SUPREME COURT OF NOVA SCOTIA

Citation: Toomey v. Nova Scotia (Attorney General), 2011 NSSC 374

Date: 12/10/2011
Docket: Pic. 329510
Registry: Pictou

Between:

Graham Toomey

Appellant

v.

The Attorney General of Nova Scotia
The Attorney General of Canada

Respondents

Heard Before: The Honourable Justice Patrick J. Murray

Place Heard: Sydney, Nova Scotia

Date Heard: April 13, 2011

Written Decision: October 13, 2011

Counsel: Kevin A. Burke, Q.C., for the Appellant
Charles Broderick, for the Attorney General of Nova Scotia
Wayne MacMillan, for the Attorney General of Canada

By the Court:

The Appellant's Position on Appeal

[1] The Appellant's main ground of appeal is based on a witness for the Crown which the Appellant describes as the "lynchpin" of the Crown's case. The Appellant says this is a witness tainted by his closeness to the offence in question. Should this witness' testimony be evaluated with some level of scepticism? That is the central issue in this appeal.

[2] On the 30th of June 2008, police conducted a controlled delivery of suspected contraband tobacco at 570 Mira Bay Road where a man named Purcell Murphy signed, accepted, and off-loaded the contraband into an acquaintance's motor home taking delivery from an undercover police officer. According to police, Murphy did not appear to be surprised when one of the boxes broke and contraband cigarettes were exposed. Not surprisingly, the police arrested this man.

[3] This man was not the man charged, convicted and sentenced to pay $361,924.00 in federal and provincial fines for possession of contraband tobacco. That man is the appellant who was an acquaintance of Murphy who owned the

motor home in which the contraband was found and from which it was seized roughly an hour after it was delivered.

[4] Aside from Murphy's testimony against the Appellant, the only other piece of evidence connecting the Appellant to the scene of the controlled delivery was the temporary presence of a red truck matching the description of the Appellant's. Mr. Murphy is the lynchpin to the Crown's case of possession against the Appellant. Either one of them could exculpate themselves by implicating the other. Mr. Murphy did precisely this.

[5] Where a witness is central to the Crown's case and it is tainted or unreliable due to being an accomplice or due to being tied to the offence in question, that witness' testimony requires a **Vetrovec** caution to the trier of fact. Failure to do so constitutes an error of law and an unprincipled exercise of a judge's discretion.

[6] Where the witness is crucial to the Crown's case and the remaining evidence is not overwhelming, the failure to give a **Vetrovec** caution is not cured by Section 686(1)(b)(iii) of the Criminal Code.

[7] The Appellant's position is that the trial judge made an incurable error of law by failing to give herself a **Vetrovec** caution regarding Mr. Murphy's evidence and failed to give due regard to the factors described in **R. v. Brooks,** (2000) 1 S.C.R. 237 that govern the exercise of a trial judge's discretion to give such a caution.

[8] The Appellant's further position is that the trial judge's failure does not correspond with a reasonable application of those principles and thus the Appellant should be entitled to a new trial.

Facts :

The following facts were presented by the Appellant and concurred with the Respondent as stated in its factum.

THE POLICE NARRATIVE:

[9] On the 26th of June, 2008, Corporal Sheppard of the R.C.M.P. received a telephone call from Midland Transport in Sydney, Nova Scotia. Midland Transport reported a suspicious package consisting of three pallets wrapped in plastic, one of which was damaged and emanating an odour of tobacco. When Corporal Sheppard

(along with Constable Gillis) responded to the call at Midland's depot, his inspection of the suspect package led him to believe the package contained contraband tobacco.

[10] After securing the suspected contraband, Corporal Sheppard and Constable Gillis attended the address to which the suspected contraband was to be shipped at 570 Mira Bay Road where they conducted surveillance of the property. There, they observed a house and a motor home that was parked and facing the house to the right of a driveway between the two.

[11] The motor home had a Nova Scotia license plate number 32001 and was found to be registered to the Appellant, Graham Toomey.

[12] Upon returning to the detachment, Corporal Sheppard began preparations for an information to obtain a general warrant so the R.C.M.P. could conduct what is known as a controlled delivery of the contraband. That delivery was executed on June 30, 2008, with a number of police officers involved.

[13] During the four days between the 26th and 30th of June, 2008, someone apparently moved the motor home from the location observed by Corporal Sheppard and Constable Gillis on the 26th to where it was found on the 30th.

[14] Corporal Bryden drove and delivered the contraband, disguised as a Midland Transport truck driver. When he arrived at 570 Mira Bay Road, he met Purcell Murphy who had a house on that property. Purcell Murphy, and someone later identified as Murray Murphy, helped Corporal Bryden unload the boxes from the delivery truck and placed them in the motor home.

[15] During the course of unloading, one of the boxes broke open, exposing cigarettes. Corporal Bryden characterized Purcell Murphy's reaction as not surprised. Purcell Murphy testified that he "should have expected" the boxes contained cigarettes.

[16] Corporal Bryden testified that during the controlled delivery, he witnessed Purcell Murphy make a telephone call on his cellular phone to a person he claimed to be in North Sydney at that particular point in time.

[17] Purcell Murphy signed for the shipment delivered by Corporal Bryden, but refused to provide his name. Corporal Bryden recorded his arrival time as being 4:27 p.m. and his departure time being 4:47 p.m.

[18] During the course of the controlled delivery, other officers were conducting intermittent surveillance by driving past the location on Mira Bay Road since it was difficult to find a spot to sit and watch the location.

[19] At least two officers, Corporal John R. Currie and Constable Paul L. Mahoney, reported seeing a red pick-up truck parked by the motor home at approximately 5:20-5:25 p.m. on June 30, 2008. At trial, they identified the truck as being similar or identical to the red Ford Ranger owned by the Appellant. None of the surveillance officers reported seeing the truck arrive. Shortly after 5:24 p.m., the red truck was gone. Mahoney testified that he turned his vehicle around and saw the same red pickup truck heading towards him on its way towards the Mira Gut bridge. Corporal Sheppard also encountered this truck on its way towards the Mira Gut bridge. Sheppard turned and followed the truck but lost it after it passed over the bridge.

[20] Shortly after the red truck was reported as no longer on the scene (5:25 p.m.), Constable Gillis, followed by Corporal Currie, entered the property at 570 Mira Bay Road. Gillis saw Purcell Murphy exiting the motor home. Officers Currie and Gillis arrested Purcell Murphy shortly thereafter. Gillis confirms that they seized a cell phone from Purcell Murphy. According to the exhibits officer, Constable Paul Tobin, the cell phone was analyzed and the contents produced in disclosure, but the results were not led as evidence against Mr. Toomey.

[21] Officers seized 54 cases of cigarettes, each containing the equivalent of 50 cartons of 200 cigarettes each, totalling approximately 540,000 individual cigarettes. Subsequent analysis of the cigarettes showed them to contain tobacco, making them unmarked or improperly marked contraband cigarettes.

[22] On July 17, 2008, police seized a red Ford Ranger substantially matching the description of the truck observed in the vicinity of the controlled delivery location on June 30, 2008. The seized truck was registered to the Appellant, Graham Toomey, who was arrested on July 18 and formally charged under Sections 32 and 216 of the **Excise Act**, 2001, and Sections 39(1)(b) and 85 of the provincial **Revenue Act** and associated regulations on July 25, 2008.

[23] None of the officers involved were able to obtain the license plate number of the truck observed on June 30th. Nor were any of the officers able to positively identify the occupants of that vehicle.

MR. MURPHY'S EVIDENCE:

[24] Purcell Murphy testified that the Appellant was renting land from him at the rate of $800.00 per month to store his motor home on his property. Murphy testified he did not know who called to make the arrangements, referring to the caller at times as "they". Murphy was not present when the motor home was delivered.

[25] Murphy also testified that the controlled delivery arranged by police was the second such delivery, although in the first, there was no odour of tobacco, nor did any boxes break open. Murphy says he was told they were t-shirts. Murphy also admitted on cross-examination that he suspected the first shipment contained cigarettes even though he did not smell anything.

[26] According to Murphy, he first saw the Appellant and his red truck on his property shortly after this first delivery when he was paid $800.00 in cash and had no notice of the delivery. A couple of weeks later, Murphy says he was in Sydney when he got a call from someone, again he did not know who, to go to the Mira to unload a truck that turned out to be the controlled delivery of June 30, 2008. Murphy also denied knowing the addressee of the shipment, John MacLean.

[27] Murphy says that on the day of the controlled delivery, after the Midland truck left, the Appellant and someone Murphy did not recognize, showed up in the Appellant's red truck and took some boxes from the motor home. Before driving off, Murphy says the Appellant promised to come back and pay him his rent, which Murphy says the Appellant never did.

[28] During the period the motor home was stored on his property, Murphy testified that he possessed and held onto the key to the motor home and the Appellant would sometimes come and take the key from time to time. He also testified that he saw the Appellant's red truck on the property two or three times in between deliveries. On redirect, he later denied seeing the Appellant's red truck on

his property between the first and second delivery and also denied having contact with the Appellant between the two deliveries on cross-examination.

[29] Murphy also testified that he went into the motor home on occasion, yet never used the motor home whilst it was on his property. He also denied being in and out of the motor home despite going in to get the key and checking out the boxes after the controlled delivery. Murphy also testified that he wanted to take it on a trip and wanted to talk to the Appellant about such a trip but never did so after he went into the motor home to inspect it for such a purpose.

THE APPELLANT'S EVIDENCE:

[30] The Appellant led evidence of alibi at trial. The trial judge rejected most of this evidence but not all of it. The trial judge did accept that the Appellant might have been at the retirement party of John O'Toole on June 30, 2008, but not that he never left.

ISSUES:

[31] The Appellant appeals his conviction on the ground that the learned trial judge erred in law in finding the evidence disclosed that the accused was ever in possession of the unstamped tobacco and such other grounds as the transcript may reveal.

[32] The issues as stated by the Appellant and the Respondent are as follows:

1. Did the learned trial judge err in law by failing to give herself a **Vetrovec** caution regarding the evidence of Purcell Murphy?

2. If so, is that error of law curable pursuant to Section 686(1)(b)(iii) of the Criminal Code?

LAW/ANALYSIS

1. Did the learned trial judge err in law by failing to give herself a Vetrovec caution regarding the evidence of Purcell Murphy?

This Appeal is about the trial judge's acceptance of a Crown witness whom the Appellant describes as the "lynchpin" of the Crown's case against him.

[33] The Appellant, Graham Toomey, argues that the witness Purcell Murphy is "tainted" for a number of reasons. Accordingly the trial judge should have given herself a clear and sharp warning as required under the principles in **R. v Vetrovic**, 1982 1 S.C.R. 811 in assessing the reliability of Mr. Murphy's evidence, which he says was central to the Crown's case against the Appellant Mr. Toomey.

[34] Mr. Murphy's testimony, the Appellant argues, raises threshold credibility issues and the failure to give a proper warning, let alone any warning at all, is an illegal exercise of judicial discretion, and as such constitutes an error of law, reviewable on appeal. Errors of law command a standard of correctness. The

Appellant argues when the legal criteria are set out, and a Judge does not follow those criteria, deference should not be shown to the trial judge's decision.

[35] Several of the facts here set the stage for an examination rooted in suspicion at the outset. The common theme in such circumstances is to approach the particular witness with a degree of caution along the road to determining credibility as well as corroboration to the degree required.

[36] In the present case the facts show that Mr. Toomey rented a portion of Mr. Murphy's land at 570 Mira Bay Road (where Murphy lives) to place his motor home, a Winnebago. Mr. Murphy had access to the keys but stated he did not use the motor home except when he received calls for deliveries. On two occasions, Murphy received calls that deliveries were being made by Midland Transport. The first delivery went without incident, Mr. Murphy believing the deliveries contained t-shirts, as he claims he was told. Mr. Murphy was paid $800 by Mr. Toomey as agreed, for a month's rent at the first delivery.

[37] The second delivery was much different in that Midland had "tipped off" the R.C.M.P. about the package, being of a suspicious nature. Consequently the second

delivery was a “controlled delivery” made to the Murphy property and placed in the Winnebago registered in the name of the Appellant. It was controlled in the sense that the driver was an RCMP officer. As well the delivery was under the surveillance of 3-4 other officers.

[38] Things happened during the second delivery on June 30th, 2008 which are pertinent to this appeal as were the events of the first delivery, which occurred some weeks earlier according to Mr. Murphy.

[39] During the second delivery there was, of course, surveillance. On both occasions a red Ford Ranger truck similar to that owned by Mr. Toomey arrived to pick up the goods which later turned out to be unstamped tobacco, and thus illegal.

[40] According to Murphy, one of the boxes, (the last box taken off the pallet), to be placed in the motor home, broke leaving a strong odour of tobacco. At that point Mr. Murphy stated he wanted nothing to do with it and also that he refused to sign for the delivery or give his name. There is evidence however, which the Appellant refers to that Mr. Murphy was “not surprised”.

[41] Mr. Murphy says on both occasions Toomey showed up to claim and take the tobacco with him in his little red Ford Ranger truck. The Appellant was on June 30th in the company of another man who Mr. Murphy did not recognize.

[42] On the second delivery, the police arrived officially (after being undercover in the controlled delivery) just after Mr. Toomey left as alleged by Murphy. Mr. Murphy was found in the motor home looking around. He was arrested then but not charged. He signed for the first delivery. Both deliveries were addressed to a John MacLean with a cell phone number on the “delivery receipt”. The June 30th delivery slips were placed into evidence as Exhibits “3 ” and “4".

[43] At the time of the second delivery, all the boxes from the first delivery had been taken from the motor home, according to Murphy. The trial judge found that Murphy had perhaps more knowledge, but that he was essentially duped by Mr. Toomey and ended up in over his head. Ultimately she believed Mr. Murphy and found the scenario placed before the Court by the Defendant, Mr. Toomey, unbelievable. The trial judge found further that the Appellant’s evidence, not only contradictory, but at times “could be shown to be outright lies”.

THE VETROVIC WARNING - The Approach

[44] The Appellant has set out his arguments in various forms, all of which go to the same singular issue on this appeal, that the trial judge erred in failing to give herself a so called **Vetrovic** warning. At page 22 lines 2, 3, 7, 8, and 9 of the decision , the learned trial judge said:

> "Mr. Murphy said that he expected that much but that doesn't mean he was involved to the extent as an accomplice."

The trial judge then said:

> "And he's not an accomplice so therefore I don't have to find that I should give myself a **Vetrovic** warning. And even if he was I would say his evidence was supported by police surveillance".

[45] The Appellant argues strongly that Mr. Murphy was by any definition an accomplice. At paragraph 50 of the Appellant's brief he states:

> " On any reasonable review of the evidence, Mr. Murphy was an accomplice. Defence counsel suggested as much on closing. The honourable judge made a palpable and overiding error in finding there was no evidence "that Mr. Murphy is an accomplice and testified for immunity", and misses the entire point of Vetrovic in doing so."

[46] While arguing the trial judge missed the point the Appellant then proceeded to argue that if one considers the definition of “possession” under the *Excise Act and* a broad nontechnical definition of the term “accomplice” as suggested by Dickson, J. in **Vetrovic** (referring to Professor Higdon) , Mr. Murphy was an accomplice who by his actions effectively exculpated himself.

[47] The proper approach is as set out by Justice Rosenburg’s article Developments in the Law of Evidence , in the Supreme Court Law Review, (1994) 5 SCLR (2nd) 421.

> “The Judge should first...determine whether there is a reason to suspect the credibility of the witness according to the traditional means... ”

[48] This, he said would include a review of the evidence to determine what factors are present which have led courts in the past to suspect a witnesses’ testimony. Secondly Rosenburg (now Rosenburg, J.A. in Ontario) said the court must assess the importance of a witness to the Crown’s case, stating:

> “the more important the witness, the greater the duty on the judge to give the caution.”

[49] Dealing with the second point first, the evidence and findings of the trial judge would suggest that Mr. Murphy was an important witness for the Crown.

One need only refer to the following passage from the trial judge's decision to establish this. At page 21, the trial judge said of the evidence she had:

> "I have Purcell Murphy who knows the defendant and says he was there. I have the police officers' surveillance of Mr. Murphy's property and registered owner of that red Ford truck and I have Mr. Toomey's motor home on the property of Purcell Murphy saying that on two occasions Mr. Toomey came and he took the cigarettes and also came and took the keys from time to time."

[50] It should be mentioned that the Appellant's sole defence was one of alibi which the trial judge rejected, having made findings in respect of the three witnesses called by the defence to support alibi, following a thorough analysis of them . Once this finding was made the sole issue remaining was one of identity (of the accused on the date of the offence).

[51] The Appellant in its brief referred to two pieces of evidence linking Mr. Toomey to the contraband cigarettes. One, the registered owner of the motor home and two, a red Ford Ranger pick up truck, similar to Mr. Toomey's was at the scene of the controlled delivery shortly after the tobacco was delivered.

[52] The Appellant argues without Mr. Murphy there is no evidence of knowledge or control of the cigarettes by the Appellant.

[53] I pause here to make several observations in respect of this argument made by the Appellant. First evidence was given that the particular Ford Ranger truck was quite distinctive, with its chrome panels and tunnel cover. As well, Mr. Rose, in rebuttal evidence told the court the truck in Exhibit # 2 was very much like Mr. Toomey's. Secondly Mr. Toomey was the owner of "a" red Ford Ranger and not "the" Ford Ranger , according to the evidence. The trial judge, however, discussed the truck in extensive detail and what she described as the implausible explanation given Mr. Toomey. He first stated, Mr. Rose had access to his truck on the day in question and then later reported it stolen. At page 20 the Learned trial judge analyzed the situation with the truck as follows:

> "On June 30th Mr. Toomey says he's at O'Tooles barbequing and says he stayed at the party overnight and someone stole his truck. Then on July 1st he says, he returned home to go ATVing and the truck was in his yard. Now on July 2nd he says he reported the truck stolen but how can that be if I accept he put spoilers on it July 3rd. As well on July 2nd the police officer says that Mr. Toomey reported the motor home stolen, the Defendant said that the police officer took pictures but the police officer says no pictures were taken at any time and he had told Mr. Toomey to call the "division" to get the motor home".

[54] In terms of importance, it appears that Mr. Murphy's evidence was very important to the Crown's case. According to the trial record however it was not the only evidence presented, as the trial judge noted at page 20:

> "The police officers, three of them, put a red truck at the scene when under surveillance and ID'd it as similar."

[55] The trial record in fact confirms that four officers including Constable Tobin who was with Officer Sheppard identified the red Ford Ranger truck at the scene. The other officers were Corporal Currie and Constable Mahoney. Three of the four identified the distinctive features as shown in the photo (Exhibit 2) taken of the truck registered to Mr. Toomey.

[56] About Mr. Murphy's role therefore, the trial judge found that even if Mr. Murphy was (an accomplice), that "his evidence was supported by police surveillance".

[57] In **R v Dowe** 2007 NSCA 128 the Nova Scotia Court of Appeal held that the trial judge erred in failing to consider other evidence which corroborated the co-accused testimony. Such evidence, it said, does not need to implicate the accused.

The Court stated “but as a matter of law evidence can corroborate (Mr. Lank’s) testimony even though that evidence does not itself implicate Mr. Dowe”. The accused was charged and a co-accused testified while awaiting to be sentenced. It concluded the judge erred in that it did not engage in an ultimate analysis of “Mr. Lank’s” testimony and then reject his credibility.

[58] Commenting on **Vetrovic and Kehler** the Court in **Dowe** stated at para. 24:

> “As is clear from **Vetrovic**, **supra** and **Kehler, supra**, evidence capable of restoring the trier of fact’s faith in relevant aspects of the witness’s account, while not directly implicating the accused in the offence, can be corroboration if satisfied the witness is truthful.”

[59] Clearly Mr. Murphy’s testimony was of central importance. However after a full analysis , additional evidence was found to corroborate his testimony. In terms of the element of “possession” the trial judge made the following findings of fact: 1) Mr. Toomey called Mr. Murphy when deliveries were to be made, 2) Mr. Toomey left the party on June 30th and arrived to pick them (the boxes) up, the inference being that he used his red truck. This is confirmed at page 23 of the trial judge’s decision as follows:

> “ I find it was his idea to put his motor home on the property to stash the cigarettes. He called when they were to be delivered and he arrived to pick them up. All of this

> makes out the element of possession and therefore I am satisfied beyond a reasonable doubt and I find Mr. Toomey guilty of both counts as set out in the Information."

[60] It is well established that great deference is to be shown by Appellant courts in matters of credibility. Similarly deference is to accorded to the trier of fact with respect to their findings of fact. The trial judge had the advantage of hearing and seeing the witnesses testify.

[61] In **R.v. Brooks** 2000 SCC 11 at paragraph 6 the SCC stated:

> "Appellate courts should show great deference to the findings of credibility made at trial and the importance of taking into consideration the special position of the trier of fact in judging credibility and of having the advantage, denied to the appellate court, of directly observing the testimonies of the witnesses (R. v. W. (R.), [1992] 2 S.C.R. 122, at p. 131).

[62] Therefore although Mr. Murphy was a key witness, the trial judge's findings should be disturbed only in the event of a palpable and overriding error. The evidence at trial does not reveal that such an error was made.

[63] This case turns therefore on whether the credibility deficits of Mr. Murphy as alleged required more of an analysis than what the trial judge performed in regard to a **Vetrovic** warning.

PURCELL MURPHY'S CREDIBILITY DEFICITS

[64] What the Appellant states was lacking was a proper analysis of the "Brooks factors" being the decision of **R v Brooks** 2000 SCC 11. A proper framework set up by the trial judge, says the Appellant would have averted the trial judge to the dangers of accepting Mr. Murphy's testimony. At para 51 of the Appellant's Factum it is stated:

> "Mr. Murphy is "tainted" by his closeness, if not direct participation in the possession of contraband cigarettes while his memory has been rendered unreliable with the passage of time."

[65] Relying on **R.v. Khela** 2009 SCC 4 the Appellant further states at paragraph 51:

> "What is important is determining whether the witness is suspect, 'unsavoury, untrustworthy, unreliable, or tainted all of which have equivalent meanings. Those terms cover anyone from bad characters (unsavoury) to characters with bad memories (unreliable)."

[66] While these terms are used interchangeably by the Appellant, the focus on a "tainted" witness is on their being a motive to lie by reason of connection to a crime.

[67] Unreliability based on the passage of time is not cited by Rosenburg, J.A. as an example of an "unsavoury witness"in his law review article referred to herein at paras 47 and 48. In **Khela**, the Court stated at paragraph 3:

> "And I mean to indicate all witnesses who because of their amoral character, criminal lifestyle, part dishonesty, or interest in the outcome of the trial, cannot be trusted to tell the truth - even though they have expressly undertaken by oath or affirmation to do so."

[68] There are instances in Mr. Murphy's evidence where his ability to recall was affected by the passage of time. In the context of **Vetrovic** however I do not believe such an impairment makes the evidence tainted or the witness unsavoury.

[69] There are other aspects in the evidence of Mr. Murphy which might more properly make him unsavoury, untrustworthy, unreliable or tainted. These have been cited by the Appellant. One such piece of evidence is the $800 rent payment per month for the Appellant to park the motor home on Mr. Murphy's land.

[70] Another piece of evidence is Mr. Murphy suggesting that Mr. Toomey would return to pay him another such amount, when only two to three weeks had passed since the first payment.

[71] I pause here to suggest that what the law requires is merely for the trial judge to establish a "foundation" for the exercise of his or her discretion. In paragraph 4 of the **Brooks** decision, the Supreme Court of Canada stated:

> "Provided there is a foundation for the Trial judge's exercise of discretion, an Appellant Court should not interfere."

[72] Additional concerns expressed on this appeal by the Appellant in regard to Mr. Murphy evidence, among others are:

i. His comment that he should have expected it when he learned the boxes contained tobacco and not t-shirts.
ii. His acceptance of two deliveries addressed to John MacLean, a person he never knew.
iii. The motor home having been moved between the surveillance on June 26th and the offence date of June 30th, 2008, despite Murphy saying he never used it and had no control.
iv. In the same vein, his being found in the motor home on the controlled delivery date.
v. On the one hand saying in direct evidence he saw the Appellant two to three times between deliveries and then in cross examination recanting and stating he did not see him between the two deliveries.

vi. The phone call made at the controlled delivery indicates he knew more than he let on.

[73] If one accepts the Appellant's position that those pieces of evidence raise at least moderate credibility concerns, the question as stated is did the trial judge have a foundation for exercising her discretion? In her decision (page 22) the trial judge accepted there were concerns with Mr. Murphy's evidence. She stated however that merely **"because he said he expected that much ... doesn't mean he was involved to that extent as an accomplice**" (my emphasis). She acknowledged that perhaps he knew more but found as follows:

> **"I find what he did say was not embellished."** (my emphasis)

[74] The trial judge addressed further, a witness' motivation to lie, which lies at the heart of the **Vetrovic** warning: At page 15 the trial judge stated:

> "A **Vetrovec** warning is not required to be given in relation to the uncorroborated evidence of an accomplice unless the trial judge considers the witness' trustworthiness to be doubtful because witness has good reason to lie."

[75] In its brief the Crown argues that there should be no set formula for approaching "the Rules of Corroboration" . It further argues that the trial judge was "alive" to the credibility concerns and there is no list of witness types which require a **Vetrovic** warning (paragraphs 19, 21 of the Respondent's brief).

[76] The following passage cited by the Respondent is particularly relevant to this appeal, which is taken from **Brooks** which in turn was citing **R v. Potvin**, 1989 Can LII 130 (SCC):

> "In every case it is for the trial judge on the basis of his or her appreciation of all the circumstances and I may add, on the basis of the application of sound common sense, to decide whether the warning is required."

[77] The trial judge in the present case followed the common sense approach as put forward by Dickson, J. in **Vetrovic**. This approach suggests that the trial judge should resist "pigeon holing" a witness thereby allowing discretion whether to give a clear and sharp warning. The trial judge in her decision made the following statement at page 15 of the decision referring to the law in **Vetrovic**:

> "There is nothing inherent in the evidence of an accomplice which automatically renders him untrustworthy."

[78] The above appears to be a true statement as evidenced by the following comparable statement by Dickson J., in **Vetrovic**:

> "If on the other hand we believe the witness to be trustworthy, then regardless of whether the witness is technically an "accomplice", no warning is necessary."

[79] In **R. v Kehler** 2004 SCC 11, decided by the Supreme Court of Canada, Justice Fish held:

> "22. However, even then, having considered the totality of the evidence, the trier of fact is entitled to believe the evidence of the disreputable witness - even on disputed facts that are not otherwise confirmed - if the trier is satisfied that the witness, despite his or her frailties or shortcomings, is truthful."

[80] It is on this basis the law has developed so that a trial judge's discretion whether to give a **Vetrovic** warning should generally be given wide latitude by Appellant Courts.

[81] Along the same line and in the same vein of thinking is that a trial judge's findings of fact and credibility should be shown deference, as they have had the advantage of seeing and hearing the evidence of the witnesses. There is little doubt

in the present case that the trial judge believed Mr. Murphy. Despite inconsistencies, the trial judge was nonetheless satisfied he was truthful.

[82] The Appellant once again argues that had the trial judge cautioned herself and set up a proper framework, Mr. Murphy's credibility deficits would have made her more alert to the dangers of accepting such evidence.

[83] In terms of evaluating his evidence, the trial judge referred to **Vetrovic** throughout her decision. In addition to those references I have already made the trial judge stated at page 15:

> "Now Purcell Murphy could be considered an accomplice, and I'll speak more about that later in my decision, but I'll outline the law with respect to a Vetrovec warning. In **R. v. Dugay**, all that can be established is that the testimony of some accomplices may be untrustworthy but this can be said of many other categories of witness. There's nothing inherent in the evidence of an accomplice which automatically renders him untrustworthy. If a trial judge believes a witness to be trustworthy, then regardless of whether the witness is technically an accomplice, no warning is necessary."

[84] **Vetrovec** has resulted in a common-sense approach that permits the trier of fact to consider the credibility of an untrustworthy witness without the trial judge

determining what, if any, evidence is capable of corroborating the untrustworthy witness' evidence.

[85] The trial judge found as a fact that Murphy was not an accomplice. She found further a **Vetrovic** warning was not necessary. That said, to state she was not alerted to the purpose of **Vetrovic** or did not advert herself to the credibility issues, is simply not the case, as is demonstrated not only by her repeated references to **Vetrovic** but in the analysis performed in the spirit of it's mandate, namely a cautionary approach to Mr. Murphy's evidence.

[86] In **R v Johnson** 1995 N.S.J. No. 193, the Nova Scotia Court of Appeal dismissed an appeal on the basis of a trial judge's failure to give himself a **Vetrovic** caution in the judge alone trial. In reasons which were concise and to the point, Justice Pugsley stated:

> "20. The decision of Dickson,J. (as he then was) in **Vetrovic v. The Queen** 1982 1 S.C.R. 811 makes it clear that there is no special category for "accomplices".
>
> 21. I agree with the Crown's submissions that there was "nothing inherently unreliable about the evidence of Fontaine Hughes and no requirement for the trial judge to warn himself about the evidence or to find corroborative evidence directly linked to the accused."

[87] In the present case the trial judge did find evidence directly linked to the accused, that being the police surveillance.

[88] The Respondent argues that the evidence of Murphy is more compelling than the witness in **Johnson**. A similarity however, is that the witness although arrested, was never charged. A distinguishing feature is that the evidence of the witness, Mr. Hughes was uncorroborated.

[89] In the recent case of **R. v Snyder** 2011 ONCA 445 , the Ontario Court of Appeal dismissed an appeal on the basis of a trial judge's failure to give a **Vetrovic** caution in a judge alone trial. At paragraph 24 Doherty J.A. stated:

> "There is no need to import the requirement of "Vetrovic caution designed to alert juries to the danger of relying on the evidence of certain witnesses into a trial judge's reasons for judgment. Judges know the risks inherent in relying on witnesses like Burgess and Doucette. It would be pure formalism to require judges to articulate those dangers in their reasons."

[90] In summary the law as stated in **Brooks** is that if a trial judge finds the witness trustworthy, despite shortcomings, no warning is necessary. Rosenburg, J.A. in his article qualified this somewhat stating:

> "It is not whether the trial judge personally finds the witness to be trustworthy but whether there are factors which experience teaches that the witness's story be approached with caution."

[91] Here, while there was cause for concern on a preliminary basis, the trial judge addressed those concerns in assessing credibility and found the witness, Mr. Murphy, to be sufficiently trustworthy without giving herself a so-called **Vetrovic** warning. (see Paragraph 8 of the Brooks decision).

[92] In doing so she fulfilled the purpose of the **Vetrovic** even though she found such a warning was not needed.

[93] There is ample authority that such a warning is less applicable in a Judge alone trial as opposed to a Judge and Jury trial. As the Court stated in **R. v Snyder** at para. 25:

> "It would take more than a simple failure by the trial judge to expressly advert to the dangers inherent in relying on the evidence of witnesses like Burgess and

> Doucette to convince me that he did not have regard to those dangers in deciding the case."

[94] For these reasons I find that the trial judge laid a foundation for her findings of credibility and that deference should be accorded to her in the exercise of her discretion. The trial judge correctly identified the issues and made findings of fact which on Appeal are not to be disturbed save for a palpable and overriding error.

[95] The evidence of Corporal Bryden was that Mr. Murphy signed for the second delivery (Exhibit 4) but refused to give his name. The trial judge did not make a specific finding in respect of this but did find at page 21:

> "I find as a fact that Mr. Toomey came up with the plan to put the motor home on Purchell Murphy's property, which was somewhat secluded, and under the false premise to sell t-shirts. I find he also gave $800 rent to Mr. Murphy who was on a fixed income and probably could use the money and I find that the first delivery, that Mr. Murphy did sign for that, that Mr. Toomey showed up, got the cigarettes and gave him $800."

[96] It is not the role of an Appeal Court to question reasonable findings of the trial judge. I have found no palpable or overriding error in the learned trial judge's decision and I believe her findings of fact were supported by the evidence in this case. Despite some reluctance on Mr. Murphy's part and his inability to recall

certain events the trial judge found him to be a truthful and trustworthy witness. As such his findings of fact and credibility should be shown deference, and I so find.

[97] Having found that the Judge did not err in failing to give herself an expressed warning, it is unnecessary for me to deal with issue number two.

[98] Accordingly I dismiss the Appeal.

J.