SUPREME COURT OF YUKON

Citation: *R.* v. *MacLeod*, 2013 YKSC 118

Date: 20131128
S.C. No. 13-01507A
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

And

JONATHAN MARK SHANE MACLEOD

Before: Mr. Justice L.F. Gower

Appearances:

Jennifer Grandy — Counsel for the Crown
Kim Hawkins — Counsel for the Accused

REASONS FOR JUDGMENT
DELIVERED FROM THE BENCH

INTRODUCTION

[1] GOWER J. (Oral): This is the trial of the accused, Jonathan Mark Shane MacLeod, on separate charges of possession of cocaine for the purpose of trafficking on March 9 and April 20, 2013. The accused also faces five other charges on the indictment for related offences of breach of probation and failing to comply with court orders, however he does not contest those charges. Nor does the accused deny that he was in possession of cocaine on the two dates just indicated. The sole issue in this trial is

whether he possessed the cocaine for the purpose of trafficking on each of the two occasions.

FACTS

[2] On March 9, 2013, the accused was arrested by RCMP Constable Menard in front of the 98 Hotel in Whitehorse. The accused was seen driving a purple Neon motor vehicle, while not wearing a seatbelt. When Constable Menard opened the door of the vehicle to speak with the accused, he detected a strong smell of recently burned marijuana and arrested the accused for possession of a controlled substance. During a search incidental to the arrest, Constable Menard also located a clear plastic baggie containing 22 portions of crack cocaine, each individually wrapped in plastic. The combined weight of the crack cocaine and the packaging was 9.4 g. This baggie was located in the right pocket of the sweater which the accused was wearing at the time. Constable Menard also located a roll of cash on the accused's person. The bills totalled $450 and consisted of 2 $10 bills, 14 $20 bills, 1 $50 bill, and 1 $100 bill. About half of the money was organized into denominations and the other half was disorganized. Although the accused was also in possession of a wallet in his left pants pocket, there was no money found in it. Lastly, a cell phone was also seized from the door pocket of the motor vehicle. No marijuana was located. In an earlier *voir dire,* cited at 2013 YKSC 117, I found that the evidence Constable Menard found during the search was admissible despite a breach of Mr. MacLeod's section 8 and 9 *Charter* rights.

[3] Later, while the accused was being processed at the RCMP detachment, further evidence was obtained. Constable Menard located an additional $20 bill which was found up the accused's right sleeve. Also at that time, Constable Menard noted that

there had been 30 missed calls on the cell phone within the previous hour. Further, while processing the accused, the cell phone rang twice and Constable Menard answered each time saying simply “yeah”. On the first occasion the caller identified herself as “Donna” and said she wanted to meet to pick up a “brownie”. On the second call, a female caller wanted to be “fronted a fifty”.

[4] On April 20, 2013, the accused was arrested just after 11 PM for breaching the undertaking on which he was released on March 9th. He was found in possession of a cell phone in contravention of that undertaking. The accused was also noted to be in possession of another clear plastic baggie containing five portions of crack cocaine, each individually wrapped in foil. The total weight of the crack cocaine and the packaging was 2.8 g. The accused was again found to be in possession of a roll or wad of cash totalling $440, consisting of 4 $50 bills and 12 $20 bills. Constable Menard also noted at approximately 11:48 PM that there had been five missed calls and 29 missed texts on the seized cell phone.

CROWN’S POSITION

[5] Crown counsel concedes that the evidence of the accused’s purpose behind possessing the crack cocaine on each of the two occasions is circumstantial. Accordingly, I must be satisfied beyond a reasonable doubt that the only reasonable inference to be drawn from the proven facts is that the accused possessed the crack for the purpose of trafficking: *R. v Cooper*, [1978] 1 S.C.R. 860, at p. 881. Further, if I am to draw the inference that the accused intended to traffic crack cocaine, the inference must flow logically and reasonably from those facts and must not be based on conjecture or speculation: *R. v. Morrissey* (1995) 22 O.R. (3d) 514 (C.A.), at para. 52.

[6] The Crown's only witness on this issue was RCMP Constable Lindsey Ellis. Following *a voir dire* on the extent of her qualifications, I allowed Constable Ellis to give expert opinion evidence on street-level trafficking of cocaine and crack cocaine, including usage habits, distribution methods, jargon, packaging methods and pricing. My reasons for that ruling are cited at 2013 YKSC 116. In those reasons, I noted that Constable Ellis' drug enforcement experience is extensive. I make the same finding here. She has been a member of the RCMP since 2001 and has worked exclusively as a drug investigator since 2006. Constable Ellis began working in Whitehorse in that capacity in January 2013. She has taken numerous RCMP courses related to drug enforcement and has recently begun teaching such courses. Constable Ellis has also worked as an undercover officer as well as an undercover cover person, and has experience in working with confidential informants. She estimates that she has been involved in over 100 drug-related investigations.

[7] Constable Ellis testified that consumers of crack cocaine do not use the drug casually or recreationally. She said that is because the drug is highly addictive and that the withdrawal symptoms after coming down from a high are so terrible that users become fixated on obtaining more crack to alleviate those symptoms. In particular, Constable Ellis testified that a crack high lasts approximately 20 to 30 minutes, and during that time the user experiences rapid heart rate, rapid breathing, and a sweaty pallor. Following this, the user becomes irritable, erratic, and even delusional or paranoid. They also often experience nausea and break out into cold sweats. This causes the user to seek out more crack and, if successful, this pattern can repeat itself

during a binge period which can last for as long as 24 to 36 hours. Eventually, the user crashes with exhaustion, insomnia and a lack of appetite.

[8] Constable Ellis testified that crack cocaine is bought and sold in the form of small rocks, usually weighing between .1 and .2 g each. These are known on the street as “50 rocks”, because they commonly cost $50 each. Rocks weighing between .2 and .3 g each are known as “100 rocks”, because they usually cost $100 each. An “8 ball" is a quantity of 3.5 g of crack cocaine (or 1/8 of an ounce), usually costing between $300 and $500. Constable Ellis said that 8 balls are usually shared between more than one user. She also testified that all three of these quantities of crack cocaine are commonly found within the street drug culture in Whitehorse.

[9] In Constable Ellis’ expert opinion, a heavy user of crack cocaine could consume between 4 and 7 g during a binge cycle of 24 to 36 hours, providing that they remained awake the entire time and were able to continue to purchase new product. However, she also suggested that consuming that amount would put the user close to death.

[10] In Constable Ellis’ experience, a crack addict will not usually purchase rocks in bulk for 2 principal reasons: (1) the nature of the addiction prevents such addicts from recognizing the logic of stockpiling the drug; and (2) an addict commonly will not have the funds to purchase enough crack at once to last for 24 to 36 hours. Consequently, she stated that an addicted user will usually not be in possession of more than 1 or 2 rocks at a time, and will also almost always have a pipe on their person with which to smoke the crack.

[11] Constable Ellis testified that heavy users of crack cocaine seldom have the ability to function in society. They often cannot hold a job and are unable to maintain most

social or family contacts. They become fixated on finding and using crack. They often find simple tasks to be impossible to perform, including driving a motor vehicle.

[12] Constable Ellis also gave evidence about the various levels of cocaine traffickers within the Whitehorse drug community. At the top are the kilogram-level traffickers; next are the mid-level traffickers who in turn supply the street-level traffickers.

[13] Within the street-level trafficking group, there are 2 principal methods of sale. Constable Ellis referred to the first of these as the “red zone trafficker”, who usually operates physically on the street in a high drug use area, such as the 98 Hotel. It was implicit in Constable Ellis’s testimony that these traffickers operate on foot. They are also usually selling at the behest of a mid-level trafficker. This is a high risk endeavour because the seller has to carry drugs on their person for resale and they are subject to being detected by police enforcement.

[14] Constable Ellis testified that the second type of street-level trafficker is known as the “dial-a-dope” trafficker. This type of seller will take orders for crack cocaine over their cell phone and arrange meetings with buyers for set amounts of product and price. Constable Ellis stated that dial-a-dope traffickers commonly receive numerous calls and messages on their cell phone seeking such transactions, often over a very short period of time. She said that these traffickers transport the product in their motor vehicle. Usually, dial-a-dope traffickers will only sell to people they are familiar with. The sales meetings are arranged at a specific time and place to reduce the risk of police detection. A dial-a-dope trafficker will usually only be in possession of the specific quantity of drugs to be sold, in order to speed up the transaction and reduce the risk of detection. However, a busy dial-a-dope trafficker may take enough product at one time to last for a few hours.

They will then return to a safe location to deposit the cash they have accumulated from the various sales and to replenish their drug supply for the next round of sales. Constable Ellis testified that it is very common for a dial-a-dope trafficker to transport rocks of crack cocaine wrapped individually in clear plastic, and all contained within a further clear plastic baggie. This allows the trafficker to more easily distinguish between 50 rocks and 100 rocks, and facilitates quicker sales.

[15] In Constable Ellis' experience, dial-a-dope traffickers are not usually users of crack cocaine. She said that is because the traffickers need to be organized in answering calls from clients, dealing with cash, and transporting drugs to the prearranged meeting places. Constable Ellis generally contrasted that picture with the nature of the crack addict, whose life is fixated on the continual cycle of purchasing and using the drug, and who often resorts to other criminal activity to obtain money for drugs. Because of that fact, she testified that if a dial-a-dope trafficker did start to use crack cocaine, then they would not be successful for very long.

[16] Constable Ellis testified that she reviewed the physical evidence seized by Constable Menard on March 9, 2013. I understand she also reviewed Constable Menard's police report of that investigation. She did so for the purpose of expressing an expert opinion as to the purpose of the accused's possession of the crack cocaine on that occasion. Constable Ellis did this before her review of the evidence relating to the second incident of April 20, 2013.

[17] Constable Ellis examined the 22 rocks of crack cocaine individually wrapped in clear plastic and all contained in a further clear plastic baggie. She noted the total weight of the crack and the packaging to be 9.4 g. Constable Ellis expressed the belief that the

quantity was likely a mixture of 50 rocks and 100 rocks. However, for the purpose of assessing a probable street value, she testified that: if all of the drugs were 50 rocks, then they would have a resale value of $1100; and if all were 100 rocks, they would have a value of $2200. Constable Ellis opined that a dealer would not likely have sold the entire quantity to the accused, because they could make more money by selling each rock separately. She also testified that with “a package like this”, which I understood to the reference to the amount of the crack, most dial-a-dope traffickers would be “fronted” the quantity from a mid-level dealer, i.e. provided the drugs on credit on the condition of being repaid in cash later, less the dial-a-doper’s profit.

[18] Constable Ellis suggested that both the amount and the state of the cash found on the accused’s person were indicative of revenue from a dial-a-dope operation. She referred to Constable Menard’s evidence that about half of the cash was organized into denominations, about half was disorganized, and a $20 bill was found in the accused’s sleeve. Constable Ellis also noted that there was no money found in the accused’s wallet. She stated that because dial-a-dope traffickers often collect their money from drug sales very quickly, they do not often have time to organize the money while on the street. Constable Ellis opined that this would also explain why the accused had no money in his wallet: (1) because it would add to the amount of time necessary for each drug transaction to be continually putting bills in and taking them out of the wallet; and (2) the bulk of the money did not belong to the accused in any event, but had to be repaid to the mid-level dealer. However, she testified that when there is a break in the operations, the dial-a-dope trafficker needs to organize the money to determine the amount that has to be repaid to the mid-level dealer and the amount that they can retain as their profit.

[19] Constable Ellis was also asked about the 2 phone calls received by Constable Menard while he was processing the accused at the RCMP detachment on March 9, 2013. Constable Menard simply said “yeah” to both callers. In response, the first caller asked for a “brownie”. Constable Ellis was of the opinion that this is street jargon for a $100 bill, which is brown in colour, and that the caller was asking for a 100 rock. She was not aware of any other criminal activity which uses this term. The second caller spoke about being “fronted a fifty”. Constable Ellis opined that this was jargon seeking a 50 rock on credit.

[20] Constable Ellis’s expert opinion was that the cocaine possessed by the accused on March 9, 2013 was destined for resale and that the possession was for the purpose of trafficking. She testified that she based this opinion on the following factors:

- the estimated individual weights of the rocks;
- the total weight of the rocks and the packaging (9.4 g);
- the fact that the rocks were individually packaged in clear plastic;
- the fact that all of the 22 individually packaged rocks were found together in one clear plastic baggie;
- the amount of money seized from the accused ($450) and the manner in which it was organized;
- the fact the accused was found in possession of a cell phone on which there were 30 missed calls;
- the 2 calls received by Constable Menard (just referenced above); and
- the fact that the accused was not found in possession of a crack pipe.

Of these factors, Constable Ellis testified that the most significant were the number of individual packages of crack cocaine and their total weight.

[21] Constable Ellis also physically inspected the evidence seized from the accused on April 20, 2013, as well as Constable Menard's related police report. She noted that there were 5 rocks of crack cocaine individually wrapped in foil and that the total weight of the crack and the packaging was 2.8 g. Constable Ellis was not able to determine what each rock weighed. However, once again assuming they were all 50 rocks, their total street value would have been $250; whereas if they were all 100 rocks, then the total value would have been $500.

[22] In Constable Ellis' expert opinion, the accused possessed this cocaine for the purpose of trafficking. She based that opinion upon the following factors:

- the fact that the 5 rocks were individually packaged;
- the fact that all 5 rocks were together in a clear plastic baggie;
- the total weight of the rocks and the packaging (2.8 g) ;
- the amount of money seized from the accused ($440);
- the cell phone seized from the accused;
- the fact that Constable Menard noted 5 missed calls and 29 missed texts on the cell phone when he examined it at the RCMP detachment; and
- the fact that the accused was not in possession of a crack pipe.

POSITION OF THE DEFENCE

[23] In cross-examination, Constable Ellis acknowledged that the study of drug addicts is not an exact science and that each user is a unique person. She also conceded that

the amount of crack cocaine used by an individual may vary depending on the user and the stage that they are in, in their usage cycle.

[24] Constable Ellis was also cross-examined about the factors which can affect the street price of crack cocaine. She testified that, at the street level, the purity of crack cocaine does not affect its price. While she acknowledged that a friendship between a seller and the user could affect the price of crack cocaine, once again it would not do so at the street level. Constable Ellis stated that street-level dealers who are "fronted" with a set amount of drugs from the mid-level traffickers must return a set amount of money to them in a timely fashion. Therefore, it is to the disadvantage of the street-level dealer to give "breaks and freebies" to users, because the street-level dealer will not make any profit and, presumably, it will take longer to pay back the mid-level dealer.

[25] Constable Ellis was also asked about users being fronted large amounts of crack cocaine. The Constable defined "a large amount" as anything more than an 8 ball (i.e. 3.5 g or 1/8 of an ounce). She opined that this would be "highly unlikely and improbable", because of the high risk of the street-level dealer not being repaid and the lack of trust in users.

[26] With respect to the incident on April 20, 2013, Constable Ellis acknowledged that something less than 2.8 g of actual crack cocaine would be within the range that a user could purchase for personal use. She also conceded that, although it would be "very unusual" for a user to buy such a large amount of crack in 5 separate packages, it was "possible". However, the Constable also clarified that the packaging of the product was an important factor supporting her opinion, i.e. that the individual rocks were packaged in foil and that all 5 were together in a further single plastic bag. In her opinion, it would be

"highly unusual" for a user to be in possession of crack cocaine packaged in this fashion, but that it would be "consistent" with a trafficker who needs to have all the product for sale kept together. Constable Ellis testified that a user would ordinarily only have 1 or 2 loose rocks on them at a time, and almost always a crack pipe as well.

[27] The Constable further clarified that her opinion that the accused was in possession for the purposes of trafficking on each occasion was also based on the fact that the accused was found in possession of both a significant amount of cash as well as a significant amount of crack cocaine. In her opinion, an addicted user would be expected to have spent all of their available cash on crack, and that any rocks purchased would be consumed one after the other in repetitive cycles until they were all gone. Thus, Constable Ellis suggested that one might see a user who is about to make a purchase with cash, but no crack; or alternatively, a user with crack but no cash, since they would have spent it all on the product; but not a user in possession of both.

[28] On a related point, defence counsel asked Constable Ellis whether her opinion that the accused possessed the crack for the purpose of trafficking would change if she was told that he was a user. The Constable replied by stating that it would be highly unusual for a user be able to run even a "somewhat organized dial-a-dope operation". She further opined that if the accused was "not a starting user", he would not have the ability to possess (or implicitly, control) the amount of cocaine and cash he was found with. Nor would the accused have had the ability to be able to answer phone calls and fill orders for drugs, let alone operate a motor vehicle. However, the way Constable Ellis phrased her evidence here would seem to leave open the possibility that if the accused was a starting user, he might be able to do some or all of these things.

[29] The only evidence that the accused was a user of crack cocaine was from Constable Menard. His evidence during the *voir dire* on the admissibility of the drugs in this trial was admitted with the consent of defence counsel. The accused also testified in that *voir dire*, however his evidence was not admitted in this trial. Constable Menard testified that he had an interaction with the accused on the evening of February 23, 2013 in front of the 98 Hotel. He said it was the first time that he had met the accused face-to-face. He was responding to a complaint that an individual was picking fights in front of the hotel. A hotel staff member identified the accused as the person causing the problems. Constable Menard said that he had a conversation with the accused about the complaint, and that the conversation then turned to the topic of whether the accused was dealing crack cocaine. He testified that the accused denied trafficking, but said that he still uses crack. Constable Menard said that the accused appeared to be high on crack at the time, as he exhibited yellow “jaundiced” eyes, fast, jittery movements, rapid speech and incoherent thoughts. He said that he asked the accused to leave the area and that the accused agreed to do so.

[30] I made a credibility finding on the *voir dire*, in that I preferred the evidence Constable Menard where it conflicted with that of the accused. In this trial, I have no reason to doubt the veracity of Constable Menard’s evidence that the accused admitted to him that he was a crack user. However, the evidence is skeletal at best and does not provide any further particulars as to the extent of the accused’s crack use or when he started using relative to the date of that conversation.

[31] One of the main arguments by defence counsel on the issue of the purpose of the accused’s possession of cocaine was that, while the Crown may have proven that the

purpose was likely to traffic, the Crown has not proven that fact beyond a reasonable doubt, especially with the crack seized on April 20, 2013. The implicit argument here was that, if it was possible that the possession on either occasion was for personal use, then the Crown will not have proven purpose beyond a reasonable doubt on that occasion. Further, since there is some evidence that the accused was a user, then that should be sufficient to raise a reasonable doubt as to whether his purpose was to traffic. The difficulty with that implied argument is that it would seem to put the Crown's burden almost to an absolute certainty. In any event, I conclude that because there is no evidence that the accused was "not a starting user", to use Constable Ellis' language, i.e. an experienced and addicted user, this brief and singular reference to the accused being a crack user is not necessarily inconsistent with him also be a dial-a-dope trafficker.

CONCLUSION

[32] I appreciate that Constable Ellis's expert testimony is in the nature of "custom of the trade" evidence, which by its nature cannot be assessed or tested in a manner that scientific evidence is; nor does it depend for its evidentiary value upon the application of such testing: see *R. v. Jackman*, 2008 ABPC 213, at para. 31. However, if the experiential basis underlying a drug expert's opinion is transparent and logically sound, the trier of fact may give considerable weight to the opinion: *Jackman*, at para. 32. I find that Constable Ellis' expert opinion is transparent and logically sound and is based on a substantial amount of training and experience: see my reasons at 2013 YKSC 116. I am also satisfied beyond a reasonable doubt that the inferences she draws from the known facts are ones which can reasonably and logically be drawn, and go well beyond pure conjecture and speculation: see *R. v. Morrissey*, cited above, at para. 52.

[33] In the result, I conclude that I can accept Constable Ellis's expert opinion that the accused's purpose in possessing the rocks of crack cocaine on both March 9 and April 20, 2013 was to resell them, i.e. to traffic them. Accordingly, I am sure of the accused's guilt on Counts # 1 and 2 of the indictment. Further, as no defence was raised on Counts #3 through #7, I find the accused guilty of each of those counts as well.

Gower J.