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COURT OF APPEAL FOR ONTARIO

OSBORNE A.C.J.O., DOHERTY and LASKIN JJ.A.

BETWEEN:	)	
	)	**J. Lockyer and**
HER MAJESTY THE QUEEN	)	**P.A. Schreck**
	)	**for the appellant**
Respondent	)	
	)	
- and -	)	**R. Versa**
	)	**for the respondent**
BALBIR AHLUWALIA	)	
	)	
Appellant	)	
	)	**Heard: October 26, 2000**
	)	

On appeal from the convictions imposed by Justice Hugh M. O'Connell, dated January 30, 1997.

DOHERTY J.A.:

I

[1] The appellant was charged with several counts of trafficking in cocaine and heroin, and related charges of possession of and laundering of the proceeds of crime. The Crown alleged that over several months the appellant sold various amounts of cocaine and heroin to police agents and to undercover police officers introduced to the appellant by the agents. He was jointly charged with Satbal Singh on some of the charges.

[2] The appellant and Singh initially pled not guilty and were tried by a judge and jury. The Crown presented its case and the appellant testified. He advanced a duress defence based on an alleged threat made against him by Frank Makdesion, one of the police agents. A mistrial was declared before the end of the trial.

[3] The appellant and Singh subsequently entered guilty pleas before O'Connell J. to some of the charges. An agreed statement of facts signed by the appellant was tendered on the plea. After three adjournments of the sentencing proceedings, the appellant put forward an entrapment claim. After a lengthy hearing, O'Connell J. dismissed the entrapment claim, convicted the appellant and sentenced him to 7 1/2 years in the penitentiary. The appellant appeals from O'Connell J.'s rejection of his entrapment claim and refusal to enter a stay of proceedings.[1] He does not challenge the findings of guilt or the sentence imposed.

[4] The appeal was presented on two discrete bases. One alleges error in the entrapment proceedings and the other relies on fresh evidence tendered on the appeal. The appellant submits that O'Connell J. misapprehended relevant evidence and erred in finding that the police had a reasonable suspicion that the appellant was involved in drug trafficking when they presented him with an opportunity to sell drugs to the police agents. The appellant contends that this error entitles him to a new entrapment hearing. Counsel for the appellant has also filed fresh evidence on the appeal. He submits that even if the finding of O'Connell J. cannot be impeached, the fresh evidence should be received and requires that the appeal be allowed and a new entrapment hearing ordered.

[5] The Crown resists both arguments and contends that the appeal should be dismissed.

[6] I would reject the first argument advanced by the appellant, but accept the second, quash the convictions and order a new entrapment hearing.

II

Did O'Connell J. misapprehend the evidence?

[7] The evidence on the entrapment hearing consisted of transcripts of the evidence heard on the aborted trial, the testimony of various witnesses, including the two police agents, and transcripts of intercepted communications involving the appellant. The appellant also testified on the entrapment hearing.

[8] In October 1990, Constable Robinson of the O.P.P. received information from an informant that a person named Kirpaul Singh Ahluwalia (Kirpaul), who had been convicted of drug trafficking and recently released from jail, was involved in the drug trade once again. The information provided to Constable Robinson indicated that the drug trafficking was taking place in Canada and the United States.

[9] Constable Robinson arranged for Marvin Elkind, a long-time paid police agent for the O.P.P., to make contact with Kirpaul at a telephone number provided by the informant. Constable Robinson also spoke to F.B.I. agents in the United States and through them enlisted the services of Frank Makdesion, a paid agent working for the F.B.I. who was knowledgeable in the drug business. Initially, Makdesion was to make contact with Kirpaul's associates in California.

[10] Various meetings took place between Elkind and Kirpaul, and later Elkind, Kirpaul and Makdesion. There were no discussions about drugs. Kirpaul introduced Elkind and Makdesion to his associate, Raymond Kompani. At a meeting in November 1990, Mr. Kompani expressed an interest in conducting drug transactions with Makdesion. Nothing came of this discussion.

[11] Elkind's contacts with Kirpaul continued during November and December 1990. He eventually spoke with Harwinder Walia (known as Bittu). Kirpaul was supposed to be working for Bittu in his dry-cleaning business. Bittu told Elkind that Kirpaul was not employed by Bittu, but that Kirpaul could be reached through his "boss", the appellant. Bittu gave Elkind the appellant's phone number and told him that he should use Bittu's name when he called the appellant to set up a meeting with Kirpaul or Kompani.

[12] Constable Robinson took the reference to the appellant as Kirpaul's "boss" as indicating that the appellant was "the guy to go for for the drugs." Elkind could not recall the context of the comment made by Bittu. There was, however, no reference to drugs in the conversation.

[13] Elkind made contact with the appellant and went to his home on January 4, 1991. At the meeting, the appellant told Elkind that Kompani had been impressed with Makdesion, but that Kirpaul had gotten "nervous". Makdesion's only contact with Kompani had occurred in November 1990 when Kompani had expressed an interest in conducting drug transactions with Makdesion.

[14] Elkind spoke with the appellant about the possibility of Elkind's finding investors for the appellant's oil and gasoline ventures. The appellant was not particularly interested in dealing with Elkind, but Elkind was very persistent. Elkind eventually advised the appellant that he could introduce him to a very wealthy person (Makdesion) who might be interested in investing in the appellant's ventures. Elkind introduced Makdesion to the appellant over the telephone on January 9, 1991. A series of discussions occurred between January 9 and February 19, 1991 during which Elkind and Makdesion attempted to develop their relationship with the appellant. There were no discussions about drug transactions.

[15] On February 19, 1991, Elkind and Makdesion met with the appellant. According to Makdesion, the appellant initially began discussing his oil and gas business but later turned the conversation to the topic of drugs. The appellant said that he could get Makdesion "whatever you want". Elkind had no recollection of any discussion about drugs on February 19th and had not said anything to Constable Robinson about drugs in the debriefing session immediately following the meeting on February 19th.

[16] Elkind, Makdesion and the appellant met on February 20, 1991 at a restaurant in Toronto. Makdesion said the appellant continued his discussion from the prior evening and offered to sell drugs to Makdesion. Elkind recalled that drugs were discussed at this meeting but could not recall who raised the topic.

[17] The appellant travelled to Windsor on February 21st and met with Makdesion. In the agreed statement of facts signed by the appellant, he acknowledged that he gave Makdesion a sample of cocaine in Windsor on February 21st. In his testimony on the entrapment hearing, the appellant denied that he had supplied cocaine to Makdesion on February 21st and tried to explain away the agreed statement of facts by saying that he had not read it before he signed it.

[18] Makdesion met with the appellant in Detroit in early March 1991. According to the appellant, Makdesion put a gun to his head at this meeting and threatened to kill him if he did not supply drugs. Makdesion denied threatening the appellant.

[19] On March 25th, Elkind and the appellant met at the King Edward Hotel in Toronto. The appellant gave Elkind a small sample of cocaine. The next day, the appellant sold a 1 kilogram brick of cocaine to an undercover police officer who was introduced to him by Elkind.

[20] On May 10, 1991, the appellant offered to sell Makdesion a 5 kilogram brick of cocaine. Eventually, Makdesion purchased 1 kilogram of cocaine from the appellant.

[21] There were additional transactions in May and July 1991. In August, Makdesion arranged for the appellant to meet with an undercover police officer. The appellant offered to sell heroin to the

officer. On August 14, 1991, the undercover police officer agreed to purchase 2 ounces of heroin from the appellant. Shortly after the delivery of a sample of the heroin, the appellant was arrested.

[22] The appellant's telephone conversations were intercepted between June 25, 1991 and the date of his arrest. O'Connell J. relied on the transcripts of some of those conversations as indicating that the appellant was a knowledgeable, active and willing participant in the drug dealings and the related money laundering.

[23] The appellant testified that he had been involved in many businesses in the United States and Canada. In 1990, he was trying to start a new gasoline company called Cobalt Petroleum. The appellant was hoping to purchase gas stations in Ontario and was looking for investors. In January 1991, Elkind called the appellant and offered to find investors for the appellant. After several calls, the appellant agreed to meet with Elkind. Elkind told him that he knew some people from the Middle East who were living in Detroit who might be interested in investing in the appellant's business. The appellant said that he knew there was a wealthy Middle Eastern community in Detroit. Eventually, Elkind introduced the appellant to Makdesion.

[24] The appellant testified that he did not discuss drugs with Elkind or Makdesion at any time before his meeting in early March when Makdesion threatened to kill him. He specifically denied any reference to drugs in discussions with Elkind and Makdesion on February 19th or February 20th.

[25] The appellant testified that he travelled to Windsor on February 21, 1991 to meet with associates of Makdesion who he hoped would be interested in investing in the gasoline business. Makdesion told him that the associates were unavailable. The appellant said that there was no conversation about drugs at this meeting. He repudiated his admission in the agreed statement of facts that he had supplied Makdesion with a sample of cocaine.

[26] The appellant further testified that he went to Detroit in early March 1991 again intending to meet with Makdesion's potential investors. Makdesion met him in Detroit and they drove around the city. According to the appellant, Makdesion suddenly changed the topic from potential investment to drugs. Makdesion told the appellant that he knew that the appellant was a drug dealer and that it was time to talk business. The appellant said that Makdesion's "whole attitude" changed. When the appellant insisted that he did know what Makdesion was talking about, Makdesion drew a gun and put it to the appellant's head. He told the appellant that he wanted to be introduced to the appellant's drug contacts.

[27] The appellant saw Makdesion the day after the alleged threat. Makdesion acted as if nothing had happened and said he still wanted to do business with the appellant. The appellant spent the day with Makdesion.

[28] The appellant acknowledged that he participated in the subsequent drug trafficking with Makdesion and others who were introduced to him by Makdesion or Elkind. He said he did so because of the initial threat by Makdesion and several subsequent threats made by him. The appellant believed that Makdesion was associated with powerful organized crime figures.

[29] The appellant admitted in cross-examination that his evidence on the entrapment hearing concerning his involvement in the various drug transactions after March 1991 was contrary to the

evidence he had given at his trial. He acknowledged that he had lied on several occasions at the trial. Not surprisingly, O'Connell J. rejected the appellant's evidence.

III

[30] The doctrine of entrapment was explained in *R. v. Mack* (1988), 1988 CanLII 24 (SCC), 44 C.C.C. (3d) 513 (S.C.C.). It is not a defence which excuses or justifies what would otherwise be criminal conduct. It is a specie of the broader doctrine of abuse of process. Entrapment recognizes that there are limits on what the police can do in the suppression of criminal activity. Those limits reflect community standards of fairness and decency. When a court gives effect to an entrapment claim and stays a proceeding, it refuses to condone state conduct that runs contrary to those community standards. It does so by refusing to lend its processes to the prosecution of those who are ensnared by the offensive state conduct. As Lamer J. put it in *R. v. Mack*, supra at 542:

> … In the entrapment context, the court's sense of justice is offended by the spectacle of an accused being convicted of an offence which is the work of the state [citations omitted]. The court is, in effect, saying it cannot condone or be seen to lend a stamp of approval to behaviour which transcends what our society perceives to be acceptable on the part of the state. The stay of the prosecution of the accused is the manifestation of the court's disapproval of the state's conduct. The issuance of the stay obviously benefits the accused but the court is primarily concerned with a larger issue: the maintenance of the public confidence in the legal and judicial process. In this way the benefit to the accused is really a derivative one. …

[31] The doctrine of entrapment is not, however, a vague licence to stay proceedings whenever police conduct offends a particular judge's sensitivities or his or her perception of how the police should go about doing their business. The boundaries of the doctrine were carefully laid out in *R. v. Mack* where Lamer J., at 559, referred to two categories of entrapment. He described them in these terms:

> (a) the authorities provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that this person has already engaged in criminal activity or pursuant to a bona fide inquiry;[2]
>
> (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.

[32] In *R. v. Mack*, *supra* at 567-68, Lamer J. also emphasized that entrapment should be recognized only in the clearest of cases. To that end, he placed the onus on the accused to demonstrate on the balance of probabilities that the police conduct had gone beyond permissible limits.

[33] O'Connell J. referred extensively to *R. v. Mack* and applied the words of Lamer J. to the facts as he found them. The appellant does not contend that O'Connell J. misdirected himself as to the applicable law, but argues that he erred in concluding that the police had a reasonable suspicion that the appellant was involved in drug trafficking when they presented him with the opportunity to traffic in drugs. In essence, the appellant argues that O'Connell J.'s conclusion was unreasonable and that the only reasonable conclusion on a proper appreciation of the evidence was that the appellant had established on the balance of probabilities that the police had no such reasonable suspicion.

[34] In advancing this argument, counsel for the appellant did not rely on the appellant's evidence that he was threatened by Makdesion in March. Counsel recognized that, based on the record before O'Connell J., he could not challenge O'Connell J.'s rejection of the appellant's evidence. Instead, counsel tried to develop an entrapment theory based on the evidence of the Crown witnesses. Counsel found himself in the difficult position of arguing that the appellant was entrapped on February 19th or 20th, despite the appellant's own evidence that there was no mention of drugs until the meeting in early March when Makdesion threatened his life.

[35] I find it hard to give any credence to a submission that the appellant established entrapment on the balance of probabilities based on a version of events which is directly contrary to his own evidence and places the entrapment some weeks before the appellant says there was any mention of drugs. The appellant's argument comes down to this: O'Connell J. erred in failing to find that the appellant had established entrapment on the balance of probabilities based on events which the appellant insisted never happened! The futility of the submission is self-evident.

[36] On any reasonable view, the appellant's entrapment claim at trial rested on his evidence that Makdesion threatened his life in early March and on later occasions. Without his testimony, the entrapment argument was untenable. The trial judge rejected the appellant's testimony that he was threatened. He had very good reason on the record before him to do so and the appellant cannot challenge that assessment on appeal.

[37] Even though I regard an entrapment theory based on the events in February as devoid of any air of reality, given the appellant's evidence, I am also satisfied that the appellant's submission that O'Connell J.'s conclusion was unreasonable must be rejected even if one ignores the appellant's evidence.

[38] The topic of drugs first came up with the appellant on February 19th, according to Makdesion, and on February 20th, according to Elkind. Makdesion testified that the appellant brought up the topic. Elkind could not remember who brought up the topic. The appellant provided a sample of cocaine to Makdesion and Elkind on February 21st. Counsel for the appellant argues that on February 19th or 20th, the police, acting through their agents, provided the appellant with an opportunity to traffic in narcotics and that at that time they did not have a reasonable suspicion that he was already engaged in drug trafficking. This submission assumes that the police agents introduced the topic of trafficking in narcotics and thereby presented the appellant with the opportunity of participating in that crime. There is no direct evidence to support this contention. It is contrary to Makdesion's evidence, not assisted by Elkind's evidence, and of course completely contradictory to the appellant's evidence, since he insisted that there were no discussions about drugs until about two weeks later. It was incumbent on the appellant to establish on the balance of probabilities that the police provided that opportunity through their agents. On this evidence, I do not think a trier of fact could find that the police agents instigated the discussion about drugs.

[39] Even if one could somehow tease from the evidence a positive finding that the police agents initiated the discussion about drug trafficking and thereby presented the appellant with an opportunity to traffic in cocaine, there was ample evidence that as of February 19th, the police had a reasonable suspicion that the appellant was engaged in drug trafficking. I would summarize that evidence as follows:

- The police had a reasonable suspicion that Kirpaul, a convicted drug trafficker, was engaged in drug trafficking.

- The police had been told by a person who knew both Kirpaul and the appellant that the appellant was Kirpaul's "boss" and that Kirpaul could be contacted through the appellant. That same person associated the appellant with Kompani who had discussed the possibility of drug deals with Makdesion.

- Prior to meeting the appellant, the police agents had met with Kirpaul's associate, Kompani, who had expressed an interest in trafficking in drugs with Makdesion.

- At the first meeting between Elkind and the appellant, the appellant was aware that Elkind and Makdesion had met with Kirpaul and Kompani. The appellant said that Kompani had been impressed with Makdesion, but that Kirpaul got "nervous". This comment could reasonably be taken as referring to Kompani's discussion with Makdesion about possible drug deals, and as an explanation for Kompani's failure to follow up on the discussions.

[40] These facts, considered in combination, could provide ample basis for a reasonable suspicion that the appellant was engaged in the trafficking of narcotics with Kirpaul and Kompani prior to February 19th. More to the point, given that the onus was on the appellant, this evidence was certainly sufficient to foreclose any finding on the balance of probabilities that the police did not have a reasonable suspicion that the appellant was involved in drug trafficking as of February 19, 1991.

[41] There is no merit to the appellant's submission that O'Connell J. misapprehended relevant evidence or that his rejection of the entrapment claim was unreasonable.

IV

The fresh evidence

[42] Frank Makdesion had been a paid F.B.I. agent since 1988. He was paid for his services, at least in part, based on the results of the investigations in which he participated. He had been involved in previous investigations with the O.P.P. F.B.I. Agent Pocica was Makdesion's handler during this investigation. He was later reassigned after he violated F.B.I. policy by becoming involved in business dealings with Makdesion. Agent Carter assumed responsibility for Makdesion in the late summer of 1991.

[43] Makdesion testified at the mistrial. He was asked about his criminal record during examination-in-chief by the Crown:

> Q. Okay. Right. I understand you have a criminal record, sir. Is that correct?
>
> A. 11 years ago, yes. 10 years ago, 11 years ago.
>
> Q. Okay, and can you tell us about that.
>
> A. Was possession of, ah, for, like, half a gram of, ah, cocaine.
>
> Q. Mm-hm. You had a half a gram of cocaine?

A. Possession of it.

Q. In your possession?

A. Yes.

Q. Okay. And you were charged with possessing that?

A. Yes.

Q. And what happened to that charge?

A. I plead guilty, myself, and I got probation.

Q. You got probation?

A. Yes.

Q. Did you spend any time in jail?

A. No.

Q. All right. Okay. Were you ordered to do any community service or anything like that?

A. No, was just fine and probation.

Q. You paid a fine?

A. Yes.

Q. How much was the fine?

A. I can't remember. Was 10, 11 years ago.

Q. Okay. All right. [Emphasis added.]

[44] Crown counsel returned to Makdesion's criminal record at the end of his examination-in-chief:

Q. We talked about your criminal record, the possession of cocaine?

A. Yes.

Q. Right. And you received a fine and probation?

A. Yes.

Q. Did the FBI get involved in that case with anyone?

A. No, they got nothing to do with it. And that was before I went to the FBI. …

[45] When cross-examined on the circumstances surrounding the conviction, Makdesion indicated that he was duped into holding the cocaine and that he did not know it was illegal to possess cocaine.

[46] The transcript of Makdesion's evidence at trial was before O'Connell J. on the entrapment hearing. Makdesion also testified on the entrapment hearing. He was cross-examined extensively about his criminal past. He repeatedly acknowledged the single prior conviction for possession of a narcotic, and never indicated that he had any further convictions. The portion of Makdesion's trial testimony set out above [paragraph 43] was put to Makdesion in the course of cross-examination on the entrapment hearing. He did not change or clarify the answers he had given at trial. There were also several discrepancies between his evidence on the entrapment hearing and his evidence at trial as to the details of the events giving rise to the single conviction he acknowledged.

[47] Makdesion was also asked on cross-examination whether he had been charged with conspiracy to sell narcotics in 1986. He said that he had been charged but that the police had no case and the matter never went to trial.

[48] Some time shortly after the appellant was sentenced, his trial lawyer (not Mr. Lockyer nor Mr. Schreck) learned that Makdesion's criminal record was more extensive than the single conviction he had admitted during his testimony at trial and on the entrapment hearing. Counsel was advised that Makdesion's criminal record consisted of the following:

1. Conviction date: March 28, 1989
   Incident date: November 15, 1986
   Charge: Assault with a dangerous weapon
   Disposition: Guilty plea
   Sentence: 90 days imprisonment, $750 fine, 2 years probation

2. Conviction date: March 28, 1989
   Incident date: November 15, 1986
   Charge: Possession of controlled substance less than 50 grams
   Disposition: Guilty plea
   Sentence: 90 days imprisonment, 2 years probation

3. Conviction date: March 27, 1989
   Incident date: January 25, 1987
   Conviction: Possession of controlled substance less than 50 grams
   Disposition: Guilty plea
   Sentence: 2 years probation

4. Conviction date: July 22, 1988
   Incident date: September 16, 1987
   Conviction: Possession of controlled substance less than 50 grams
   Disposition: Found guilty
   Sentence: 2 years probation

[49] In his testimony, Makdesion had referred only to the fourth conviction set out above. The other three convictions were subsequent to the one Makdesion had acknowledged, although they related to two separate events, both of which had occurred before the events giving rise to the conviction he

admitted during his testimony. Makdesion was in the employ of the F.B.I. when the convictions which he did not mention in his evidence were entered against him.

[50] Armed with the information that Makdesion had a more extensive trial record, trial counsel wrote to the Crown and asked him to verify the information trial counsel had received. He also asked the Crown to explain why defence counsel had not been given Makdesion's full criminal record.

[51] In his response, Crown counsel verified that Makdesion did have the additional convictions discovered by defence counsel. He provided records detailing those convictions that had been forwarded to the Crown by Agent Carter of the F.B.I. Crown counsel told trial counsel that he did not have that information until F.B.I. Agent Carter had forwarded it to him in response to trial counsel's inquiry. Crown counsel went on to say:

> … This material [documents setting out Makdesion's various convictions] has never been in the possession of the Crown or in the possession of the Ontario Provincial Police. Additionally, neither myself nor Kevin Wilson of this office were aware of convictions other than that which was previously disclosed to you, as well, Randy Roziak, Don Perron and Al Bush [O.P.P. officers] have indicated they were also unaware of any further convictions or for that matter charges. I am unable to say why this information was not disclosed at an earlier time. [Emphasis added.]

[52] Crown counsel also advised trial counsel that when Agent Carter provided the Crown with the additional entries on Makdesion's record, he also indicated that Makdesion had been charged with firearms offences, assaults and drug possession in January 1987. Makdesion pled guilty to the drug charge (entry number 3 on the criminal record set out above) and the other charges had been dismissed or withdrawn.

[53] Some time after appellate counsel had been retained, he wrote to the Crown requesting a further and better explanation for the failure to disclose Makdesion's full criminal record. Counsel wrote:

> I am therefore requesting that you provide me with some explanation as to why Mr. Makdesion's entire criminal record was not disclosed to Mr. Ahluwalia's counsel in a timely fashion prior to sentencing.

[54] Crown counsel telephoned appellate counsel and advised him that the information provided to the Crown by the F.B.I. prior to trial referred only to the conviction that Makdesion had admitted in evidence. The Crown reiterated its position but it did not learn of Makdesion's full record until trial counsel provided it to him after the sentencing. Crown counsel also continued to take the position that he could not explain why he did not receive Makdesion's full criminal record from the F.B.I. [3]

[55] Counsel wrote again to Crown counsel and asked him to produce Makdesion and agent Carter for cross-examination with a view to determining why the full record had not been disclosed to the defence. Crown counsel declined to produce the witnesses saying "I'm of the view that the effect of the non-disclosure can and should be dealt with on the basis of the existing record". The existing record included Crown counsel's statement that he could offer no explanation for the failure to disclose the full record. [4]

[56] Counsel for the appellant submits that the fresh evidence demonstrates a failure by the prosecution to make full disclosure and that the effect of that failure on the convictions must be measured by the standard set in *R. v. Dixon* (1998), 1998 CanLII 805 (SCC), 122 C.C.C. (3d) 1 at 11-19 (S.C.C.). In advancing this submission, counsel argues that as the Crown requested the assistance of the F.B.I. in the investigation, it must bear the responsibility of "choosing to do business with foreign authorities who behave unfairly."

[57] I am not persuaded that this should be approached as a case involving non-disclosure. On the present record, it cannot be said that the Crown failed to produce everything it had concerning Makdesion's criminal record, nor that it had any reason to think that it had not disclosed the entire record to the defence. It is not clear to me that the prosecution's failure to disclose information kept from it by a third party, even a foreign police agency, is properly described as non-disclosure. I tend to the view that the admissibility of the evidence tendered on appeal should be determined by reference to general principles governing the admissibility of evidence on appeal. Those principles were set down in *R. v. Palmer* (1979), 1979 CanLII 8 (SCC), 50 C.C.C. (2d) 193 (S.C.C.) and recently reaffirmed in *R. v. Lévesque*, 2000 SCC 47.

[58] I do not, however, have to choose between these two characterizations as, in my view, the evidence is admissible and determinative of the appeal on either characterization. Indeed, as Rosenberg J.A. recently observed in *R. v. Babinski* (1999), 1999 CanLII 3718 (ON CA), 135 C.C.C. (3d) 1 at 19 (Ont. C.A.), in so far as the inquiry into the effect of the fresh evidence on the verdict is concerned, the test enunciated in *R. v. Dixon*, *supra*, and the fourth criterion set down in *R. v. Palmer*, *supra*, are similar and overlapping. I will test the admissibility of the fresh evidence against the four criteria set down in *R. v. Palmer*, *supra*.

[59] The Crown accepts that the appellant has met the first three criteria. The defence exercised due diligence, and the fresh evidence is credible and relevant. Counsel submits, however, relying on the fourth criterion in *R. v. Palmer*, *supra*, that the fresh evidence, when taken with the other evidence adduced on the entrapment hearing, could not reasonably be expected to have affected the result.

[60] The fresh evidence compels the conclusion that Makdesion committed perjury at the trial when he testified about his criminal record and that he did not resile from that perjury when questioned about his criminal record on the entrapment hearing. Makdesion was an important witness and his credibility was very much in issue, especially as it related to his testimony that he did not threaten the appellant. While the additional convictions disclosed by the fresh evidence had some impeachment value, the fact that Makdesion committed perjury when asked about his criminal record could very well destroy his credibility entirely.

[61] The fresh evidence also reveals that Makdesion had committed an assault with a dangerous weapon on one occasion and that on another occasion he had been charged with assault and firearm offences. This information could have been used by the defence in its cross-examination of Makdesion in an effort to support its position that Makdesion could be a violent person and that he had threatened the appellant with a gun. [5]

[62] Given Makdesion's improbable explanation for the one conviction he acknowledged in his evidence, the explanations he may have offered for the additional convictions and charges would no doubt have opened the door to further cross-examination going to his credibility.

[63] Even though the fresh evidence could destroy Makdesion's credibility, if its value rested exclusively in its ability to impeach Makdesion's credibility, it would be debatable whether the fresh evidence taken with the evidence adduced at trial could reasonably be expected to have affected the result. The fresh evidence establishes that Makdesion, like the appellant, is a perjurer. The appellant, however, had the onus of demonstrating entrapment on the balance of probabilities. I do not think his entrapment claim could succeed unless his evidence concerning the threats by Makdesion was credible. The appellant's perjury was obvious and indeed admitted by him. It is open to serious question whether the fact that Makdesion was also a perjurer could in any way restore the credibility of the appellant. If the appellant was not believed, his entrapment claim would fail whether Makdesion was believed or disbelieved

[64] I need not decide whether the potential impact of the fresh evidence on Makdesion's credibility is by itself sufficient to warrant a new entrapment hearing. The fresh evidence has implications beyond those relating exclusively to Makdesion's credibility. I think the fresh evidence raises serious questions about state involvement in Makdesion's perjury. The answer to these questions could affect the entrapment claim and raise abuse of process concerns apart entirely from entrapment.

[65] At trial, in answer to a very open-ended question by Crown counsel (*supra*, para. 43), Makdesion testified that he had one prior conviction. This answer was false. It also coincided exactly with the incomplete disclosure the Crown had provided to the defence and which the Crown now says it received from the F.B.I. The fresh evidence establishes that the F.B.I. had the more extensive criminal record which it has now revealed. In fact, Makdesion was in the employ of the F.B.I. when he was convicted of the additional offences shown in the record uncovered by defence.

[66] The correspondence between Makdesion's perjury and the incomplete disclosure provided to the defence is what makes the fresh evidence so troubling. How is it that Makdesion felt he could reveal only one entry in his criminal record when asked if he had a criminal record? It would appear that his handler, Agent Carter, who was aware of his full criminal record, was in the courtroom when Makdesion gave this evidence.[6] Furthermore, how is it that the one conviction which Makdesion chose to reveal was also the one conviction disclosed to the defence?

[67] One answer to these questions is that Makdesion was aware that an incomplete version of his criminal record had been disclosed to the defence and he believed he could perjure himself without fear of being confronted with additional convictions. If that is what happened, those responsible for providing the incomplete disclosure would potentially be implicated in the perjury. If one were to conclude that those responsible for providing full disclosure deliberately failed to do so and knew that Makdesion tailored his evidence to fit the incomplete disclosure, the integrity of the entire investigation would be in doubt. If one or more police officers deliberately misled the Crown, and ultimately the defence, as to the extent of Makdesion's criminal record so as to facilitate Makdesion's perjury, one could legitimately question the integrity of the entire investigation. One could also wonder what it was about the events underlying the undisclosed convictions that caused the police and Makdesion to hide them from the defence.

[68] In the course of his reasons, O'Connell J. indicated that he found it difficult to believe that Makdesion would threaten the appellant with a gun while under the close scrutiny of his police handlers. O'Connell J. might have come to a different conclusion if there was evidence before him that

supported the inference that one or more of those handlers were prepared to provide misleading disclosure and permit Makdesion to perjure himself.

[69] The questions I have raised cannot be answered based on the fresh evidence. I should not be taken as suggesting, much less finding, that any police officer or F.B.I. agent acted improperly. There may well be an "innocent" explanation for how Makdesion came to give perjured evidence which matched the incomplete disclosure, or it may be that the fault for the non-disclosure does not lie with the police or the F.B.I. All that can be said on the present state of the fresh evidence is that Makdesion perjured himself and the nature of his perjury, combined with the incomplete disclosure, raises serious concerns about potential state complicity in that perjury.

[70] These concerns remain unanswered largely because of the position taken by the Crown when confronted with the perjury of its own witness. Once the Crown had verified the information provided to it by the defence, it knew that Makdesion had committed perjury. It must also have been obvious to the Crown that Makdesion's perjured testimony was consistent with the incomplete disclosure that the Crown says came from the F.B.I. I would think that the Crown would have recognized that the information provided to them by the defence raised serious questions about the integrity of the prosecution, and would have launched a thorough investigation aimed at finding out exactly what had happened.

[71] For reasons not shared with this court, the Crown does not appear to have regarded itself as under any obligation to get to the bottom of this matter. It contented itself with inquiries of counsel involved in the case and some of the Canadian police officers.[7] The Crown does not appear to have made any inquiries of Makdesion or the F.B.I. agents responsible for providing Makdesion's criminal record to the Crown. As those involved in the Canadian component of the investigation disavowed any knowledge of Makdesion's full criminal record, inquiries of Makdesion and the relevant F.B.I. agents would have been the next obvious step. Not only was the Crown apparently uninterested in finding out what light Makdesion or Agent Carter might shed on the troubling questions raised in the fresh evidence, it also refused to assist the defence in obtaining that information by way of cross-examination of Makdesion or Agent Carter.

[72] The Crown has obligations to the administration of justice that do not burden other litigants. Faced with its own witness's perjury and the fact that the perjured evidence coincided with the incomplete disclosure that the Crown says it innocently passed to the defence, the Crown was obliged to take all reasonable steps to find out what had happened and to share the results of those inquiries with the defence. In my view, the Crown did not fulfill its obligations to the administration of justice by acknowledging the incomplete disclosure discovered by the defence, and after making limited inquiries, professing neither a responsibility for the incomplete disclosure nor an ability to provide any explanation for it. The Crown owed both the appellant and the court a fuller explanation than it chose to provide.

[73] The Crown's decision to leave the questions raised by the fresh evidence unanswered has put it in an untenable position in resisting the admissibility of the fresh evidence. Remarkably, the Crown professed to have no idea why full disclosure had not been made, offered no explanation for how it was that Makdesion's perjury coincided with the incomplete disclosure, and yet argued that the appeal should be dismissed without any further inquiry. [8]

[74] The fresh evidence establishes beyond peradventure that Makdesion committed perjury. It also raises the reasonable possibility of state complicity in that perjury. If such complicity exists, the integrity of the entire investigation and prosecution is open to reassessment. Abuse of process arguments, apart entirely from an entrapment claim, may well be open. The fresh evidence raises serious questions, the answers to which lie with the prosecution. It has chosen not to attempt to answer those questions in this court.

[75] The appellant has established that depending on the answers to the questions outlined above, the fresh evidence could reasonably, when taken with the other evidence adduced at the entrapment hearing, be expected to have affected the result at that hearing. A new entrapment hearing is necessary to resolve the serious unanswered questions raised by the fresh evidence.

[76] I would allow the appeal, quash the convictions and direct a new entrapment hearing. There is no challenge to the guilty pleas and the guilty verdicts stand: *R. v. Pearson*, 1998 CanLII 776 (SCC), [1998] 3 S.C.R. 620.

Released: "Dec. 1, 2000"

"CAO"

"Doherty J.A."
"I agree C.A. Osborne ACJO"
"I agree John Laskin J.A."

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[1] The co-accused, Singh, has also appealed. His appeal is presently an in-person appeal. The court was advised on the hearing of this appeal that Singh is in fact represented by counsel and that he had advised counsel for both the appellants and the Crown that Singh did not wish to participate in this appeal. He is content to have his appeal heard after this appeal is determined. If this appeal is dismissed, Mr. Singh's appeal must fail. If this appeal is allowed, then the merits of Mr. Singh's appeal must be addressed bearing in mind the result of this appeal.

[2] The parties to this appeal advanced different views of the meaning to be attributed to the phrase "bona fide inquiry". I need not address that controversy: see *R. v. Barnes* (1991), 1991 CanLII 84 (SCC), 63 C.C.C. (3d) 1 (S.C.C.).

[3] Counsel for the appellant does not concede that the criminal record disclosed to the defence after trial is necessarily Makdesion's entire record.

[4] Counsel did not apply for an order compelling the appearance of Agent Carter or Makdesion. Presumably, they reside outside of Canada.

[5] Agent Carter told the Crown that the assault with a weapon charge did not involve a firearm and arose out of a domestic dispute. The defence would, of course, not be obliged to accept that representation.

[6] Makdesion testified on May 15, 1996. The two extracts from his examination-in-chief set out above (see paras. 42, 43) are found at pp. 505-506 of the transcript and at p. 569. At p. 573, very shortly after

cross-examination commenced, Crown counsel raised an objection to a question put by defence counsel and asked Agent Carter to leave the courtroom. It would seem, therefore, that Agent Carter was in the courtroom during Makdesion's examination-in-chief.

[7] In counsel's response to the inquiries about Makdesion's criminal record, he indicated that he had spoken to certain police officers who assured him that they were unaware of Makdesion's full criminal record. Crown counsel listed the officers he had spoken to. He made no reference to Detective Constable Robinson. Robinson was Elkind's handler and had worked with Makdesion in the past.

[8] In oral argument, Crown counsel, Mr. Visca, who was not the Crown at trial, and was not involved in the post-conviction correspondence, was asked by the court about the failure to make inquiries of the F.B.I. agent responsible for disclosure. He advised that at some time prior to oral argument, he had spoken with Agent Carter. It was Carter's position to Crown counsel that full disclosure had been made of Makdesion's criminal record to the Canadian authorities. While Crown counsel's account of what agent Carter said is not evidence on this appeal, it hardly resolves the questions raised by the fresh evidence. If anything, it highlights the need for further inquiry.