

R v. Devloo, [2020] MJ No. 2

By N McRae

Credibility of a Civilian Agent

Where the Crown has employed the use of a civilian agent to procure evidence from a criminal enterprise that agent's credibility becomes integral to the credibility of any evidence they procure. This is especially true when the agent has some aspect of their person, such as a criminal history, which might indicate some level of untrustworthiness. In this case the civilian agent is the sole source of the evidence produced against the appellant, and the agent's trustworthiness form the first ground for appeal. The general rule that, absent an overriding error, an appellate court must show deference to findings of fact is operative in this case and the Court of Appeal must defer to the trial judge's assessment of the agent's character.

In the trial of this case, the judge recognized the concerns of the plaintiff (appellant) that the agent's history of being untruthful with his handlers should call into question evidence which could not be independently verified. This argument was however rejected, due to the fact of the agent appearing to be generally intelligent and the instances of the agent being untruthful were not related nor were they regarding items of significance to the surveillance project. The trial judge was nonetheless required by the decision in *Vetrovec v. The Queen* to seek additional confirmation of evidence supplied only by an agent with questionable credibility. The specific evidence which the appellant complains of is a text message in a restaurant, providing two methods of independent verification of what the agent claimed. Despite the minor inconsistencies with the agent's testimony, the trial judge found that he was sufficiently credible based on the totality of his interactions with his handlers and his testimony; this finding was entitled to deference and the Court of Appeal was unwilling to disturb it.

Opinion and Hearsay Evidence

The appellant raised additional issues surrounding evidence submitted which he believes to be based on the opinion of the agent and therefore inadmissible hearsay. This invites an examination of the curious circumstance where the agent is relied on to essentially act as expert witnesses in relation to the drug trafficking trade; instead of cautionary requirements based on his criminal history, the Crown is now relying on it to provide context to the interactions with the appellant. This is supported by the statements of the appellate judge in para 32 where the experience with the drug trade and the language used entitled the agent to draw inferences based on his understanding of events as they unfolded. To my eye the Court appears to contradict itself in the following paragraph, stating that if there is an aspect of opinion in the evidence it is admissible as lay opinion. If the opinions of the agent are to be considered lay opinion what purpose is there to reference his familiarity with the drug world and its language? The Court could just have easily allowed those statements as inferences of witnesses *per Graat v. The Queen* instead of implying that they were of particular value based on the agent's experience; in fact, opinions based on experience were addressed in *Graat* and the court concluded that it would be improper to give preferential treatment in those circumstances.

Misapprehensions of Evidence

After all the effort which has been expended to ensure that the evidence and opinions of the agent are admissible at trial, evidence must still be handled correctly to afford an accused a fair trial. The role of an appellate court in situations where there may have been a misapprehension of evidence is detailed, and referenced, in the cases of *R v. Sinclair* and *R v. Whiteway*. For evidence to have been misapprehended, the trial judge must have made more than an apparent mistake; that is, errors which the judge may have made but are speculative in nature. To determine what is an apparent mistake and what is an actual mistake the appellate court must not overly disturb findings of fact by effectively dissecting the reasons of the judge. Underlying this entire analysis is that there is a difference between misapprehension of evidence and a different interpretation of the evidence which is adopted by the trial judge. This

applies to both judges and accused in appeals. In this case what the appellant contended were misapprehensions of evidence were not found to be actual mistakes by the trial judge, rather all six issues were instances where the accused simply disagreed with the interpretation of the trial judge.

