COURT OF APPEAL OF YUKON

Citation: *R. v. McMillan*
2016 YKCA 10

Date: 20160826
Docket: 15-YU765

Between:

Regina

Appellant

And

Jason McMillan

Respondent

Before: The Honourable Mr. Justice Frankel
The Honourable Madam Justice Stromberg-Stein
The Honourable Madam Justice Dickson

On appeal from: An order of the Territorial Court of Yukon, dated September 11, 2015 (*R. v. McMillan*, 2015 YKTC 31, Whitehorse Docket 13-00620).

Counsel for the Appellant: E. Marcoux

Counsel for the Respondent: V. Larochelle

Place and Date of Hearing: Vancouver, British Columbia
March 22, 2016

Place and Date of Judgment: Vancouver, British Columbia
August 26, 2016

Written Reasons by:
The Honourable Madam Justice Dickson

Concurred in by:
The Honourable Mr. Justice Frankel
The Honourable Madam Justice Stromberg-Stein

Summary:

Crown appeal from acquittal. The drug trafficking charge was particularised to a specific time and place. The case was circumstantial and based mainly on the accused's fingerprints found on drug packaging and a witness of questionable reliability seeing the accused in the city in weeks prior. The accused successfully argued that there was insufficient evidence placing him in the territory at the time specified. Held: Appeal dismissed. Time and place were necessary elements of the offence in this case. They were necessary to identify the transaction alleged and critical to the accused's defence. The appellant conflates jurisdiction of the court to try offences occurring outside of its territory with issues of sufficiency of pleadings. The court's wide territorial jurisdiction for drug offences does not absolve the Crown from proving necessary elements of the offence as alleged in the charge.

Reasons for Judgment of the Honourable Madam Justice Dickson:

Introduction

[1] On September 11, 2015, Chief Judge Ruddy acquitted the respondent, Jason McMillan, on a single count of possessing cocaine for the purpose of trafficking "on or about August 30, 2013, at or near Whitehorse, Yukon Territory". Following a three-day trial, she found the Crown failed to prove the date and location of the offence, as particularised in the information. She also held the date and location of the offence were essential elements the Crown was required to prove because they were necessary to Mr. McMillan's understanding of the allegation against him and the case he had to meet to defend himself. The Crown appeals, contending the judge erred in law in holding the date and location of the offence had to be proved beyond a reasonable doubt. At the hearing, Crown counsel abandoned a second ground of appeal relating to a possible amendment of the information which was neither sought by the Crown nor considered by the judge.

Factual Background

[2] Mr. McMillan was arrested as part of a larger investigation into a drug trafficking operation between the lower mainland of British Columbia and Yukon. The Crown's case against him was circumstantial. It relied mainly upon two fingerprints found on material used to package a brick of cocaine retrieved on

August 30, 2013 by a police agent, D.S., from a Whitehorse residence and turned over to his handlers. A fingerprint expert later linked the two fingerprints to Mr. McMillan.

[3] D.S. is a former drug trafficker in the Whitehorse area. At trial, he testified that he was unaware of any involvement by Mr. McMillan in the August 30 transaction and did not know him, although they had met once at the Yukon Inn about two to four weeks before it occurred (approximately August 2-16). He did not identify Mr. McMillan as someone who had previously delivered drugs to Whitehorse. Nor did he say Mr. McMillan was present in the Whitehorse residence on August 30 when he retrieved the cocaine.

[4] Cpl. Ellis, the primary investigator, also testified. She described police surveillance conducted on August 30 when D.S. retrieved the cocaine. She testified further about an August 6, 2013 cocaine delivery to Whitehorse. According to Cpl. Ellis, D.S. was also involved in distributing that cocaine.

[5] Throughout the trial it was clear to all concerned that the time and place of the offence were significant from the defence perspective. At the outset, defence counsel identified the time of the offence as an issue for determination. He also cross-examined the Crown's fingerprint expert on the time and location of their placement and made closing submissions on the time and location of the offence particularised in the information. Amongst other things, he emphasised the absence of evidence that Mr. McMillan was in Whitehorse on or about August 30 and submitted that, even if accepted, the fingerprint evidence was more consistent with him having handled the cocaine in British Columbia rather than in Whitehorse.

[6] For his part, Crown counsel acknowledged that the case against Mr. McMillan was circumstantial. He submitted, however, the only reasonable inference to be drawn from the evidence was that Mr. McMillan was in possession of the cocaine in Whitehorse on or about August 30, 2013. According to Crown counsel, Mr. McMillan had obviously acted in a cocaine delivery capacity previously, given his encounter

with D.S. at the Yukon Inn a few weeks before the August 30 transaction. When his presence in Yukon at the time of the earlier delivery was taken together with his fingerprints on the cocaine packaging, Crown counsel urged the judge to infer that Mr. McMillan wrapped the cocaine package and transported it to Whitehorse. On this basis, he urged her to find him guilty as charged.

Reasons of the Trial Judge

[7] The judge began by reviewing the evidence and submissions of counsel. She concluded the case could be disposed of based on whether the Crown had proven the time and location of the offence, as particularised. In reaching this conclusion, she acknowledged that not all particulars set out in a count are essential to the charge. Some may be mere surplusage. However, citing *R. v. Saunders*, [1990] 1 S.C.R. 1020 and s. 581(3) of the *Criminal Code*, R.S.C. 1985, c. C-46, she also recognised that a count must contain sufficient detail to identify the transaction alleged in a manner which allows the accused to understand the case to be met.

[8] Without making definitive findings, the judge assumed the fingerprints identified by the Crown expert were Mr. McMillan's. She also assumed that their location on the cocaine packaging gave rise to the inference of possession for the purpose of trafficking. However, she went on to find the specified date of "on or about August 30" and the place of Whitehorse were essential elements to be proved by the Crown because they were necessary to Mr. McMillan's understanding of the transaction alleged and the case he had to meet. She also found that Mr. McMillan relied on those details when considering how to mount his defence to the charge he was facing. For example, she noted that had the location been particularised differently it may have impacted on his decision as to whether or not to testify.

[9] The judge was not satisfied that the Crown had proved either the date or location of the offence particularised in the information. She noted there was no direct evidence that Mr. McMillan was in Whitehorse on or about August 30 and found D.S.'s testimony regarding the alleged meeting in early August was unreliable.

In these circumstances, she found there was no evidence upon which to conclude beyond a reasonable doubt that Mr. McMillan had ever been in Yukon prior to the proceedings. She also found that, as defence counsel submitted, the location of Mr. McMillan's fingerprints was more consistent with his having been in contact with the cocaine in British Columbia rather than in Whitehorse. In the result, she acquitted Mr. McMillan.

Positions of the Parties

Defence Position

[10] Defence counsel submits that the judge was correct to conclude the Crown was obliged to prove time and place given the circumstances of the case before her. Both were necessary to identify the transaction at issue and critical to the defence.

Crown Position

[11] On appeal, Crown counsel does not challenge the judge's conclusion that the Crown failed to prove beyond a reasonable doubt the time and place particularised in the information. Rather, he submits that the Crown was not obliged to prove them because, in this case, they were not material. In support of this submission, he relies on *R. v. B.(G.)*, [1990] 2 S.C.R. 30; *R. v. Robinson,* 2005 NSCA 65; and *R. v. D.J.P.*, 2004 YKSC 9. He also relies on s. 601(4.1) of the *Criminal Code* and s. 47(2) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 [*CDSA*]. I will summarise the salient aspects of these authorities and statutory provisions in order to explain my understanding of the Crown's position on appeal.

[12] *B.(G.)* was a sexual assault case. Several young offenders were charged with sexually assaulting a fellow elementary school student between certain dates specified in separate informations. At trial, the judge held that if the alleged event did take place, its date had not been established and, on that basis, acquitted the accused. On appeal, the Saskatchewan Court of Appeal and Supreme Court of

Canada held that he erred in finding the time of the offence was an essential element which must be proved.

[13] The Supreme Court of Canada noted in *B.(G.)* that courts have recently tended not to require the degree of specificity in criminal pleadings formerly thought to be necessary to overcome insufficiency arguments. Nevertheless, an information must still provide an accused with enough information to enable him to prepare an adequate defence. While the time of the offence must be specified, the Crown need not prove the exact time alleged unless it is an essential element of the offence or crucial to the defence. In *B.(G.)*, it was neither. As Wilson J. stated, "the date of the offence is not generally an essential element of the offence of sexual assault. It is a crime no matter when it is committed" (at 53). The Nova Scotia Court of Appeal came to a similar conclusion in *Robinson*, holding that the date of possession of prohibited weapons was not an essential element of the offence in the circumstances of the case (at para. 14).

[14] Section 601(4.1) of the *Criminal Code* concerns amendment of defective counts in an indictment. It provides that a variance between the indictment and the evidence is not material with respect to i) the alleged time of the offence, if the indictment was preferred within the prescribed limitation period, or ii) the place of the alleged offence, if it arose within the court's territorial jurisdiction.

[15] Section 47(2) of the *CDSA* permits the Crown to prosecute drug offences anywhere in Canada where the offence occurred, the subject-matter of the proceedings arose, the accused is apprehended, or the accused is located. In *D.J.P.*, the Yukon Supreme Court relied on s. 47(2) to confirm its jurisdiction to try a youth on a charge under the *CDSA* for a drug offence that took place in British Columbia.

[16] Drawing on these authorities and statutory provisions, Crown counsel submits that the court in this case had jurisdiction to try the charge even if Mr. McMillan possessed the cocaine in British Columbia rather than in Whitehorse. He

emphasises that, like sexual assault and possession of prohibited weapons, possession of cocaine for the purpose of trafficking is a crime no matter where and when it is committed. He goes on to submit the result here must be wrong because the acquittal was based on Mr. McMillan's possession of drugs in a place other than Whitehorse. However, given the court's s. 47(2) *CDSA* jurisdiction to try drug offences committed outside the territory, the principles discussed in *B.(G.)* and *Robinson*, and the language of s. 601(4.1) of the *Criminal Code* regarding materiality, he contends that time and place were not essential elements of the offence, nor were they crucial to the defence because no defence was presented. In consequence, he submits, as in *B.(G.)* and *Robinson*, the acquittal should be set aside and a new trial should be ordered.

Discussion

[17] I would not accede to the Crown's submissions. In my view, they conflate issues of jurisdiction with issues of sufficiency of pleadings. They also ignore the requirements of the pleadings sufficiency rule.

Jurisdiction

[18] Every court must have jurisdiction to hear the case presented. As a general rule, a criminal court can only try a case committed within its territorial jurisdiction: *Criminal Code*, s. 478(1). This rule is, however, subject to statutory exceptions. One such exception is found in s. 47(2) of the *CDSA*.

[19] The purpose of s. 47(2) of the *CDSA* is to address the nature of the drug trade, which crosses provincial and national borders: *D.J.P.* at para. 13; *R. v. Cameron*, [1999] Q.J. No. 1812 (S.C.). This section broadens the general rule by expanding territorial jurisdiction in drug prosecutions, although the reach of its application may be limited by the *Charter* and the doctrine of abuse of process: *Cameron* at para. 10; *D.J.P*. at para. 20. Similar jurisdictional provisions can also be found in other federal statutes: see, for example *Canada Shipping Act, 2001*, S.C. 2001, c. 26, ss. 257–258 (marine vessel offences); *Customs Act*, R.S.C. 1985, c. 1

(2nd Supp.), s. 162 (import and export offences); *Species at Risk Act*, S.C. 2002, c. 29, s. 101 (offences concerning endangered wildlife); *Canada Agricultural Products Act*, R.S.C. 1985, c. 20 (4th Supp.), s. 38 (agricultural production and trade offences).

[20] I accept that the Yukon court had jurisdiction to try the charge in this case. However, the key issue was not jurisdiction. It was whether the time and place alleged in the information were material in the circumstances and thus had to be proven.

[21] The fact that a court may assume jurisdiction to try an offence under s. 47(2) of the *CDSA* does not relieve the Crown of its obligation to comply with the pleadings sufficiency rule. If it were otherwise, the Crown could obtain convictions in drug cases regardless of the relationship, if any, between the evidence presented as to time and place in Canada and the allegation specified in the information. That is not the law.

Sufficiency of Pleadings

[22] The Crown must prove the details it specifies in an information if they are either (a) an essential element of the offence, or (b) critical to the defence: *B.(G.)* at 52. Any other details specified are mere surplusage and need not be proven.

[23] Time and place are not ordinarily considered essential elements of an offence, however, they will be when they are necessary for the accused to identify the factual transaction which forms the basis of the offence in question. For example, time or place will be essential where “there is a paucity of other factual information available with which to identify the transaction”: *B.(G.)* at 52. The “golden rule” for determining whether a count is factually sufficient is that the accused must be “reasonably informed of the transaction alleged against him, thus giving him the possibility of a full defence and fair trial”: *R. v. Côté* (1977), [1978] 1 S.C.R. 8 at 13; *Brodie v. The King*, [1936] S.C.R. 188 at 193-194. At a minimum,

this means that a count must describe the offence in such a way as to "lift it from the general to the particular": *Brodie* at 198.

[24] Section 581(3) of the *Criminal Code* codifies the rule regarding the sufficiency of pleadings. It obliges the Crown to charge accused persons with a sufficient degree of specificity, which will depend on the nature of the offence and the circumstances of each case: *B.(G.)* at 44. Section 581(3) provides:

> 581(3) A count shall contain sufficient detail of the circumstances of the alleged offence to give to the accused reasonable information with respect to the act or omission to be proved against him and to identify the transaction referred to, but otherwise the absence or insufficiency of details does not vitiate the count.

[25] Specifics are critical to the defence when the accused relies on them to defend the charge as particularised. If there is a variance between the details specified in the count and the evidence at trial, the accused may be misled as to the alleged transaction that he or she must address. In such circumstances, the court will not amend a count to conform to the variance because it would be "unfair and prejudicial" to change the nature of the Crown's case retroactively: *Saunders* at 1024; *B.(G.)* at 49-51.

[26] In this case, the judge recognised the need for specifics to lift the Crown's allegation "from the general to the particular" as a matter of fairness. Unlike the allegations in *B.(G.)* and *Robinson*, specifics as to time and place were necessary to identify the transaction which formed the basis of the charge and inform Mr. McMillan of the case he had to meet. The Crown's submission at trial that Mr. McMillan was also involved in trafficking cocaine in a separate transaction in Whitehorse some weeks earlier highlighted the need to particularise time and place of the transaction at issue with specificity. In these circumstances, I see no error in the judge's conclusion that the Crown was obliged to prove he possessed cocaine for the purpose of trafficking at a time proximate to August 30 in Whitehorse.

[27] Nor do I see error in the judge's conclusion that Mr. McMillan relied on the details of time and place in the information in mounting his defence to the charge he was facing. Amongst other things, his counsel focused much of his cross-examination and argument on the poor quality of the evidence placing Mr. McMillan in Yukon at the time and place specified. It is obvious both were critical to the defence strategy that was adopted. Accordingly, as the judge found, it was incumbent upon the Crown to prove them beyond a reasonable doubt. It failed to do so.

Conclusion

[28] It follows that I would dismiss the appeal.

"The Honourable Madam Justice Dickson"

I AGREE:

"The Honourable Mr. Justice Frankel"

I AGREE:

"The Honourable Madam Justice Stromberg-Stein"