PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Mercer*, 2017 NSPC 3

Date: 2017-01-12
Docket: 2906851
Registry: Sydney

Between:

Her Majesty the Queen

v.

John Russell Mercer

Judge:	The Honourable Judge Brian Williston
Heard:	January 12, 2017, in Sydney, Nova Scotia
Decision:	January 12, 2017
Charge:	Section 286.1(1) Criminal Code of Canada
Counsel:	Christa MacKinnon and Peter Harrison, for the Public Prosecution Service Nash T. Brogan and T.J. McKeough, for the Accused

By the Court:

Ruling on Entrapment Application

[1] The accused, John Russell Mercer, is charged that he on or about the 26th day of August, 2015, at or near Cape Breton Regional Municipality, Nova Scotia, did communicate with Constable Ashely MacDonald, contrary to s. 286.1(1) of the Criminal Code of Canada.

[2] The accused entered a guilty plea after his application for a stay of proceedings for abuse of process for an alleged infringement of his rights under section 7 of the ***Charter of Rights and Freedoms*** was denied.

[3] After entering the guilty plea, the Defence then made application for a stay of proceedings on the grounds that he was entrapped into committing the offence.

[4] The Defence and Crown have come to an agreement that evidence heard during the abuse of process hearing before the guilty plea shall apply to this application.

The General Background

[5] In the spring of 2014, the Cape Breton Regional Police Service received complaints from the Downtown Business Association that customers and tourists were being approaches by sex trade workers and "johns" who thought they were sex trade workers. The police responded by putting more uniformed officers on those streets along with plain clothes officers to try to move the activity to other locations away from the downtown core.

[6] Sgt. Jodie Wilson, officer in charge of the Community Safety Enforcement Unit continued to monitor and gather information regarding prostitution in downtown Sydney. It was determined that the scope of the problem was more serious than originally thought. Over time there were upwards of thirty-seven sex trade workers and over fifty johns visiting the downtown area. The police came to learn that many of the workers were being subjected to violence from some of the johns as well as from boyfriends who were "pimping" them out.

[7] When Bill C-36 became law, it changed the approach of the police who, with the realization of the potential violence from johns and pimps now treated the sex trade workers as “victims”. The police had not realized the extent of the violence the street workers had been subjected to until they looked at their situation over time. The police felt that they had to do something before someone was seriously injured or killed.

[8] The police began “Operation John Be Gone” to deter and abolish the sex trade from the downtown area. The officers received training regarding human trafficking as well as methods to help the workers exit from the sex trade. Many of those workers were seen by the police as not being in that line of work by choice but by circumstances such as socio-economic conditions, childhood abuse and addictions to alcohol and drugs.

[9] The police began to focus more on helping the workers find an exit strategy through making them aware of what was available in the local area regarding addiction and mental health treatment. Many of those workers were aboriginal. The Cape Breton Regional Police partnered with the Royal Canadian Mounted Police in the community of Eskasoni to identify support groups and “elders” in that location who could help those suffering with addiction and mental health issues. Some of the elders even accompanied the police officers when they met with aboriginal sex trade workers in the downtown area of Sydney to encourage them to get help and support for their addictions and health issues.

[10] During that time period police surveillance identified vehicles and licence plate numbers of johns who had a history of violence. With this information the police began to stop vehicles driven by these individuals to try to disrupt their transactions with the sex trade workers. During that time, the police also laid charges under the Motor Vehicle Act against those individuals and other johns.

[11] The police also began to give the sex trade workers as much information as they could about these potentially violent johns and did safety checks on the workers. The police enlisted reformed former sex trade workers to come on patrols with them to talk to the workers. They offered peer counselling and introductions to the methadone treatment program to wean them from their addictions, enabling them to leave prostitution if they wished to do so.

[12] Sgt. Jodie Wilson testified that the police were supplied with one thousand lipstick tubes from Mary K Cosmetics which they filled with notes containing the contact information of agencies which could help the workers deal with their addictions and mental health. As the police distributed these containers and began to meet with the workers, they saw a trust begin to build between them. Sgt. Wilson and her colleagues began to receive text messages and telephone calls from the workers who now were reporting violent johns. These workers, who earlier had a distrust of the police, were coming to realize that these officers were there for their support and assistance in treating them as victims and trying to keep them safe. However, despite this new relationship with the police, the workers would not agree to testify against the johns, expressing fear of retaliation.

[13] Sgt. Wilson testified that the police came to the realization that something had to be done before someone was killed or injured. As a result, Operation John Be Gone was established to deter and abolish the ongoing activity in the downtown area. During the eighteen months leading up to Operation John Be Gone, the police had given the johns warnings and second chances but it was to no avail. In the opinion of the police officers who witnessed the increasing demand on the sex trade, it was felt they could no longer use a "band-aid" approach and the decision was made to begin the use of undercover police officers and the laying of charges as the best form of action to enforce Bill C-36.

[14] The accused, John Russell Mercer, is one of twenty-seven accused charged as a result of that police action.

[15] Following the December 20, 2013 decision of the Supreme Court of Canada in ***Bedford v. Canada*** **(Attorney General) 2013 SCC 72**, Parliament enacted new Criminal Code offences in Bill C-36 which are now contained in sections 286.1-286.5. Counsel for the Crown and Defence have jointly filed for the consideration of the Court as Exhibit 1, the Technical Paper: Bill C-36, Protection of the Communities and Exploited Persons Act, published by the Department of Justice. The Technical Paper speaks of the purpose in creating the new provisions and goes into the background of research and consultation leading to these new Criminal Code provisions.

[16] The centerpiece of Bill C-36 is a shift in legislative policy away from the old approach which treated prostitution as a public nuisance to a recognition that prostitution is inherently exploitive to sex trade workers with great potential for violence from johns and pimps. Under the previous legislation, the sex trade workers were themselves subject to prosecution and reporting violence at the hands of a john or pimp could have also exposed them to criminal penalties for engaging in prostitution. In addition, the previous law which criminalized the sex trade workers often fostered a distrust of the police who were seen as not being there to protect them.

Legislation

[17] The applicable section of the Criminal Code is as follows:

> 286.1 (1) Everyone who, in any place, obtains for consideration, or communicates with anyone for the purpose of obtaining for consideration, the sexual services of a person is guilty of
>
> (b) an offence punishable on summary conviction and liable to imprisonment for a term of not more than 18 months and a minimum punishment of,
>
> (ii) in any other case,
> (A) for a first offence, a fine of $500, and
> (B) for each subsequent offence, a fine of $1,000.

The Police Undercover Operation

[18] The new law has shifted the focus away from the women who were seen as victims to the johns and pimps on the demand and exploitative side.

[19] The new legislation, for the most part, decriminalizes prostitutes in recognition of their marginalized and vulnerable positions and criminalizes the johns who buy, or attempt to buy, and the pimps and human traffickers who exploit, and profit from, coercing women into the sex trade.

[20] The police were not able to use the actual sex trade workers themselves since they were reluctant to participate in prosecutions for fear of reprisals from the johns or pimps.

[21] The police sought and received specialized training on the new prostitution offences, on human trafficking and on undercover operations.

[22] Operation John Be Gone was initiated using undercover police officers posing as sex trade workers.

[23] Operation John Be Gone trained undercover police officers in an observable setting with minimized risk to those officers.

The Law

[24] The accused makes this application for a stay of proceedings as an aspect of abuse of process which if established compels a court to disassociate itself from the state's conduct regarding the investigation by the police. Following a guilty verdict where the accused alleges he was "entrapped" by the police, the conduct of the police becomes the focus of inquiry.

[25] The leading authority on entrapment is the decision of the Supreme Court of Canada in ***R. v. Mack*** [1988] S.C.J. No. 91, [1988' 2 S.C.R. 903 (1988) 44 C.C.C. (3d) 513. On such an application, the burden is on the Defence "to demonstrate by a preponderance of evidence that the prosecution is an abuse of process because of entrapment." If entrapment is proven, the remedy, be it at common law or under section 7 and section 24(2) of the ***Charter***, is a stay of proceedings. This remedy is only granted in the "clearest of cases." In **Mack** (*supra*.), Justice Lamer, as he then ws, describes the two branches of the test at paragraph 126:

> [126] In conclusion, and to summarize, the proper approach to the doctrine of entrapment is that which was articulated by Estey J. in Amato, supra, and elaborated upon in these reasons. As mentioned and explained there is entrapment when,
>
> > (a) the authorities provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that this person is already engaged in criminal activity or pursuant to a bona fide inquiry;
> >
> > (b) although having such a reasonable suspicion or acting in the course of a bona fide inquiry, they go beyond providing an opportunity and induce the commission of an offence;

[26] In the present case, the Defence and Crown filed an agreed statement of facts that there is no evidence that prior to Operation John Be Gone that the accused, Mr. Mercer, had already engaged in criminal activity relating to the solicitation of prostitution. Therefore, the police had no reasonable suspicion Mr. Mercer was likely to commit this offence. However, the Crown submits that the police were operating in the course of a *bona fide* inquiry as contemplated by the second part of the first branch of the test set out in **Mack** (*supra*.).

[27] The concept of a *bona fide* inquiry was explained by the Supreme Court of Canada in ***R. v. Barnes*** [1991] 1 S.C.R. 449, 63 C.C.C. (3d),where Lamer C.J.C., as he then was, stated at paragraphs 21-26:

> [21]The accused argues that although the undercover officer was involved in a bona fide inquiry, she nevertheless engaged in random virtue-testing since she approached the accused without a reasonable suspicion that he was likely to commit a drug-related offence. She approached the accused simply because he was walking near Granville Street.
>
> [22] In my respectful opinion, this argument is based on a misinterpretation of **Mack**. I recognize that some of my language in **Mack** might be responsible for this misinterpretation. In particular, as noted above, I stated, at p. 956:
>
> > In those cases [where there is a particular location where it is reasonably suspected that certain crimes are taking place] it is clearly permissible to provide opportunities to people associated with the location under suspicion, even if these people are not themselves under suspicion. This latter situation, however, I sonly justified if the police acted in the course of a *bona fide* investigation and are not engaged in random virtue-testing.
>
> [23] This statement should not be taken to mean that the police may not approach people on a random basis, in order to present the opportunity to commit an offence, in the course of a *bona fide* investigation. The basic rule articulated in **Mack** is that the police may only present the opportunity to commit a particular crime to an individual who arouses a suspicion that he or she is already engaged in the particular criminal activity.

> [24] An exception to this rule arises when the police undertake a *bona fide* investigation directed at an area where it is reasonably suspected that criminal activity is occurring. When such a location is defined with sufficient precision, the police may present any person associated with the area with the opportunity to commit the particular offence. Such randomness is permissible within the scope of a *bona fide* inquiry.
> [25] Random virtue-testing, conversely, only arises when a police officer presents a person with the opportunity to commit an offence without a reasonable suspicion that:
>
> (a) the person is already engaged in the particular criminal activity, or
>
> (b) the physical location with which the person is associated is a place where the particular criminal activity is likely occurring.

[28] In R. v. Swan 2009, B.C.C.A., 142 Prowse J.A. considered the scope of the entrapment defence as outlined in **Mack** (*supra*.) and as clarified in the subsequent decision of the Supreme Court of Canada in **Barnes** (*supra*.) He stated at paragraphs 21 and 22:

> [21] The question of what amounts to a reasonable suspicion was discussed by this Court in ***R. v. Cahill*** 1992 2129 (BCCA), (1992), 12 B.C.A.C. 247, 13 C.R. (4th) 327, where Mr. Justice Wood, speaking for the Court, stated (at para.32) that, "as a matter of abstract theory, a reasonable suspicion means something more than a mere suspicion and something less than a belief based upon reasonable and probable grounds."
> [22] According to **Barnes**, "reasonable suspicion" must exist either with respect to the person being targeted, or with respect to the area being targeted. In order to establish entrapment, the defence must establish, on a balance of probabilities, that neither of those criteria is satisfied. (Here, I am addressing only the first branch of the test for entrapment in **Barnes** as set forth at para.18, supra, not situations, such as in **Mack**, where the police have actively importuned the accused to commit an offence.)

Was This a *Bona Fide* Inquiry?

[29] The above decisions have made it clear that the police may present an opportunity to commit a crime to persons present in a location where it is reasonably suspected that criminal activity is taking place.

[30] Operation John Be Gone was devised as an undercover "sting operation" in an effort to target those procuring sexual services from vulnerable sex trade workers at the places in downtown Sydney where it was determined those activities were taking place. As is not uncommon with these types of activities, it was difficult if not impossible for the police to enlist the co-operation of the sex trade workers themselves so undercover female officers including Cst. Ashely MacDonald, were deployed to three distinct areas of downtown Sydney where these activities were suspected to be taking place. This was based on their own observations in addition to intelligence information gathered, as well as from complaints from tourists, downtown workers and the Downtown Development Association.

[31] The area where the accused was located was near the Bank of Montreal on Charlotte Street, one of three areas where the police reasonably suspected this criminal activity was occurring. Sgt. Jodie Wilson of the Community Safety Enforcement Unit testified that the Bank of Montreal location and two other locations, in front of Spinners and by the Y.M.C.A., were chosen as "known" areas where solicitation for prostitution was taking place. Prior to choosing those locations, the police had conducted surveillance for over a year and a half and witnessed street sex workers being picked up in those areas. The members of the Community Safety Enforcement Unit also talked to sex trade workers in the months leading up to Operation John Be Gone confirming the activities taking place in those areas.

[32] In considering all of the evidence in this case, I am satisfied that the police had a credibly based belief that solicitation for the purpose of prostitution was taking place in the area of the Bank of Montreal as well as the other two areas on Charlotte Street in downtown Sydney when they deployed Cst. Ashley MacDonald posing as a prostitute in that area.

Did the Police Conduct Go Beyond Merely Providing an Opportunity to Commit a Crime and Instead Actually Induce the Commission of the Offence?

[33] Even though this was a reasonable bona fide inquiry in this case, there is still the second branch to consider as to whether the police went beyond

permissible limits and used "entrapment" techniques. In **Mack** (*supra*) at para. 129, the Supreme Court of Canada stated:

> [129] The presence of reasonable suspicion or the mere existence of a bona fide inquiry will, however, never justify entrapment techniques: the police may not go beyond providing an opportunity regardless of their perception of the accused's character and regardless of the existence of an honest inquiry.

[34] Also at para. 129 in Mack (supra) Lamer, J. set out a non-exhaustive list of factors which might be considered in deciding whether the police went beyond permissible limits to attract Mr. Mercer into the commission of an offence:

> -the type of crime being investigated and the availability of other techniques for the police detection of its commission;
> -whether an average person, with both strengths and weaknesses, in the position of the accused would be induced into the commission of a crime;
> -the persistence and number of attempts made by the police before the accused agreed to committing the offence.
> -the type of inducement used by the police, including deceit, fraud, trickery or reward;
> -the timing of the police conduct, in particular, whether the police have instigated the offence or became involved in ongoing criminal activity;
> -whether the police conduct involves an exploitation of human characteristics such as the emotions of compassion, sympathy and friendship;
> -whether the police appear to have exploited a particular vulnerability of a person such as a mental handicap or a substance addiction;
> -the proportionality between the police involvement, as compared to the accused, including an assessment of the degree of harm caused or risked by the police, as compared to the accused, and the commission of any illegal acts by the police themselves;
> -the existence of any threats, implied or express, made to the accused by the police or their agents;
> -whether the police conduct is directed at undermining other constitutional values.

Application of Facts Regarding Accused

[35] At approximately 7:20 p.m. on August 26, 2015, Cst. Ashley MacDonald, posing as a prostitute, standing in front of the Bank of Montreal on Charlotte Street, observed a red truck circle around and noted the driver immediately nodded his head showing signs of being interested. The undercover police officer was dressed in long black leggings, open toed shoes and a regular shirt which was not low cut. The driver who was later identified as the accused, Mr. Mercer, established eye contact and after pulling into an alleyway made nodding motions to her to come over. For safety reasons the undercover officer did not go into the alley and Mr. Mercer went around again and pulled over right in front of her on the street. Cst. MacDonald again made eye contact with him. He nodded for her to come over and she went over to the car asking him what he wanted. He replied that he wanted a "blow job" and a price of $30.00 was agreed upon. The police officer indicated in cross-examination that she never waved at Mr. Mercer but she might have at one point flipped or fixed her hair. She was not able to make notes until the end of her operation each day back at the police station. That week in five days, she was involved in the arrest of seventeen "johns". In two cases, individuals were not arrested.

[36] The accused Mr. Mercer, age 73, testified that on that date he saw a lady on that corner who kind of nodded at him, signaling him to pull in. He stated that he first thought she might have been someone who knew him and that he drove around the block again. He testified that the second time he drove around he believed she was a prostitute and that she kind of signaled him to pull over. He stated that he heard about prostitutes on Charlotte Street and "figured she was one of them". He further stated that she said "What are you looking for?" and that he replied "What are you offering?".

[37] In cross-examination, the Crown pointed out what he told police in his statement that night and he then agreed in his testimony that Cst. MacDonald in fact asked him what he would like and that he replied "a blow job". He said that is the way it went down, but as far as he was concerned, it was entrapment.

[38] When I consider the testimony of Cst. MacDonald and the accused, Mr. Mercer, it is clear the officer was not steering the conversation in the direction of sex. I can find no fault in relation to the methodology utilized by the undercover police officer in this case.

[39] Solicitation for the purpose of engaging the service of a prostitute is the type of "consensual" crime recognized as requiring creative initiatives by police that often involve decoys or undercover agents.

[40] In Bedford decision (supra) the Supreme Court of Canada observed at para. 86:

> First, while some prostitutes may fit the description of persons who freely choose (or at one point chose) to engage in the risky economic activity of prostitution, many prostitutes have no meaningful choice but to do so. Ms. Bedford herself stated that she initially prostituted herself "to make enough money to at least feed myself" (cross-examination of Ms. Bedford, J.A.R., vol.2 at p. 92). As the application judge found, street prostitutes, with some exceptions, are a particularly marginalized population (paras.458 and 472). Whether because of financial desperation, drug addictions, mental illness, or compulsion from pimps, they often have little choice but to sell their bodies for money. Realistically, while they may retain some minimal power of choice-what the Attorney General of Canada called "constrained choice" (transcript, at p.22) – these are not people who can be said to be truly "choosing" a risky line of business (see PHS, at paras. 97-101).

[41] In Operation John Be Gone, the police, the police use trained undercover police officers posing as prostitutes in a observable setting with emphasis placed on minimized risk to those officers.

[42] I am satisfied that Cst. MacDonald's recollection of the conversation between her and the accused is the correct one. The substance of that conversation was important to her as she was instructed in her training before Operation John Be Gone. She had god reason to be paying attention to what was being said leading up to the arrest of Mr. Mercer. Mr. Mercer's own statement to the police after the arrest corroborates the testimony of Cst. MacDonald in regard to the words spoken by her and his reply. The police officer did not initiate the communication for the purpose of prostitution. She simply asked what he was looking for. There was no evidence that the police officer exploited any weakness of the accused. There were no implicit or explicit inducements or threats. The police conduct was not aimed at undermining other constitutional

values. While it is true that Cst. MacDonald was posing as a prostitute, that in itself was not inappropriate in the context of the investigation.

[43] On the evidence which I accept in this case, I do not believe that the police officer, Cst. MacDonald, went beyond permissible boundaries in her interaction with Mr. Mercer and I find no "objectionable police conduct" which induced the accused to commit the offence. Mr. Mercer was a willing participant in the sexual dialogue and interaction he had with Cst. MacDonald.

Conclusion

[44] On the evidence before me in its totality, I find that the accused has failed to establish on a balance of probabilities that the defence of entrapment has been clearly made out. Accordingly, the application for a stay of proceedings is dismissed and the conviction for communication for the purpose of obtaining sexual services, contrary to s. 286.1(1) is confirmed.

Brian Williston, J.P.C.