witness in order to introduce the certificates.

Issues

(1) Is the verbal statement voluntary; did police conduct render it inadmissible?

(2) Ought the Crown be permitted to recall a witness on a critical element of proof?

Result

(1) The statement is admissible. Police did not attempt to elicit the utterance. The threatening manner of the entry and arrest was justified by legitimate law enforcement objectives. The oppressive conduct was not directed to obtaining a statement. While there was no direct evidence of the subjective state of the accused, an objective view of his behavior and surrounding circumstances leads to a conclusion that the statement did not offend the "confessions rule."

(2) Permission granted to recall witness, there being no prejudice to the accused's defence, the omission being mere oversight, not lack of preparation.

REASONS FOR DECISION

[1] The accused, Augustus Clarence Tremblett, is charged with three offences under the Controlled Drugs and Substances Act – possession of cocaine for the purpose of trafficking and possession of oxazapam for the purpose of trafficking contrary to s.5(2) and simple possession of hydromorphone contrary to s.4(1).

[2] Following a pre-trial voir dire on November 24, 2011 into a s.8 Charter issue, which resulted in a finding that the police search of the accused's residence was warranted, (at R. v. Tremblett 2012 NSPC 14) trial proper commenced on February 23, 2012.

[3] The trial began with a second *voir dire* concerning the admissibility of both a verbal utterance made by the accused at his residence during the search and a formal statement given at the Central Division office of the Cape Breton Regional Police later that same evening.

[4] Following this *voir dire* the case continued with other evidence in chief. Crown's final witness was Constable O'Neil from whom the Crown elicited testimony of his involvement in the search of the residence. However, Crown forgot to question him about his role as an exhibit custodian before left the stand. As a result of this omission certain exhibits, notably certificates of analysis, were neither addressed nor tendered. This evidence is obviously crucial to the Crown's case.

[5] The final witness for the Crown was Constable Timmons. Crown sought to elicit expert opinion evidence about the significance of the quantity and nature of the drugs seized and of other paraphernalia found in the residence. Defense objected. A third voir dire was held on Constable Timmons' qualifications.

[6] Decisions were reserved on the above issues and trial adjourned to March 28, 2012 for continuance.

[7] This decision addresses (1) whether the Crown should be permitted to recall Constable O'Neil and (2) the admissibility of the statements. The issue of the expert evidence will be considered in separate reasons.

Permission to recall the Crown witness

[8] Before court convened for trial the court clerk, in order to expedite the process, marked the exhibits which Crown intended to adduce in evidence. These were spread out on an exhibit table in full view of counsel and witnesses. Certain of the exhibits were identified and introduced, but critical items, notably the exhibit envelopes and certificates of analysis, were overlooked. Constable O'Neil had taken samples of the seized substances and sent them for analysis, in the usual fashion, but during questioning, Crown did not direct him to that aspect of his involvement in the case.

[9] Crown *did* introduce the "drugs" themselves (at this point there is no legal proof that this is what the substances are). Constable MacKinnon acted as exhibit custodian during the search. Items found in various places in the residence were given to him at that time. He placed these in police exhibit bags, marked them, returned to the police station with them, weighed them and put them together in a box of some sort in the exhibit room at the station. One year later O'Neil later became exhibit custodian, seemingly as a result of changing assignments within the drug section. In this capacity, O'Neil sent the subject exhibits off for analysis and received the certificates back. In his capacity as witness, however, he was not directed to the certificates and so they remain unidentified and untendered.

[10] Before trial, reasonable notice of the Crown's intention to introduce these exhibits was given to defense under the relevant provisions of the CDSA.

[11] Permission to recall O'Neil is being sought at the "first stage" of the trial as that was defined in R. v. G.(S.G.) [1997] 2 S.C.R. 716. Crown has not yet closed its case. If permission is granted, defense will have full opportunity for further cross-examination. It is difficult to see how a full cross-examination of O"Neil, or that of any other witness, on any other aspect of the case, has been compromised. The omission was mere oversight, not a result of inadequate preparation. There seems no likelihood that the accused's defence will be unfairly prejudiced as the trial progresses should I grant the requested remedy.

[12] For these reasons leave is granted to recall Constable O'Neil to testify about the exhibits he handled, to address continuity of these exhibits while in his possession, and to introduce the certificates of analysis and other items into evidence.

The admissibility of the statements

[13] From the evidence on the *voir dire* I know that six Cape Breton Regional Police officers, firearms drawn, made a forced entry into the accused's residence at 6:55 p.m. on the date in question. They surprised the occupants – the accused and two others – exclaiming as loudly as they could "police - search warrant - get down". The accused

was standing in the kitchen area of the small house; it adjoined a living room where the two others were located. Next to the accused on the kitchen counter was a quantity of white powder – later shown to be cocaine. Constable Campbell said the accused was "stunned, surprised, like a deer in the headlights." He was arrested for possession of cocaine for the purpose of trafficking. The accused went to the floor as directed and was handcuffed. He was given the standard Charter rights. Constable Campbell also advised the accused, verbatim from a "standard issue card", of his right to remain silent. Although he did not have the card in court he could remember telling Mr. Tremblett that "you need not say anything; you have nothing to hope from any promise of favour, nothing to fear from any threat . . . anything you do say may be used as evidence. Do you understand?" The accused replied "yes".

[14] Next, while lying on his side on the floor, and while the other two occupants were being arrested by other officers, Mr. Tremblett said, according to Constable Campbell : "I'm just small time, I just sell an 8-ball or two to help raise my daughters."

[15] Constable Campbell did not record this utterance in his running notes at the time of arrest, but says he jotted it down about two hours later at the police station when making an incident report. He says the accused spoke in a normal tone of voice. Within twenty minutes the accused was turned over to another police officer and transported to the station for further questioning.

[16] The accused was processed, placed in a holding cell, and at 10:20 p.m. given an opportunity to speak with duty counsel, and did. He was then taken to an interview room where an audio-recorded statement was obtained. A transcript of this was tendered into evidence. Mr. Tremblett was apprised again of the reason for his arrest, read his Charter rights and given a "secondary caution." At page seven the police intimate that because he is not being forthcoming with them they will have to question his teenage daughters about some pills which were found in the house. The accused told police that he lived at the residence with his two daughters, aged 15 and 16. The daughters were not in the residence at the time of the arrests; the occupants were two other males, apparently acquaintances of the accused. When asked if he knew why he was arrested he said "you found some cocaine on the counter and so you arrested me." Apart from this he refused to answer questions.

(a) The verbal utterance

[17] Defence argues against the admissibility of the verbal utterance at the residence at the time of arrest Before considering the factors affecting voluntariness, I will indicate that I am convinced that the utterance, as related by Constable Campbell was, in fact, made. The fact that the other police officers did not hear the remark is unsurprising,

given that they were all occupied by their own tasks in this early stage of the "bust". Because the statement was recorded on pen and paper, and a couple of hours after the fact, one cannot be absolutely certain that Constable Campbell has given the court an exact verbatim account. However I have no doubt that his recording and recollection of the statement is sufficiently accurate for it to come into evidence; that the gist of the statement has been reliably reproduced.

[18] Voluntariness is another criterion of admissibility. Given the presence of persons in authority and the circumstances of arrest the Crown has the burden of proving beyond a reasonable doubt that the statement was made voluntarily, in the legal sense of the word.

[19] A given accused may well have imagined a time when s/he would be apprehended by police, may well have thought what s/he might say in such a case; another may never have considered any such thing. A given accused may become anxious at the slightest departure from normal routine; another may be virtually impervious to strain. One person may be inclined to negotiate, another to confront, in the face of authority. In this case there is no direct evidence of the subjective state of the accused. I say this mindful that there is no onus on the accused to prove involuntariness. However, given the virtual impossibility of analyzing the internal thought processes of the accused the inquiry largely involves the actions of the police and other surrounding circumstances – things brought to bear on the mind of the accused by state actors.

[20] The "confessions rule" does *not* require that the statement emanate from a composed mind, that the thought process be reflective and considered, nor that the accused instigate the making of it. The rule *does* require that the accused have an operating mind, that the accused's thought process not be overborne by oppressive police conduct, that reliability not be distorted by threats or promises made to the accused, and that the statement not be elicited by police trickery. The rule respects the autonomy of the individual; it requires police to be fair and circumspect in the exercise of their powers and duties.

[21] Reported cases almost always deal with confessions obtained after lengthy interaction with police. For instance, in R. v. Oickle [2000] 2 S.C.R. 3 the accused was given a lie detector test and then held for hours. While a confession could, no doubt, be improperly elicited during a brief interaction, it is more common to find exclusion of a confession where the will of the accused, the ability to edit his or her thoughts, has been beaten down over a period of time.

[22] R. v. Jackman [2008] A.J. No. 793, cited by defence, is a case where the interaction, although brief, resulted in exclusion of the accused's statement. Factually

there are strong similarities with the case before me. Six police officers, conducting a drug raid, forcibly entered a residence with a ram, yelling "search warrant." The accused was one of four people inside. They ordered the occupants into the kitchen where they were cuffed and arrested. Within two minutes the accused was provided his Charter rights to counsel and given the standard police caution. He told the arresting officer that he did not wish to say anything and said "no, not now" about speaking with a lawyer. However the officer proceeded to ask who lived in the residence. The accused replied "just me" – a statement which the Crown sought to introduce into evidence against him at trial.

[23] The spontaneous utterance exception to the hearsay rule proceeds on the assumption that a statement uttered in a state of emotional excitement may be more reliable, and hence admissible, for that very reason. Mr. Tremblett's statement fits the same criterion, but the resemblance is probably specious. A person under arrest, subsequently charged with a criminal offence, giving a statement to an agent of the state, is not a mere witness. The concerns go beyond simple reliability to include the right to silence and procedural fairness. Cited in Oickle, supra, at para 70, Wigmore describes voluntariness as "shorthand for a complex of values."

[24] Along with the widely-supported values noted above, Canadians expect the law to be enforced. Police, when engaged in this task, do not generally operate in a stress-free environment. Safety - of the police themselves and of people they encounter - is an important objective. Effective exercise of police power is a legitimate goal. The preservation of evidence is a valid concern. With this in mind it is neither surprising nor disturbing that police, authorized by warrant to search a house for illicit drugs and evidence of drug trafficking, with probable cause to believe that substances such as cocaine are present in the dwelling, would enter the premises with force and by surprise, overwhelm the occupants and assume control over their movements.

[25] The police in this case did not attempt to elicit evidence from the accused prior to the verbal utterance at the residence. This serves to distinguish it from Jackman, supra, where the police asked a pointed question.

[26] To give effect to the defence argument here would be tantamount to giving use immunity to anything said by an accused during a police raid conducted in such a fashion. In the case of Mr. Tremblett any oppressive conduct, use of force, aggression or hostility was not utilized with a view to obtaining a statement. Police were conducting arrests of multiple persons in strange premises. Personal security and preservation of property were of great concern. There was no abuse of authority by state officials. However one characterizes the conduct, police here were advancing valid law enforcement objectives which were unconnected to any attempt to extract evidence from an accused.

[27] I conclude that the verbal utterance in the residence was made voluntarily and should be admitted into evidence.

(b) The formal statement

[28] Defence submits that the remark by police about questioning the daughters constituted a threat. Nothing was said subsequent to that, and so it strikes me as a moot point. I have considered what occurred prior, including both the questioning and advice at the beginning of the interrogation and the events at the residence. Having done so I am unable to see anything in the conduct of the police or the behavior of the accused which violates the confessions rule Those parts of the written statement in which the accused acknowledges the dwelling as his residence, and calls the substance on the counter "cocaine", are ruled admissible. I am convinced beyond a reasonable doubt that these statements were made voluntarily and recorded accurately.

Dated at Sydney, N.S. this 10th day of April, 2012.

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Judge A. Peter Ross