14/2/08
Cim

IN THE GRAND COURT OF THE CAYMAN ISLANDS
Before The Honourable Chief Justice

IND. #45/06
#46/06

A.B.*

-vs-

REGINA

Preliminary Argument in respect of the Crown's obligation to present RCIPS Investigating Officers for cross-examination and as to the completion of the Crown's obligation to disclosure sensitive information which was at one time the subject of Public Interest Immunity Orders.

Present

Mr. Ward Senior Crown Counsel for the Crown
Mr. Ben Tonner for the applicant A.B.

14th February 2008

RULING

1. The question is whether the investigating officers should be required to submit to cross-examination as to their dealings with the applicant who was a confidential informant. These dealings were in respect of two significant criminal conspiracies which culminated in robberies of two businesses in Grand Cayman.

2. The purpose of this cross-examination would be, as Mr. Tonner puts it – to ascertain whether the evidence of the officers might strengthen the basis of the applicant's pending application to vacate his plea of guilty. These are pleas already entered in relation to each of the two acts of offences described above.

3. That application to vacate the pleas will proceed, I am told, on the hypothesis that had the Crown disclosed to his attorney, the fact of the applicant's role as an

informant and any relevant information in relation to his role, the applicant might have been advised to plead not guilty. Further, that he should now, on the basis of his attorney's advice given in the light of the information that has since been disclosed, be allowed to withdraw his guilty pleas and have his conviction set aside.

4. Whatever the merits or lack of merits ultimately to be ascribed to his application to vacate his pleas, the question for me now is whether the applicant should be allowed to cross-examine the officers for the purposes explained above.

5. This question of cross-examination arises against the background of the Crown having – since being requested to do so by the defence for the purposes of the application to vacate the pleas – provided four documents which the Crown asserts comprise the entire record within the RCIPS of the appellants' relationship with the RCIPS as informant. These are documents which clearly show that he was indeed providing undercover intelligence about the involvement of others who later came also to be charged in respect of the two sets of offences.

6. The defence at its request has also been provided with a copy of the applicant's custody record while he was in the custody of the RCIPS. This record, according to Mr. Tonner, shows that at some point in time, the applicant had been taken by his police handlers from the lock-ups to somewhere else. There is however no record of the purpose for this movement.

7. It is Mr. Tonner's belief that that was an occasion when the applicant identified to the officers one of the others who had been involved in the offences. At this very hearing before me, Mr. Ward also provided a memorandum addressed to the

Court from the RCIPS which summarises in text form, the contributions made by the applicant in his role as informant. So in summary, there has been disclosure of the form documents recording the relationship of informant, the custody record and the RCIPS memorandum describing the applicant's role as informant.

8. Despite this giving of disclosure at the request of the defence, Mr. Tonner says that there might be more to be elicited by way of cross-examination of the officers. Such further information he asserts could bolster the applicant's assertions that, had the Crown at the outset, made full and frank disclosure, his pleas may well have been different. And this notwithstanding that the whole subject of the disclosure would relate particularly to his own involvement going to his own state of mind: matters peculiarly therefore within his own knowledge.

9. There is authoritative judicial pronouncement which clearly discountenances allowing cross-examination of the kind proposed by Mr. Tonner. I regard the reasons given as highly cogent and persuasive.

10. Re X [1999] 2 Cr App R 125 the dispute was over whether a document disclosed by the police relating to assistance given by X as an informant, fully reflected that assistance or its result so as to provide the Court an accurate basis for the sentencing of X.

11. In deciding upon whether X ought to have been allowed to cross-examine his police handlers about those matters, the English Court of Appeal established the following guidelines which I adopt as being applicable and suitable to the present situation:

"3. Courts must rely very heavily upon the greatest possible care being taken, by the Police in compiling a document that fully reflects the assistance given by the informant, and in the event it might be relevant to questions of sentencing, the results of his assistance. The judge will have to rely upon (that document), without investigation, if police enquries are not to be damaged or compromised and other suspects, guilty or innocent, are not to be affected.....Those who prepare such documents, and senior officers who verify them, must realise the importance of ensuring that they are complete and accurate.

4. Except in very unusual circumstances, it will not be necessary, nor will it be desirable for a document of this kind to contain that kind of details which would attract a Public Interest Immunity ("PII") application."

12. I must interject here to note however, that while the documents in this case had been ordered to be kept sealed on the basis of a PII application by the Crown, the primary concern of this Court then was to protect the identity of the applicant as informant and his role as informant. When those matters became relevant to the defence of the other defendants and the PII protection was reversed, the Crown discontinued the prosecution against the other defendants in order to protect the identity of the applicant and the information about his involvement.

I continue the question from In Re X:

"5...

6. Absent any consideration of PII [(as is now the case here with the documents already disclosed to the applicant and as he is entitled to further disclose them as they may relate to his case)], the document is fully available to defence counsel who is free to discuss it with the applicant his client.

   That is not, it is to be emphasized, because it will be necessary to debate its contents, but it is that there should be no room for doubt about what the judge has been informed about the applicant. [(For the purposes of sentencing)].

   Furthermore, there should never normally be any question of evidence being given, nor of an issue being tried upon the question of the extent of the information provided.

7. If the defendant wishes to disagree with the contents of such a document, it is not appropriate for there to be cross-examination of the policeman, whether in Court or in Chambers. The policeman is not a Crown witness, he has simply provided material for the judge at the request of the defendant.

   [(In the context I would add in the present situation, of the defendant's application to vacate his plea)].

   If the applicant does not accept what the documents says, his remedy is not to rely upon it."

Quite apart from the position of the police officers as officers reporting at the request of the defendant [(e.g. as here in fulfillment of the

Crown's duty of disclosure)] cross-examination on the usefulness, [(completeness or otherwise)] of the information, would almost inevitably be contrary to the public interest. If allowed, it would most certainly become known that police officers are prone to having to disclose confidential information in this way in Court proceedings. That would be likely to damage other investigations, trials yet to come of other suspects guilty or innocent and more generally, the ability of the police to maintain the confidence of those who would give important information leading to the detection or prevention of crime.

8. ...

9. [(Observations relevant to sentencing)].

13. Consistent with these principles I have decided - as did the Court of Appeal in X's case - to decline to investigate any further into the accuracy or completeness of the documentation already provided. That documentation was given with the Crown's assurance that it contains any and everything of relevance to the applicant's case for the vacating of his plea. Indeed, the memorandum that summarises his involvement, clearly explains in narrative form, the details contained in the other documents.

14. *Prima facie* therefore, the Crown is in full compliance with its duty of disclosure such as that duty can properly be said to arise in favour of someone who is not being prosecuted but instead seeking to have set aside, his own plea of guilty.

15. Nothing from the arguments point to any basis for thinking that there is other relevant information known to the officers which has not been disclosed.

16. If there is something relevant and which is known to the applicant from his own involvement with the police officers, he is free to disclose that to his attorney who is then free to raise it with the Crown to see whether it might become the subject of an admission by the Crown. If the Crown is not to agree such a matter, it can hardly be right that the attorney should, in a pre-emptive way, be allowed to interrogate the police officers in the hope that those equivalent of an admission might be extracted.

17. The application for cross-examination is refused for all the foregoing reasons.

Hon. Anthony Smellie
Chief Justice

14th February 2008