

**PROVINCIAL COURT OF NOVA SCOTIA**

**Citation:** *R. v. Fisher*, 2019 NSPC 79

**Date:** 20191217  
**Docket:** 8253923  
**Registry:** Truro

**Between:**

Her Majesty The Queen

v.

George Fisher

<b>Judge:</b>	The Honourable Judge Alain J. Bégin,
<b>Heard:</b>	December 17, 2019, in Truro, Nova Scotia
<b>Decision</b>	December 17, 2019
<b>Charge:</b>	5(2) Controlled Drugs and Substances Act
<b>Counsel:</b>	Len MacKay, for the Crown Attorney David Mahoney, for the Defendant

**By the Court:**

**Background**

[1] On July 6, 2018, George Fisher, while driving his taxi in the town of Truro, was stopped and arrested by Detective Constable Moody of the Truro Police Service for possession of cannabis for the purpose of trafficking.

[2] Did Detective Constable Moody have sufficient grounds to effect the arrest of Mr. Fisher without a warrant, based solely on the prior information received from a confidential informant? Of importance is that this was a new informant for Detective Constable Moody, and as such there was no history of proven reliability for the informant on which Detective Constable Moody could readily rely.

[3] The relevant history prior to the July 6, 2018 arrest of Mr. Fisher is as follows:

June 2018:

[4] Detective Constable Moody receives information from a confidential informant (Source A) advising that there was a taxi driver named George that was selling marijuana from his taxi. The taxi driver had the telephone number of 902-305-2519, and the driver was described as being male with glasses and a moustache. The informant also advised Detective Constable Moody that the driver drove a blue van taxi, he owned a gold car, and that he lived at 18 Wellington St. in Wynn Park in Truro.

June 16, 2018:

[5] Detective Constable Moody confirmed with the Town of Truro that a taxi driver licensed by the town of Truro named George Fisher resides at 18 Wellington Court.

[6] Detective Constable Moody checked with the PROS system and notes the following information:

- George Fisher is listed as residing at 18 Wellington Court

- His telephone number is 902-305-2519
- In March 2018 George Fisher was issued a ticket while driving a blue Dodge Caravan

June 19, 2018:

[7] Detective Constable Moody viewed a photograph of George Fisher which was provided by the town of Truro and it showed George Fisher to be a white male who wore glasses and a moustache.

June 19, 2018:

[8] Detective Constable Moody drove past 18 Wellington Court, the presumed residence of George Fisher, and he noted a gold coloured car in the driveway with NS plate DXX 187. Detective Constable Moody checked the JEIN database and confirmed that the brown 2007 Chevrolet Malibu with plate DXX 187 was registered to George Fisher.

July 5, 2018:

[9] Detective Constable Moody received information from the same confidential informant, Source A, that:

- They personally observed George Fisher to be in possession of marijuana in the blue van within the past 24 hours
- George Fisher will have marijuana in the blue minivan
- They personally observed George Fisher sell marijuana from the blue van in the past 24 hours

July 6, 2018:

[10] Detective Constable Moody arrests Mr. Fisher when he sees him driving the blue van taxi. Marijuana (35 grams) is found in the taxi, along with a cellphone

with a text indicative of drug trafficking. The arrest was based on the information provided by Source A the previous day.

### **The Reliability of Source A**

[11] Counsel for Mr. Fisher submits that Source A was not a reliable informant, and that Detective Constable Moody did not have sufficient grounds to arrest Mr. Fisher based solely on Source A.

[12] With regards to Source A, Detective Constable Moody testified as follows:

- He had known Source A for a minimum of 3 weeks
- He spoke with Source A on a daily basis
- Source A had no convictions for fraud, theft or mischief
- Source A was not paid for their information
- Source A was not financially motivated to provide information to the police
- Source A never provided any information to Detective Constable Moody that led Detective Constable Moody to question their reliability or credibility

[13] On cross-examination, Detective Constable Moody acknowledged that much of the information initially provided by Source A regarding Mr. Fisher was publicly available (address, drove a cab, cell number, etc.). The information regarding the selling of drugs would not have been publicly available.

[14] Consequently, the corroboration of information provided by Source A would simply be confirming information that was publicly available, apart from the alleged drug dealing.

[15] Detective Constable Moody did not do any surveillance of Mr. Fisher. Detective Constable Moody indicated that it made no sense to do surveillance on a taxi as a taxi driver would be expected to make frequent stops as part of their job.

[16] Detective Constable Moody had no independent corroboration that Mr. Fisher was selling marijuana, and he acknowledged that he was relying on Source A, an informant with unproven reliability.

[17] **Based on this information and facts, did Detective Constable Moody have sufficient grounds to arrest Mr. Fisher? Was there sufficient corroboration by Detective Constable Moody to confirm the information from Source A?**

**The Law on Arrests without a Warrant (all emphasis added)**

[18] S. 495 of the *Criminal Code* provides police with the authority to arrest without a warrant. The applicable portions of s. 495 are:

495 (1) A peace officer may arrest without warrant

(a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence;

(b) a person whom he finds committing a criminal offence;

[19] In *R. v. Storrey* 1990 CanLII 125 (SCC) the Supreme Court of Canada held that s.495 (at that time s.450) requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. In other words, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest.

[20] On the other hand, the police need not demonstrate anything more than reasonable and probable grounds. The police are **not** required to establish a *prima facie* case for conviction before making the arrest. In the *Storrey* case, the trial judge's finding that the investigating officer had reasonable and probable grounds to make the arrest was amply supported by the evidence.

[21] The 'reasonable and probable grounds' are determined by considering the totality of all of the evidence available to the police at the time of the arrest. This would include hearsay evidence and any information from informants.

[22] It is settled law that, for a warrantless arrest to be lawful, it must be based upon reasonable and probable grounds: *R. v. Storrey*, [1990] 1 S.C.R. 241. The standard is "credibly based probability" (*Baron v. Canada*, [1993] 1 S.C.R. 416, and not proof beyond a reasonable doubt or even a *prima facie* case of guilt (*R. v. Storrey*, at pp. 250-51).

[23] To assess the grounds for belief by the police at the time of the arrest, reference to the cases of *R. v. Garofoli* [1990] 2 SCR 1421 and *R. v. Debot* 1989 CanLII 13 (SCC) are instructive.

[24] *Garofoli* held that hearsay statements of an informant can provide reasonable and probable grounds to justify a search, but evidence of an informer's tip, by itself, is insufficient to establish reasonable and probable grounds. The reliability of a tip is to be assessed by having regard to the totality of the circumstances. The results of the search cannot, *ex post facto*, provide evidence of the reliability of the information.

[25] *Garofoli* at page 20:

Lamer J. also referred with approval to the following passage from Martin J.A.'s judgment in *R. v. Debot* (1986), 1986 CanLII 113 (ON CA), 30 C.C.C. (3d) 207 (Ont. C.A.), at pp. 218-19, as the test for assessing confidential informer's information:

I am of the view that such a mere conclusory statement made by an informer to a police officer would not constitute reasonable grounds for conducting a warrantless search. . . . Highly relevant . . . are whether the informer's "tip" contains sufficient detail to ensure it is based on more than mere rumour or gossip, whether the informer discloses his or her source or means of knowledge and whether there are any *indicia* of his or her reliability, such as the supplying of reliable information in the past or confirmation of part of his or her story by police surveillance.

[26] And continuing on at page 20:

Although *Greffe* concerns admissibility under s. 24(2)....I see no difference between evidence of reliability of an informant tendered to establish reasonable and probable grounds to justify a warrantless search....and evidence of reliability of an informant tendered to establish similar grounds in respect of a wiretap authorization. Moreover, I conclude that the following propositions can be regarded as having been accepted by this Court in *Debot* and *Greffe*.

(i) Hearsay statements of an informant can provide reasonable and probable grounds to justify a search. However, evidence of a tip from an informer, by itself, is insufficient to establish reasonable and probable grounds.

(ii) The reliability of the tip is to be assessed by recourse to "the totality of the circumstances". There is no formulaic test as to what this entails. Rather, the court must look to a variety of factors including:

- (a) the degree of detail of the "tip";
- (b) the informer's source of knowledge;
- (c) indicia of the informer's reliability such as past performance or confirmation from other investigative sources.

(iii) The results of the search cannot, *ex post facto*, provide evidence of reliability of the information.

[27] The *Debot* case provides the following guidance:

At least three concerns must be addressed in weighing whether or not the evidence relied on by the police justified a warrantless search. First, was the information predicting the commission of a criminal offence compelling? Second, where a "tip" originated from a source outside the police, was that source credible? Finally, was the information corroborated by police investigation prior to making the decision to conduct the search? Each factor does not form a separate test. **Rather, it is the "totality of the circumstances" that must meet the standard of reasonableness. Weaknesses in one area may, to some extent, be compensated by strengths in the other two.**

The information received by the police was compelling. It was sufficiently specific to warrant their attention and did not take the form of bald conclusory statements or "mere rumour or gossip". Two caveats, however, must qualify the use of reputation as germane to the issue of a reasonable search. First, the reputation of the suspect must be related to the ostensible reasons for the search. And second, if the reputation of the suspect is based on hearsay rather than police familiarity with the suspect, its veracity cannot be assumed. The police here appear to have relied on both direct experience and hearsay.

The informant whose credibility is most critical is the one who provided the details of the anticipated transaction. The evidence of previous dealings with the informant in this case tended to validate the decision to treat the informant as credible. Where the police rely on an anonymous tip or on an untried informant, the quality of the information and corroborative evidence may have to be such as to compensate for the inability to assess the credibility of the source.

The police need not confirm each detail in an informant's tip so long as the sequence of events actually observed conforms sufficiently to the anticipated pattern to remove the possibility of innocent coincidence. The level of verification required, however, may be higher where the police rely on an informant whose credibility cannot be assessed or where fewer details are provided and the risk of innocent coincidence is greater. Given the quality of the information and the reliability of the

informant, the police surveillance yielded sufficient corroborative evidence to warrant the belief that a drug transaction had occurred.

[28] As noted previously, no independent surveillance was conducted by the police to verify the information provided by Source A.

### **Sufficiency of the Information from Source A – the *Garofoli* 3 C's**

[29] Was the information from Source A **compelling**? Was the information from Source A **corroborated** by the police? Was Source A a **credible source** of information?

#### **Was Source A's information **Compelling**?**

[30] Crown submits that Source A was a compelling source of information as Source A had first-hand knowledge. On July 5, 2018, the day prior to the arrest, Source A personally observed Mr. Fisher selling marijuana from the blue van, and Source A also saw Mr. Fisher in possession of marijuana.

[31] Defence counsel argued that the initial tip was lacking in detail, but this does not address the issue of Source A subsequently being an eyewitness to marijuana being sold by Mr. Fisher.

#### **Was Source A's information **Corroborated**?**

[32] The information that the Defence refers to as publicly available information was corroborated by Detective Constable Moody. Detective Constable Moody was able to corroborate the information regarding Mr. Fisher's occupation, vehicle, telephone number, home address, sex, whether he wore glasses, and if he had a moustache.

[33] The issue of the corroboration of publicly available information was considered by the Nfld & Labrador Court of Appeal in ***R. v. Whalen*** 2015 NLCA 7 where at para 43 they stated, "Some further corroboration of neutral facts came from the police search of data bases, where the information of the sources regarding the address of Ms. Whalen was confirmed, as well as the presence of Mr. Whalen and his vehicle."



[34] Defence counsel notes that Detective Constable Moody did not corroborate whether Mr. Fisher was selling marijuana from his taxi. No surveillance was conducted on Mr. Fisher. I accept that there is no legal requirement for the police to corroborate criminal activity alleged by informants as confirmed by *Whalen* at para 47 where the Court stated, “It is not the law that police must always by independent investigation confirm the source information or provide corroboration of it.”

[35] The issue of the lack of corroboration of criminal activity was also considered by the New Brunswick Court of Appeal in *R. V. Goodine* 2006 NBCA 109 at paragraph 20:

As I note in the introduction to these reasons, lack of corroboration of the “criminal” aspect of a tip by an untested anonymous source does not preclude a finding that an arrest based on that tip was lawful, at least where the following circumstances are in play: (1) there is no evidence that an improper motive underlies the tipster’s report; (2) the corroborated “neutral” data would lead a reasonable and dispassionate observer to infer that the tipster is both closely acquainted with the target and privy to the criminal activity being reported; and (3) that observer would be at a loss to point to any fact-based, as opposed to speculative, justification for the conclusion that the allegation of criminal conduct is unreliable. **In my view, the issue for trial judges is always whether, having regard to the totality of the circumstances, sufficient grounds existed to lawfully carry out the arrest. In other words, there is no hard and fast rule; what is required is a case-specific determination that reflects an assessment of the totality of the circumstances apparent to the arresting officers at the time they took action.**

[36] In *R. v. Charlton* (1992), 1992 CanLII 367, the BC Court of Appeal held at page 9 that the following observations were applicable concerning the value of hearsay statements by untested informants:

In many instances the police may properly act upon information received from an untried source (i.e. concerned citizens, crime-stopper tips, first-time informant)...The inability to assess the credibility of the informant may be compensated for by the quality of the information as well as by any corroborating or confirmatory evidence.

[37] Further, in *R. v. Lewis* (1998), 1998 CanLII 7116 (ON CA), the Ontario Court of Appeal emphasized at para. 22 that corroboration of the “criminal” aspect of a tip is not a prerequisite to reliance on the tip as the basis for a lawful arrest:

In concluding that the totality of the circumstances did not provide reasonable grounds for an arrest, I do not suggest that there must be confirmation of the very criminality of the information given by the tipster. The totality of the circumstances approach is inconsistent with elevating one circumstance to an essential prerequisite to the existence of reasonable grounds. [...]

### Was Source A a Credible Source of Information?

[38] It is acknowledged that Source A did not have past proven reliability. Detective Constable Moody had only known Source A for three weeks. The Crown contends that Source A could still be considered a credible source of information as all of the ‘publicly available information’ provided regarding Mr. Fisher was corroborated by Detective Constable Moody.

[39] Defence counsel submits that the risk of ‘innocent coincidence’ is a serious issue in this case as most of the information provided by Source A was of the ‘publicly available information’ variety.

[40] Further, the Crown submits that Source A would be credible as they were providing first-hand information when they had personally observed Mr. Fisher selling marijuana from his blue van on July 5, 2018.

[41] Crown submits that by Source A personally observing Mr. Fisher selling marijuana, this would remove any risks that we would have for an ‘innocent coincidence.’

### Decision

[42] I must make my determination by assessing the totality of the circumstance. I must look at the totality of the circumstances available to Detective Constable Moody at the time that he effected the arrest of Mr. Fisher on July 6, 2018. I must not look at the grounds used by Detective Constable Moody in a piecemeal approach as each factor does not form a separate test, and to so would be an error (*Debot*).

[43] Source A was an informant of unproven reliability for Detective Constable Moody. Detective Constable Moody did not immediately seek to arrest Mr. Fisher when he received the information from Source A in June 2018. Rather, Detective

Constable Moody sought to corroborate the information, what is acknowledged as publicly available information, that he had received from Source A.

[44] Detective Constable Moody corroborated the following information that he had received from Source A: Mr. Fisher's sex, his occupation, the style and colour of his work vehicle (a blue van), his personal vehicle (a gold car), his telephone number, his home address, whether he wore glasses, and if he had a moustache.

[45] Of importance in this case is that Detective Constable Moody took no steps between June 16, 2018 and July 6, 2018 to arrest Mr. Fisher. Detective Constable Moody did not immediately act on the initial information from Source A.

[46] The subsequent information provided by Source A to Detective Constable Moody on July 5, 2018 was compelling as Source A had personally observed Mr. Fisher selling marijuana from his blue van, and he had seen marijuana in the blue van.

[47] Detective Constable Moody did not corroborate criminal activity by Mr. Fisher and he did not undertake surveillance of Mr. Fisher. He indicated that he did not do so as Mr. Fisher drove a taxi so he would be expected to make many stops with his vehicle. I refer again to the *Goodine* case by the NB Court of Appeal and their guidance that the lack of corroboration of the "criminal" aspect of a tip by an untested anonymous source does not preclude a finding that an arrest based on that tip was lawful, at least where the following circumstances are in play:

1. There is no evidence that an improper motive underlies the tipster's report;
2. The corroborated "neutral" data would lead a reasonable and dispassionate observer to infer that the tipster is both closely acquainted with the target and privy to the criminal activity being reported; and
3. That observer would be at a loss to point to any fact-based, as opposed to speculative, justification for the conclusion that the allegation of criminal conduct is unreliable.

[48] Source A was not paid for their information and they did not appear to be motivated financially. There was also corroboration of the neutral data.

[49] *Goodine, Charlton, Lewis*, and other cases by the Courts of Appeal across this country, make it clear that the issue for myself as the trial judge is always whether, having regard to the totality of the circumstances, sufficient grounds existed for the police to lawfully carry out the arrest. What is required is a case-specific determination that reflects an assessment of the totality of the circumstances apparent to the arresting officers at the time they took action.

[50] The determination of the totality of the circumstances must ensure that there was no risk of innocent coincidence. I find that the actions taken by Detective Constable Moody to corroborate the information that he had been given by Source A, along with the subsequent information of personally witnessing the sale of marijuana by Source A, takes this case out of the innocent coincidence category of cases.

**[51] Had Detective Constable Moody merely acted in June 2018 on the initial information of Source A and there were drugs found on Mr. Fisher's car this would have been innocent coincidence.**

[52] The second supply of information on July 5, 2018, of the personal observation by Source A of Mr. Fisher selling marijuana from his blue van in the past 24 hours provided compelling and credible information for Detective Constable Moody to form the reasonable and probable grounds to effect the arrest of Mr. Fisher based on the totality of the circumstances that were available to Detective Constable Moody up to, and including on, July 6, 2018 when considered along with the other information that had been supplied to, and previously corroborated by, Detective Constable Moody.

[53] As noted, for a warrantless arrest to be lawful, it must be based upon reasonable and probable grounds (*R. v. Storrey*). The standard is “credibly based probability” (*Baron v. Canada*) and not proof beyond a reasonable doubt or even a *prima facie* case of guilt (*R. v. Storrey*). Or to paraphrase *Garofoli*, the arrest was based on more than a rumour and gossip, but rather it was based on firsthand knowledge as Source A had personally witnessed Mr. Fisher selling marijuana from his van the previous day.

[54] Detective Constable Moody in these circumstances had the reasonable and probable grounds to arrest Mr. Fisher.

[55] Should the arrest have not been lawful, a *Grant* analysis by myself would result in the evidence found upon arrest to **not** be excluded. The expectation of

privacy in a publicly accessible taxi is at the low end of the spectrum, and any violation of Mr. Fisher's rights would be minimal considering the information that was available to Detective Constable Moody leading to the arrest of Mr. Fisher, and the corroboration that was conducted by Detective Constable Moody prior to the arrest. There was also the tip from Source A the day prior stating that they personally observed Mr. Fisher selling marijuana from his blue van. As well, this is not behaviour that should be condoned by the Courts or society.

[56] I reserve the right to provide a more detailed *Grant* analysis should that become necessary.

[57] The arrest was lawful. Mr. Fisher is guilty of the offence as charged.

Judge Alain Bégin, JPC