

Citation: *R. v. Wuor*, 2021 YKTC 27

Date: 20210419
Docket: 19-00682
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Chisholm

REGINA

v.

JOSEPH WUOR
and MALAKAL KWONY TUEL

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

Appearances:

Amy Porteous and

Lauren Whyte

Lynn MacDiarmid (by telephone)

Jennifer Budgell

Counsel for the Crown

Counsel and Agent for Joseph Wuor

Counsel for Malakal Tuel

REASONS FOR JUDGMENT

[1] CHISHOLM T.C.J. (Oral): Malakal Tuel and Joseph Wuor are charged with possession of cocaine for the purpose of trafficking, contrary to s. 5 of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 ("CDSA"), at or near Carcross, Yukon, on December 1, 2019. Additionally, they are charged with other offences, pursuant to the *Criminal Code*, also alleged to have occurred on December 1, 2019.

[2] They have elected to be tried in Supreme Court by a judge and jury.

[3] The preliminary inquiry in this matter was held before me on January 27 and 28, and April 6 to 9, 2021.

[4] Mr. Tuel and Mr. Wuor contest committal with respect to the charge of possession for the purposes of trafficking, which I will consider below.

[5] The Crown concedes that it has led no evidence on count 9, a charge of attempt murder of Barry Lee while using a firearm, contrary to s. 239(1)(a.1) of the *Criminal Code*. I therefore discharge Mr. Tuel with respect to that count.

[6] There are a number of other offences on the Information for which there is no jurisdiction to hold a preliminary inquiry, since the newer legislation restricts preliminary inquiries to offences for which the maximum punishment is 14 years or more. For Mr. Wuor, the charges in this category are counts 2, 3, 4, 5, and 6 (ss. 354(1)(a), 88, 86(2), 91(1), and 117.01(1)), respectively. For Mr. Tuel, the charges falling into this category are counts 2, 12, 13, 14, and 15 (ss. 354(1)(a), 91(1), 145(3), 117.01(3), and 354(1)(a)), respectively. For both accused, those matters will proceed in due course before the Supreme Court, pursuant to s. 536(4.3).

[7] The Crown has also indicated its intention not to proceed with respect to count 10 of the Information also involving Mr. Lee.

[8] Additionally, Mr. Tuel accepts that the test for committal has been met with respect to the following alleged offences from December 1, 2019: attempt murder for having discharged a handgun at John Thomas Papequash, which is count 8, an offence

contrary to s. 239(1)(a.1); and using a handgun while committing an aggravated assault with a weapon, s. 85(1)(a), which is count 11 as amended.

[9] I agree that the test has been met with respect to those matters and I commit Mr. Tuel to stand trial on those two counts.

[10] Additionally, the Crown has sought committal, and counsel for Mr. Tuel is not contesting committal, on other substantive charges in respect of the same transaction, namely, aggravated assault of John Thomas Papequash by wounding (s. 268); discharging a firearm with intent (s. 244(2)(b)); discharging a firearm recklessly (s. 244.2(1)(b)); possession of a weapon for a dangerous purpose (s. 88); carrying a concealed weapon (s. 90); and possession of a prohibited firearm with ammunition (s. 95).

[11] Having heard sufficient evidence, I commit Mr. Tuel to stand trial on those counts.

[12] The Crown is also seeking that both accused be committed on the charge of possessing a prohibited firearm in a motor vehicle (s. 94(1)); and on the charge of unauthorized possession of a prohibited firearm knowing that its possession is unauthorized (s. 92).

[13] The defence does not contest committal with respect to those matters.

[14] I agree that there is evidence to commit both accused and therefore I order both to stand trial on those two offences.

[15] Finally, the Crown is seeking committal of both accused on a charge pursuant to s. 86(2) for having contravened a regulation made under para. 117(h) of the *Firearms Act*, S.C. 1995, c. 39, namely *Regulation 12 of the Storage, Display, Transportation and Handling of Firearms by Individuals Regulations*, SOR/1998-209, which deals with the transportation of prohibited firearms.

[16] The defence does not contest committal on this charge.

[17] I find that there is sufficient evidence on which to commit both accused to stand trial with respect to that matter and I order them to stand trial on it.

Section 5 of the CDSA

[18] Returning to count 1 of the Information, although both accused contest committal with respect to the allegation of possession of cocaine for the purposes of trafficking, Mr. Tuel and Mr. Wuor have admitted, for the purposes of the preliminary inquiry, that the substance seized and suspected to be cocaine is cocaine, and that if there is sufficient evidence to make a committal for possession of that cocaine, it is conceded that the purpose of that possession was trafficking.

Possession

[19] Section 4(3) of the *Criminal Code* reads:

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; and

(b) where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them.

[20] As set out in *R. v. Pham*, [2005] 77 O.R. (3d) 401 (C.A.), at para. 14, and affirmed in 2006 by the Supreme Court of Canada, s. 4(3) of the *Code* creates three types of possession:

- (i) personal possession as outlined in section 4(3)(a);
- (ii) constructive possession as set out in section 4(3)(a)(i) and section 4(3)(a)(ii); and
- (iii) joint possession as defined in section 4(3)(b).

[21] Constructive possession may be established in circumstances where the accused did not have physical possession of the item in question but had 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 of benefit of himself or of another person" (*R. v. Vukaj*, 2020 ABPC 242, at para. 22).

[22] In *R. v. Morelli*, 2010 SCC 8, at para. 17, the Supreme Court of Canada held that constructive possession is 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.

See also *R. v. Lights*, 2020 ONCA 128, at para. 47.

[23] Joint possession, as defined in s. 4(3)(b), encompasses "...knowledge, consent, and a measure of control on the part of the person deemed to be in possession" (see *R. v. Pham*, at para. 16).

[24] As stated in *Vukaj*, at para. 30:

Joint possession may be established if the evidence, direct or circumstantial, establishes that the accused is one of a number of individuals [who] has the object in their custody "with the knowledge and consent of the rest" such that possession may be ascribed or deemed to all of them.

[25] In *R. v. Lincoln*, 2012 ONCA 542, at para. 3, the Court explained:

... While the fact that a person is the operator with control of the vehicle, together with other evidence, may enable a trial judge to infer knowledge and control in appropriate cases, it cannot, standing alone, create such a rebuttable presumption. See *R. v. Watson*, 2011 ONCA 437, at paras. 11-13.

Test for committal at a preliminary inquiry

[26] In the *United States of America v. Shephard*, [1977] 2 S.C.R. 1067, the Supreme Court of Canada held that a justice is "... required to commit an accused person for trial in any case in which there is admissible evidence which could, if it were believed, result in a conviction."

[27] In *R. v. Arcuri*, 2001 SCC 54, the Supreme Court of Canada held that where there is direct evidence of every essential element of the offence, the preliminary inquiry court must commit the accused to stand trial. However, McLachlan C.J.C. further stated that the task of the judge is more complicated where there is no direct evidence as to every element of the offence.

[28] In that situation, she explained at para. 23 that:

... The question then becomes whether the remaining elements of the offence – that is, those elements as to which the Crown has not advanced direct evidence – may reasonably be inferred from the circumstantial evidence. Answering this question inevitably requires the judge to engage in a limited weighing of the evidence because, with circumstantial evidence, there is, by definition, an inferential gap between the evidence and the matter to be established – that is, an inferential gap beyond the question of whether the evidence should be believed. ... The judge must therefore weigh the evidence, in the sense of assessing whether it is reasonably capable of supporting the inferences that the Crown asks the jury to draw. This weighing, however, is limited. The judge does not ask whether she herself would conclude that the accused is guilty. Nor does the judge draw factual inferences or assess credibility. The judge asks only whether the evidence, if believed, could reasonably support an inference of guilt.

[29] At a preliminary inquiry, the presiding judge "... proceeds on the basis that the jury accepts the evidence tendered by the Crown and draws the inferences most favourable to the Crown" (*R. v. S.B.*, 2020 ONSC 5406, at para. 55).

Summary of the Evidence in Relation to the Issue of Possession

[30] As indicated, Mr. Tuel has been committed to stand trial on a number of charges, including attempted murder. This allegation stems from an incident outside the 202 bar in Whitehorse on December 1, 2019. There is evidence that the handgun used in the

shooting was found within 18 hours after that incident in a truck in which Mr. Tuel was the driver and Mr. Wuor was in the front passenger seat. The handgun in question was located in plain view in the passenger seat footwell beside a Hugo Boss fanny pack.

[31] After the police seized the fanny pack, they opened it and discovered 19 individually wrapped spitballs of cocaine. The police located the spitballs in a magnetic key holder inside a Ziploc bag inside a Canada Post envelope.

[32] Police also located inside a plastic bag in the Hugo Boss fanny pack a baggie containing rocks of hard cocaine.

[33] The police also located a black Air Jordan backpack in the middle area of the back seat of the truck. Inside the backpack, a brown wallet was located. It contained a Yukon health card in the name of Malakal Tuel.

[34] Police also found a Hugo Boss traveller's purse made of the same material as the Hugo Boss fanny pack. The traveller's purse contained cash in the amount of \$7,480.

[35] A black suitcase was also located in the rear seat area of the truck. Police located a yellow hoodie with the words "Crooks & Castles" on the front of it.

[36] A tall black man wearing a sweatshirt with the same words is captured by the video surveillance camera at the 202 bar on the evening of November 30, and early morning hours of December 1, 2019. A witness testified that this man introduced himself by the name "Joseph".

[37] Crack cocaine was also located in the black suitcase, as well as an Alberta graduated driver's licence in the name of Joseph Wuor. The crack cocaine seized by police consisted of 37 individually wrapped rocks of crack cocaine in a magnetic key case.

[38] The police also seized a red, white, and blue puffy jacket on the back passenger seat of the truck. A similar jacket worn by a tall black male is seen in video footage from a cab near the entrance to the 202 bar on the night of the shooting. The male is walking towards the bar entrance. Soon after he is off-camera, a gunshot is heard, and the male runs back in the direction from which he had come.

[39] A bouncer testified that a shorter black man, whom he identified as Mr. Tuel, was in front of the bar just before the shooting.

[40] There is evidence that the tall male spoke to the shorter male just before the shooting. There is also some evidence that the shorter male was seen running while carrying a handgun just after the shooting in the direction opposite to that of the tall male.

[41] Upon arrest, Mr. Tuel had \$1,505 in cash on him.

[42] Police also searched the residence at 3036 South Klondike Highway, which they had surveilled while items were moved from it to the truck. They located documents in the kitchen as well as business cards in one of the bedrooms in the name of Sonny Tuel. The documents in the kitchen included a receipt from Mic Mac Toyota in the name of Malakal Tuel. Police located electronic devices in the residence, including four

cell phones found beside the couch. A few boxes of Ziploc bags were located underneath the coffee table in the living room. In one of the two bedrooms, magnetic key holders were discovered, similar to the ones located in the vehicle with drugs in them.

[43] In the case at bar, counsel for Mr. Wuor submits that there is insufficient evidence to link her client to the closed fanny pack containing cocaine on the floor mat of the front passenger side of the truck, despite him being seated in the front passenger seat.

[44] Counsel maintains that there is no physical link to the handgun or the fanny pack, whereas Mr. Tuel's DNA is on the handgun, and the fanny pack is similar in make to a traveller's purse found in the Air Jordan bag containing his health card.

[45] Counsel for Mr. Wuor contends that it would be speculation to find that there is some evidence that he had knowledge and control of the illicit drugs located in the vehicle. However, even if I were to accept the submission regarding the fanny pack, the police located 37 individually wrapped rocks of crack cocaine in a magnetic key case in a black suitcase also containing clothing that Mr. Wuor is seen wearing in video footage earlier that day. Additionally, driving documentation in Mr. Wuor's name was discovered in that suitcase. The magnetic key holder containing cocaine is similar to empty magnetic key holders found in the house at 3036 South Klondike Highway.

[46] In my view, there is some circumstantial evidence upon which a reasonable jury, properly instructed, could find that Mr. Wuor was in constructive possession of the cocaine in the black suitcase. Therefore, I find there is sufficient evidence to commit

Mr. Wuor to stand trial on the charge of possession of cocaine for the purposes of trafficking.

[47] Counsel for Mr. Tuel submits that I would be speculating to hold that there is some evidence that her client had knowledge and control of the drugs in the vehicle. Defence contends that there is no link to Mr. Tuel that would allow a jury to conclude beyond a reasonable doubt that he had knowledge and control of the drugs. Counsel contends that the drugs were not in plain view but concealed in a closed fanny pack.

[48] In assessing this issue, I consider the evidence of the handgun, linked to Mr. Tuel by his DNA, being found beside the closed fanny pack containing drugs, and these two items being found in a vehicle Mr. Tuel was driving and is connected to through documents. The fanny pack and the handgun are in plain view. The Ziploc bag in the fanny pack contains a magnetic key holder with hard rock cocaine in it. Other Ziploc bags and similar magnetic key holders are found inside the residence the two men had just left when arrested. The Ziploc bags are located on a shelf under the living room coffee table, as opposed to the kitchen where one might expect to find them.

[49] The discovery of Mr. Tuel's business cards in the residence is circumstantial evidence that he was residing there.

[50] I also take into account the evidence of Cpl. McLaren that the Hugo Boss fanny pack containing drugs found beside the handgun was made of the same material as the Hugo Boss traveller's purse containing \$7,480 in cash and Mr. Tuel's health card. The officer gave evidence that she could tell that the two Hugo Boss items came from the same collection.

[51] Additionally, the presence of over \$1,500 in cash on Mr. Tuel at the time of his arrest, and the large sum of money linked to him in the traveller's purse, is circumstantial evidence available for consideration by the jury as pointing to his knowledge and control of drugs (see *R. v. Duvivier*, 2010 ONCA 136, at para. 8). This is so, despite there being some evidence through business cards that Mr. Tuel had a carpentry company.

[52] I should also point out that submissions were made with respect to four cell phones located in the residence. Defence counsel for Mr. Tuel submits that a number of cell phones found in the residence is inconsistent with drug dealers abandoning their residence and that, in any event, there is no indication as to who controlled the cell phones. The Crown submits that this is another piece of circumstantial evidence that I may consider.

[53] However, at the end of the day, I find there is insufficient information before me with respect to the four cell phones in the house and the three cell phones in a duffel bag behind the truck to draw any inferences.

[54] In my view, when considered as a whole, there is some circumstantial evidence upon which a reasonable jury, properly instructed, could find that Mr. Tuel constructively possessed the cocaine in the fanny pack.

[55] Aside from this conclusion, I should also point out that, in my view, there is some evidence that Mr. Tuel and Mr. Wuor were involved in a joint enterprise or a common unlawful venture to deal in illicit drugs.

[56] Firstly, there is circumstantial evidence that the house was being abandoned. It must be remembered that Mr. Tuel is linked to a shooting that occurred less than 18 hours previously. There is some evidence that Mr. Wuor was present at the time of the shooting. The handgun located in the truck Mr. Tuel was driving, and linked to the shooting, has his DNA on it. At the residence, the two men were removing items from the house and placing them in the truck in the darkness of the winter afternoon and early evening. The accused were arrested in this truck that was jam-packed with items, including luggage and a twin mattress. The police found no clothing in the residence except a T-shirt. Uncooked fish had been left on the counter.

[57] In *S.B.*, the Crown applied for *certiorari* with *mandamus* in aid to quash an order discharging S.B. and to direct the preliminary inquiry judge to commit S.B. to stand trial on firearm-related charges. A handgun was located under the passenger seat occupied by one of the three occupants of a vehicle stopped by the police. S.B. was the driver of the vehicle. In addition to marijuana found on S.B., a large sum of money was located in the front door panel on the driver's side and a large quantity of cash in the rear seat passenger's jacket pocket. Police also located a set of digital scales in plain view on the floor of the front passenger seat.

[58] The Superior Court held, at paras. 61 and 62:

61 Moreover, there is ample evidence, as I set out, which would reasonably support the inference that SB was engaged in drug dealing. It is widely known that guns and drugs go hand in hand. As Watt J.A. observed in *R. v. Simon*, 2010 ONCA 754, "handguns and drug deals are frequent companions, but not very good friends." Whether it is a matter of common human experience or of judicial notice, drugs and guns are frequently intertwined.

62 When considered as a whole the evidence reasonably supports inferences that SB was involved in a common unlawful venture to deal in unlawful substances; that possession of a loaded handgun was an element of the common unlawful venture; and that SB knew of the presence of the gun in the car. It further supports the conclusions that he either put the gun in the car or that he kept it there for his or another person's use.

[59] In the case at bar, when the circumstantial evidence is considered as a whole, there is some evidence upon which a reasonable jury, properly instructed, could find that Messrs. Tuel and Wuor were involved in a joint enterprise to deal in illicit drugs, specifically the cocaine found in the truck.

[60] Defence concedes for the purpose of the preliminary inquiry that, based on the amount of cocaine seized, the purpose of its possession was for trafficking. Therefore, I find that there is sufficient evidence to commit Mr. Tuel and Mr. Wuor to stand trial on the charge of possession of cocaine for the purpose of trafficking.

CHISHOLM T.C.J.