'Improper and illegal'

Entrapment spoils a drug case

Cape Dorset, a community of about 800 people on the southwestern tip of Baffin Island, is known to the world as a centre of Inuit art. But the success of the village's artists has brought problems along with prosperity. "There's quite a bit of money in this community, no doubt about it," says Constable Brian Donogh of the local RCMP detachment. "Some of these guys make $100,000 a year or more selling their stuff, travelling to Europe and so on." A lot of that money is spent on drugs. Flown into Iqaluit (formerly Frobisher Bay) from Montreal and Ottawa, the contraband is brought to Cape Dorset by dozens of local traffickers. Drug use is widespread—one bust a week is not uncommon—"mostly because there's nothing really to do around here," says Const. Donogh. "Most people are bored a lot of the time."

In April, 15 people from the village were charged with trafficking in hashish after an undercover operation that began when schoolteacher Thomas Fitzsimmons, charged with possession of more than half a pound of hashish, agreed to work with police before being sentenced. Most of the cases ended in convictions and sentences averaging from three to five months. But last month Mr. Justice David Marshall of the Supreme Court of the Northwest Territories stayed a charge of trafficking in hashish against one of the accused after finding that police had entrapped him.

Although the concept of entrapment is a controversial one in Canadian law, Mr. Justice Marshall found that the function of the courts "in protecting the rights of the citizens before them . . . must entail the power to ensure that citizens are not abused by state power at any stage of the criminal process."

The accused, an Inuit named Joemie Ashoona, testified that he was at home one night in November 1985 getting ready to go to bed when Mr. Fitzsimmons arrived. The police agent, he testified, offered to give him two packages of hashish if he would sell a third to a friend whom he expected to arrive at any minute. The friend, dressed in work clothes with a heavy beard and shoulder-length hair, turned out to be an undercover RCMP officer flown into Cape Dorset specifically to investigate the drug trade.

Mr. Justice Marshall found that Mr. Ashoona's testimony raised a reasonable doubt sufficient to warrant dismissal of the case. "If the evidence of the accused is accepted," he wrote, "the conduct of the police agent in going to the accused's home late at night and handing him three packages of drugs and inducing him by telling him that two would be his if he dealt in the third, was an improper and illegal inducement. Such a scheme . . . is not one acceptable to the Canadian public and would bring the administration of justice into disrepute."

Cape Dorset, N.W.T.
A centre of the drug trade in the eastern Arctic.

As Mr. Justice Marshall described it in his 15-page decision, the place of entrapment in Canadian law stands somewhere between the British and American. British courts do not recognize the defence at all. "What the judge at the trial is concerned with," declared the British jurist Lord Diplock in a 1979 case, "is not how the evidence . . . has been obtained, but how it is used by the prosecution at trial." Courts in the United States, on the other hand, have for more than 100 years accepted entrapment as a defence leading to complete acquittal. American courts have produced two lines of reasoning on the issue. The first states that something done at the instigation of police does not constitute an illegal act. The second, in the words of the noted Supreme Court justice Louis D. Brandeis, holds that the courts must reject cases in which the state has taken part in the very crime it seeks to prosecute, "in order to maintain respect of law . . . promote confidence in the administration of justice [and] preserve the judicial process from contamination."

It is the second line of reasoning that Canadian courts have tended to follow. After a number of cases in which different courts ruled various ways on the issue, the Supreme Court of Canada established a binding precedent in the 1982 case of Amato vs. the Queen, in which a Vancouver hairdresser claimed an undercover policeman had pestered him continually until he agreed to sell the man drugs. Writing for the majority that found the defence of entrapment does exist in Canadian law, Mr. Justice Willard Estey ruled that it is available when "police investigate an offence and ensnare an accused into committing it" and when "the scheme is so shocking and outrageous as to bring the administration of justice into disrepute." However, Mr. Justice Brian Dickson (now chief justice) agreed with the trial judge who rejected the defence. "What the accused is saying is: 'I did commit the offence. I was importuned by another and fortunately for me that other had some relationship with the police, and as a result I should be found not guilty.' I do not accept that," wrote Mr. Justice Dickson.

Although a majority of the court found that the defence of entrapment exists, Amato lost his case because the police investigation that led to the charge against him was not sufficiently shocking as to bring the administration of justice into disrepute. But according to Mr. Justice Marshall, the conduct of the police in the Ashoona case met that requirement. Cape Dorset, meanwhile, remains a centre of the drug trade in the eastern Arctic. "There have been fewer [drug busts] since the Ashoona investigation," said Const. Donogh last week, "but they're on the rise again. I think [the investigation] put a bit of fear into people, but it hasn't lasted."

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