Citation: *R. v. Prowal*, 2021 YKTC 39

Date: 20210909
Docket: 19-00175
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Chief Judge Cozens

REGINA

v.

BRADLEY ARTHUR JAMES PROWAL,
LUCAS JAMES RADATZKE and
CHRISTOPHER TREY DICK

Publication of evidence taken at the preliminary inquiry is prohibited by court order pursuant to section 539(1) of the *Criminal Code*.

Appearances:

Benjamin Eberhard	Counsel for the Crown
Jennifer A. Cunningham (by telephone)	Counsel and Agent for Bradley Prowal
Jennifer A. Cunningham (by telephone) (Agent for Andrew Fong)	Counsel and Agent for Lucas Radatzke
Jennifer A. Cunningham (by telephone) (Agent for Amy Steele)	Counsel and Agent for Christopher Dick

REASONS FOR JUDGMENT

[1] COZENS C.J.T.C. (Oral): Bradley Prowal has been charged as a co-accused with two others, Lucas Radatzke and Christopher Dick, with having committed an offence contrary to s. 5(2) of the *Controlled Drug and Substances Act*, S.C. 1996, c. 19, ("*CDSA*"), on May 24, 2019.

[2] He was also charged on his own with having committed offences contrary to ss. 5(2), 5(1), and 4(1) of the *CDSA* on May 23 and 24, 2019.

[3] The preliminary inquiry took place on June 7 to 9, 2021. During and at the conclusion of the preliminary inquiry, the two co-accused consented to, or did not contest, committal on the single s. 5(1) *CDSA* count with which they were charged.

[4] Mr. Prowal contested his committal on the co-accused charge. He did not contest his committal on the remaining charges.

[5] The evidence adduced at the preliminary inquiry with respect to the May 24, 2019 single count s. 5(2) *CDSA* offence was that the RCMP executed the search warrants by dynamic entry at 26 South Klondike Highway on that date.

[6] Located in the residence was a large quantity of drugs, both powder and crack cocaine, in a closed safe. The safe was situated in a cupboard in the kitchen area and was not in plain view. The keys to the safe, while in direct proximity within the residence to the location of the safe, in plain view hanging on the wall with other keys were not actually with the safe.

[7] There appeared to be an unsophisticated cocaine cooking operation in the kitchen area.

[8] Mr. Prowal was sleeping on a couch in the open area of the residence. He had a CPAP sleep apnea machine with him. There were various pieces of his clothing and personal documentation in the open area near him.

[9] No items connected to Mr. Prowal were located in any of the bedrooms of the residence. There were no items of clothing associated to Mr. Prowal beyond what he was wearing and right around him.

[10] While the co-accused were linked to the residence through a rental agreement, Mr. Prowal was not.

[11] No fingerprints identified as being Mr. Prowal's were located on the safe, nor were there any identified as being his in other locations within the residence.

[12] There had been no long-term surveillance of the residence that had connected Mr. Prowal to the residence prior to the execution of the search warrant.

[13] No house key was noted or located in his possession.

[14] There was no other direct evidence that linked Mr. Prowal to the residence itself prior to the execution of the search warrant and his presence there.

[15] The search warrant for 26 South Klondike Highway was obtained, in part, on the basis of observations that flowed from an incident on May 23, 2019. On that date, Mr. Prowal had been observed delivering a package to Air North for shipping that contained a significant quantity of cocaine, both powder and crack. Mr. Prowal had been driving a fairly identifiable grey Mustang vehicle on that occasion, known by the RCMP as belonging to Lucas Radatzke. Mr. Prowal was under investigation for *CDSA* charges in relation to this incident when a search warrant was obtained and executed at 26 South Klondike Highway.

[16] The observation of a grey Mustang vehicle parked in the driveway at 26 South Klondike Highway by an RCMP officer driving into Whitehorse from Carcross that appeared to him to match the Mustang associated with Mr. Prowal and Mr. Radatzke, proximate in time to the Air North occurrence, contributed to the obtaining of the search warrant for the 26 South Klondike Highway residence.

[17] Crown counsel submits that there is a sufficiently strong circumstantial case for Mr. Prowal to be committed to stand trial on the s. 5(2) *CDSA* charge with the co-accused.

[18] Counsel submits that Mr. Prowal was in the residence on more than a purely temporary basis. He was sleeping there on a couch, had some personal documents there, a CPAP sleep apnea machine, admittedly portable, and was already under recent investigation in relation to illegal cocaine activity at Air North the day before.

[19] Counsel submits there was a logical inference to be drawn that a known drug dealer would have knowledge that drugs were in the residence of other known drug dealers, these being the co-accused Dick and Radatzke.

[20] Counsel for Mr. Prowal submits that there is no direct evidence, and no evidence that is capable of supporting inferences that Mr. Prowal was in possession of the cocaine found at 26 South Klondike Highway, that could lead the Court to find that the standard for committal was met on a case based on circumstantial evidence. His connection to the 26 South Klondike Highway residence is tenuous at best, and any connection to the drugs in the locked and hidden safe even less so, if at all.

[21] Counsel submits that there is no case made out for constructive possession. At best, the evidence only establishes Mr. Prowal as being essentially a couch surfer in the wrong place at the wrong time. The fact that there is evidence that connects him to an illegal cocaine transaction the day before in an unrelated location does not assist the Crown in establishing the circumstantial case required to his being in constructive possession of the cocaine located at 26 South Klondike Highway.

[22] The test for committal at preliminary inquiry is well set out in the ***R.*** v. ***Tulloch***, 2020 ONSC 6069 case, at paras. 9 to 14 as follows:

> 9 The *Criminal Code* provisions relating to committal can be found in subsection 548(1), which reads as follows:
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> > 548(1) When all the evidence has been taken by the justice, he shall
> >
> > (a) if in his opinion there is sufficient evidence to put the accused on trial for the offence charged or any other indictable offence in respect of the same transaction, order the accused to stand trial; or
> >
> > (b) discharge the accused, if in his opinion on the whole of the evidence no sufficient case is made out to put the accused on trial for the offence charged or any other indictable offence in respect of the same transaction.
>
> 10 If there is sufficient evidence of criminal charges upon which a reasonable and properly instructed jury could convict, the preliminary inquiry judge must commit an accused person to stand trial on those charges: *United States of America v. Shephard*, [1977] 2 S.C.R. 1067, at p. 1080. The threshold at the preliminary inquiry stage is not high: the test is whether there is "any evidence" on which a jury properly instructed could return a guilty verdict: *R. v. Wilson*, 2016 ONCA 235, at para. 21.
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> 11 A preliminary inquiry judge is not permitted to weigh the evidence or make credibility findings. If the Crown has adduced direct evidence on all elements of the offence, the preliminary inquiry judge must commit the

> accused even in the face of exculpatory evidence: *R. v. Arcuri*, 2001 SCC 54, [2001] 2 S.C.R. 828, at para. 29.
>
> 12 An application for certiorari does not involve the reviewing judge substituting their decision for that of the preliminary inquiry judge. Upon review, the preliminary inquiry judge's decision may only be interfered with if a jurisdictional error is shown: *R. v. Manasseri*, 2010 ONCA 396, 276 C.C.C. (3d) 406, at para. 28. The test is whether there is a "scintilla of evidence" upon which the preliminary Inquiry could conclude that committal is justified: *R. v. Martin*, [2001] O.J. No. 4158 (C.A.), at para. 3.
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> 13 There is a distinction, however, when the Crown relies upon circumstantial evidence to justify committal. In these circumstances, the preliminary inquiry judge is permitted to engage in a "limited weighing" exercise. When they do so, the judge does not draw inferences from facts or assess credibility but evaluates "the reasonableness of the inferences to be drawn" from the circumstantial evidence: *Arcuri*, at paras. 29-30. Where more than one inference can be drawn from the evidence, only the inferences that favour the Crown are to be considered: *Wilson*, at para. 24; *R. v. Sazant*, 2004 SCC 77, [2004] 3 S.C.R. 635, at para. 18.
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> 14 If there is no evidence on an essential element of the charge, it is a jurisdictional error to commit an accused for trial: *Shephard*, at p. 1080. It is also important to note that, on review, the preliminary inquiry judge's determination of the sufficiency of evidence is entitled to the greatest deference: *R. v. Russell*, 2001 SCC 53, [2001] 2 S.C.R. 804, at para. 48.
>
> [See also ***R.*** v. ***Deschamplain***, 2004 SCC 76, and ***R.*** v. ***Moore***, 2006 ONCJ 489]

[23] As stated in ***R.*** v. ***Sazant*** (2003), 178 O.A.C. 1, at para. 28:

> …I see no basis in the reasons for concluding that the preliminary inquiry judge proceeded in that way. He properly instructed himself on the tests to be applied at the opening of his reasons: that where there was a scintilla of evidence, he must commit; that he was not to weigh the evidence or assess credibility; and, that all available inferences from the evidence must be made in favour of the Crown. …

[24] With respect to the drawing of inferences, in ***R.*** v. ***Mitchell***, 2014 ONSC 3502,

Ellies J. stated at paras. 55 and 56:

> 55 Inference drawing is a two-step process. First, it is necessary to find the primary fact or facts from which the inference is alleged to flow. Where it is alleged that the primary facts from which an inference has been drawn by the preliminary inquiry judge were not established by the evidence, the task of the reviewing court is a relatively simple one. Where primary facts are not established, then any inferences purportedly drawn from them will be the product of impermissible speculation: *R. v. Alexander*, [2006] O.J. No. 3173 (S.C.), at para. 24. This is what occurred in *R. v. Portillo* (2003), 176 C.C.C. (3d) 467 (Ont. C.A.), one of the cases relied upon by the applicants.
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> 56 The second step in drawing an inference requires a determination as to whether the primary fact or facts make the existence of the inferred fact more likely. As Ducharme J. pointed out in *Alexander*, at para. 21, this second step involves the application of inductive, rather than deductive, logic. In other words, the inference to be drawn from the primary facts *may*, but not necessarily *must*, follow. Deciding whether it does usually involves the application of common sense and human experience. Because we all have different life experiences, the fact that inference drawing is an inductive process means that there may be room for disagreement among reasonable people as to whether an inference should be drawn from an established primary fact. I believe that this is one of the reasons why the reviewing judge's task in an application such as this is usually limited to determining what the preliminary inquiry *judge* could reasonably do, not what the *jury* could: *Tuske*.
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> [See also ***R.*** v. ***Foster*** (2008), 76 W.C.B. (2d) 769 (O.N.S.C.), at para. 31].

[25] In ***R.*** v. ***Barnes***, [2014] O.J. No. 6341 (O.N.S.C.), Tab 1 of the Crown's cases, the accused, who was arrested outside of a residence where drugs were subsequently located, was found to be in possession of a key to the residence. Drugs were also found in the vehicle he was driving when he was arrested. There were no documents or papers in the residence that were connected to the accused. There was no direct evidence to connect the accused to the drugs found in the residence. The drugs were not visible in plain view. There were no prints for the accused found on the plastic bags containing the drugs.

[26] The Court considered what is required to established constructive possession.

At paras. 20 to 22, the Court states:

> 20 For constructive possession, sometimes referred to as attributed possession, there must be knowledge which extends beyond mere quiescent knowledge and discloses some measure of control over the item to be possessed. And I would refer to *R. v. Grey* (1996), 28 O.R. (3d) 417, (C.A.).
>
> 21 For joint possession in accordance with section 4(3)(b) of the *Criminal Code*, there must be knowledge, consent and a measure of control on the part of the person deemed to be in possession. …
>
> 22 Where there is no direct evidence of an accused knowledge of the presence of narcotics, it may be established by circumstantial evidence. The requisite knowledge may be inferred from the circumstantial evidence.

[27] ***Barnes*** was a trial decision and the accused was convicted. The Court found that the key found in the possession of the accused was a significant factor in establishing knowledge and control of the drugs. The Crown was not required to establish the accused had exclusive possession of the drugs.

[28] In the trial context, the "Crown cannot succeed unless the only reasonable inference drawn from the proven facts is that the accused knew the prohibited item was present in the location over which he had control." (p. 10)

[29] In the context of a preliminary inquiry, however, only inferences favourable to the Crown are to be drawn for the purpose of assessing whether the test for committal is met (***R.*** v. ***Jackson***, 2016 ONCA 736, at para. 8, and ***R.*** v. ***Savoury***, [2008] O.J. No. 2896, at para. 14).

[30] In ***R.*** v. ***Biggs***, 2016 ONCA 910, Tab 6 of Mr. Prowal's book of authorities, a trial decision, the Court examined the proper test for establishing constructive possession as set out in ***R.*** v. ***Morelli***, 2010 SCC 8, paras. 10 and 11:

Possession, as relevant to this appeal, is defined in s. 4(3) of the *Criminal Code*, R.S.C. 1985, c. C-46:

> 4(3) For the purposes of this Act,
>
> (a) a person has anything in possession when he has it in his personal possession or knowingly
>
> (i) has it in the actual possession or custody of another person, or
>
> (ii) has it in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or of another person…

[31] The Court then stated at para. 11:

> The trial judge reviewed several of the leading cases dealing with constructive possession. His starting point, correctly in my view, was *Morelli* where Fish J., after setting out s. 4(3)(a) of the *Code*, said, at para. 17:
>
> > *Constructive* possession is established where the accused did not have physical custody of the object in question, but did have it "in the actual possession or custody of another person" or "in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or of another person" (*Criminal Code*, s. 4(3)(a)). Constructive possession is thus complete where the accused: (1) has knowledge of the character of the object, (2) knowingly puts or keeps the object in a particular place, whether or not that place belongs to him, and (3) intends to have the object in the particular place for his "use or benefit" or that of another person.

[32] In ***Biggs***, again a trial decision, a reasonable doubt was raised on the issue of the accused having possession of the drugs hidden in a recessed light fixture in the closet of the bedroom the accused was sleeping in. The Court pointed to:

I. The accused not being the target of a police investigation. There was no surveillance that established the accused as having previously been to the residence;

II. There was no evidence directly connecting the accused to the drugs;

III. There were seven individuals in the house at the time of the raid, including three in the bedroom, no drug paraphernalia was found in the immediate bedroom area where the accused was sleeping; and

IV. The wallet and letter addressed to the accused were not necessarily inconsistent with the accused taking them out of his pocket to sleep and the letter did not have the same address as the residence.

[33] The Court referenced the decision of Laskin J.A., (*R. v. Grey*, [1996] 28 O.R. (3d) 417 (C.A.)) at para. 28, where he stated:

> There was no direct evidence of the appellant's knowledge. The Crown did not have a witness who could state affirmatively that the appellant knew about the cocaine. Also, the drugs seized by the police were not in plain view — they were hidden. To find that the appellant had possession of the cocaine, the trial judge had to infer knowledge from the circumstantial evidence. The case against the appellant rested principally on his regular occupancy of Ms. Escoffery's apartment and on the presence of his clothing and other belongings in the bedroom where the crack cocaine was found. The question is whether the trial judge was entitled to infer knowledge from this evidence. In my opinion, he was not.
>
> …
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> I would not prescribe a firm rule for inferring knowledge from occupancy: cf. *R. v. LePage*, [1995] 1 S.C.R. 654, 36 C.R. (4th) 145. In the present case no other evidence connected the appellant to the drugs, there was no direct evidence of knowledge, the drugs were hidden, the apartment was rented by the co-accused, other persons frequented the apartment, and the appellant was not a permanent occupant. The circumstantial

> evidence does not therefore support a finding that the appellant had knowledge of the crack cocaine. Accordingly, the finding that the Crown had proved possession was unreasonable.

[34] The convictions of the accused were overturned.

[35] I appreciate that ***Biggs*** is also a trial decision, where the test for establishing guilt is much higher for the Crown to meet than it is for committal and where inferences are not to be taken in the best light possible for the Crown.

[36] In ***R.*** v. ***Graham***, 2012 ONCJ 638, it involved a preliminary inquiry decision on committal where a firearm was the subject of the charges. The accused was not committed to stand trial.

[37] The Court stated the test to be applied at para. 18:

> In order to commit Terry Graham on any or all of the charges, I must be satisfied that there is some evidence that a properly instructed jury might find that the accused had possession of the items found. With all forms of possession — actual, joint, or constructive possession — it is necessary that the person knows first that he has the article in his possession. In the case of personal possession, where a person has manual possession of an object, it is often difficult though not impossible to deny knowledge of the presence of the article. In the case of constructive or joint possession, knowledge must often be inferred by circumstances of the case.

[38] In ***Graham***, the Crown relied on the following for committal:

I. The accused being found on a couch in the basement of the residence in only his underwear with clothes and his identification nearby, as

were two scales and a cellphone. The only other individual in the residence was a female;

II. Papers (unspecified) in a safe with the accused's name on them; and

III. The plain-view presence of a shotgun being one of the two firearms involved.

[39] The Court disagreed that the Crown had proven evidence beyond that which would require the Court to engage in speculation and conjecture, even when considering the evidence at its highest in favour of the Crown, stating at para. 36:

> In this case, while it's tempting to find that there is a reasonable inference a properly instructed jury might find that Mr. Graham, who was after all was the named target of the search warrant, was a drug dealer, who hid his firearms because like any drug trafficker, he would not keep his weapons in plain view, that there is simply not the evidence to support those findings. I find it would be pure speculation and conjecture on the quality of evidence that was called at this preliminary hearing to infer Mr. Graham had knowledge or control over the firearms. Knowing that I must consider the evidence at its highest in favour of the Crown at this stage of the proceedings, all this court is left with is that Mr. Graham was in a basement apartment, at midnight, comfortable in his underwear and there were some documents in a safe with his name on them. Going even farther: that Mr. Graham was seated or perhaps, sleeping on a couch and in front of him was a cell phone that might be his and some drug scales. However, based on all of the circumstances, the evidence does not lead a properly instructed jury to go any farther in their analysis and find a reasonable inference that Mr. Graham knew there were firearms stowed away in the basement, let alone that he had control over them.

[40] The case for committal of Mr. Prowal is not strong. His association with 26 South Klondike Highway is tenuous at best:

I. There was no long-term surveillance that placed him as a regular occupant who visited the residence;

II. He was not a tenant of 26 South Klondike Highway, while Mr. Dick and Mr. Radatzke were;

III. There was no documentation in Mr. Prowal's possession that connected him to 26 South Klondike Highway;

IV. He did not have a key to the residence on him;

V. There were no fingerprints of Mr. Prowal's located anywhere, and, in particular, in connection to the immediate area of the safe with the cocaine in it;

VI. There were no other items at 26 South Klondike Highway that connected to Mr. Prowal in a way that showed him to be more than a temporary occupant at the time that the search warrant was executed. This includes the portable CPAP sleep apnea machine; and

VII. The cocaine was not in plain view where Mr. Prowal would be expected to have knowledge of its presence.

[41] The case for committal rests on:

I. Mr. Prowal being in the residence sleeping with a CPAP sleep apnea machine at the time that the search warrant was executed, with some clothes around him, and some paperwork;

II. Mr. Prowal's known association with Mr. Radatzke is evidenced by his use of Mr. Radatzke's grey Mustang; and

III. The incident the day before at Air North where Mr. Prowal, using Mr. Radatzke's grey Mustang, was attempting to ship a package of cocaine that contributed to the search of 26 South Klondike Highway.

[42] In my mind, were it not for the May 23, 2019 occurrence at Air North, there would clearly be insufficient evidence to lead to tests for committal.

[43] However, while other inferences more favourable to Mr. Prowal may be drawn, it is also an available inference that the cocaine Mr. Prowal was attempting to ship via Air North, is connected to the cocaine at 26 South Klondike Highway. In particular, Mr. Radatzke has a direct connection to Mr. Prowal through the use of Mr. Radatzke's grey Mustang. Further, if there is such a connection, it could also be inferred in the circumstances that Mr. Prowal had the requisite possession of this cocaine.

[44] I appreciate that there is no evidence before me that an analysis of the cocaine located at each location has resulted in them being identifiable as arising from the same source. Such evidence, of course, would be helpful to the Crown if it established this.

[45] However, as stated earlier, I must draw only those inferences most favourable to the Crown at this stage of the proceedings, in order to determine whether the test for committal is met. The connection of Mr. Prowal to the drugs located at Air North and to Mr. Radatzke, through the use of Mr. Radatzke's grey Mustang, occurring within a day of them both being at 26 South Klondike Highway with the grey Mustang present, and a

significant quantity of cocaine in the residence, is some evidence on which I can infer that Mr. Prowal was in possession, at least jointly with Mr. Radatzke and Mr. Dick, of the drugs located at 26 South Klondike Highway.

[46] I am satisfied, thin as the case may be, that the Crown has met the test for committal of Mr. Prowal on the s. 5(2) *CDSA* charge arising on May 24, 2019, and that he be committed to stand trial on this charge.

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COZENS C.J.T.C.