

Citation: *R. v. Naiker*, 2007 YKTC 45

Date: 20070530
Docket: T.C. 06-00769
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Chief Judge Faulkner

REGINA

v.

DARNELL AVINASH NAIKER

Appearances:
Eric Marcoux
James Van Wart

Counsel for Crown
Counsel for Defence

REASONS FOR JUDGMENT

[1] FAULKNER C.J.T.C. (Oral): Darnell Avinash Naiker is charged with possession of crack cocaine for the purpose of trafficking, contrary to s. 5(2) of the *Controlled Drugs and Substances Act*, R.S.C. 1996, c. 19.

[2] Mr. Naiker was arrested on March 20, 2007 at the 98 Hotel bar in Whitehorse, Yukon, by Constable Fradette of the RCMP. The subsequent search of Mr. Naiker revealed a magnetic key case in his pocket which contained 65 rocks of crack cocaine. A search under the table that Mr. Naiker had been sitting at prior to his arrest revealed another magnetic key case, almost identical to the first. The second case contained 30 rocks of crack cocaine. The size of all of the rocks was consistent with that normally

sold on the street for the sum of \$20. Thus the total value, if all of the cocaine was sold. one rock at a time, would be in the order of \$1900.

[3] Mr. Naiker seeks exclusion from evidence of the drugs on the basis that they were seized by police as the result of an unreasonable search and seizure. The arrest and subsequent seizure are both the result of information from a confidential police informant. Constable Fradette testified that he has known this informant, who I will now refer to as Informant 1, for a number of years.

[4] Earlier that same day, Informant 1 had provided information in an unrelated investigation, and that information had proved to be reliable. Informant 1 does have a criminal record and is involved in the drug culture.

[5] The information relating to Mr. Naiker, provided by Informant 1, was that a man named Cameron was at that moment in possession of crack cocaine at the 98 Hotel bar and that Informant 1 had first-hand knowledge that Cameron was dealing crack at that location. From the very detailed description of the man named Cameron that was provided by the informant, there was no doubt that Cameron was the accused Darnell Naiker, a man previously known to Constable Fradette, as will become clear.

[6] Cameron was said to be in the company of another man whose description closely fit another man by the name of Eli Auclair, who was also known to Constable Fradette. After receiving this information and after discussing the matter with other police officers, Constable Fradette went to the 98 Hotel bar. This was within an hour or so of receiving the information. There, the constable saw Mr. Naiker seated at a table with Mr. Auclair. Constable Smith was already in the bar and talking to Mr. Naiker and

Mr. Auclair. Mr. Naiker was arrested and searched, revealing the container of crack cocaine. It was Constable Smith who located a second box containing crack cocaine, attached by a magnet to the underside of the table where the accused had been seated.

[7] As I have indicated, the legality of the arrest and search is challenged by the accused and it becomes necessary to assess the nature of the information that the police had. The tip provided by Informant 1 might have been insufficient in and of itself to provide reasonable and probable grounds for the arrest and subsequent search since it could be argued that there were relatively limited indicia of the informer's reliability, and that despite the claim of first-hand knowledge, that the assertion that the accused was dealing crack in the 98 Hotel bar was in some respects a conclusory statement. However, the tip provided by Informant 1 was far from the sum total of the information available to the police, and it is, of course, the overall quality of that information that is determinative.

[8] Whitehorse RCMP had first identified Mr. Naiker as a person of interest back on February 23rd of 2007. On that day, Constable Fradette received information from another confidential informant, Informant 2, who told Constable Fradette that there were two individuals recently arrived in Whitehorse from Surrey, British Columbia, who were dealing crack out of the Blue Moon Saloon. No names were provided but detailed descriptions were given which clearly fit Mr. Naiker and Mr. Auclair. That same day, Constable Fradette went to the Blue Moon Saloon and had no difficulty picking out Mr. Naiker and Mr. Auclair, who were playing pool in the bar. Constable Fradette engaged Mr. Naiker in conversation and was told, either then or subsequently, that

Mr. Naiker was from Surrey, B.C. Mr. Naiker indicated that he was in Whitehorse to watch the Canada Winter Games.

[9] As I have indicated, the information was provided by Informant 2. Constable Fradette has known this person for the entire length of the constable's posting in Whitehorse. This informant has no criminal record.

[10] On March 6th, Constable Fradette received some additional information relevant to the case at bar. That information was provided by yet another informant, Informant 3. Informant 3 advised that Mr. Naiker and Mr. Auclair were dealing crack, although no specific details were provided. Constable Fradette had known Informant 3 for only a few months. Informant 3 does not have a criminal record.

[11] Constable Fradette testified that none of the informants in the case were paid or received other consideration for the information provided.

[12] From February 23rd until Mr. Naiker's arrest on March 20th, Mr. Naiker and Mr. Auclair were kept under a degree of surveillance by the police. Mr. Naiker, usually in the company of Mr. Auclair, was noted to be in the Blue Moon Saloon or other Whitehorse bars on ten occasions in this period of time, in addition to the encounter on February 23rd already described. On some of these occasions, Mr. Naiker was also in the company of known drug users or traffickers. The Blue Moon Saloon, which has since closed, and the 98 Hotel, were known to Constable Fradette and the Whitehorse RCMP as places where drug trafficking occurs on a relatively regular basis.

[13] With respect to the sightings of Mr. Naiker in the bar, it is obvious that there is nothing illegal in going to a bar, or shooting pool, for that matter. So these sightings in and of themselves are innocuous, but they did serve to confirm what the informants were saying about Mr. Naiker's whereabouts and his association with Auclair. As well, the conversations with Mr. Naiker were able to confirm that he was recently arrived from Surrey, B.C. Thus the March 20th tip, which led directly to the arrest and search of Mr. Naiker, does not stand alone, but was the final piece of information which corroborated and amplified what was already known about Mr. Naiker and his activities.

[14] In these circumstances, I am satisfied that the overall quality of the informant and other information available to Constable Fradette provided him, both subjectively and objectively, with reasonable and probable grounds to make the arrest and search within the test in *R. v. Debot*, [1989] 2 S.C.R. 1140. Accordingly, the application to exclude the evidence as being unconstitutionally obtained must fail.

[15] If I am wrong in this conclusion, I find that I would not, in any event, have excluded the evidence. Constable Fradette clearly did not act until he felt that he had reasonable and probable grounds, thus he did not arrest Mr. Naiker after the first informant's tip, or even after the second. The information of all three informants was corroborated by police observations of the accused in the company of Mr. Auclair and known drug users at various bars.

[16] It is also worthy of note that, having received the March 20th tip, Constable Fradette did not act immediately on it but first discussed the matter with senior officers to see if they agreed with his assessment of whether or not he now had reasonable and

probable grounds to act. Thus it is clear that he acted in the utmost good faith. It is also clear that the search incident to arrest was minimally intrusive. The evidence obtained was real and the charge is serious.

[17] The next matter for determination is the issue of the second key box of crack cocaine found under the table and not on the person of the accused. A comparison of the cocaine and the key case found on Mr. Naiker with the cocaine and key case found under the table shows that the cocaine rocks in the first container are indistinguishable, in the photographs, from those in the second. As well, it appears from the photos that the magnetic key case containers are nearly identical. As well, it was noted that the container was magnetically attached to the underside of the table in a position that was nearest to where the accused and not Mr. Auclair sat. The evidence also suggested that it would have been difficult for Auclair to have placed the key case where it was found since he would have had to make a considerable movement underneath the table in order to put the key case where it was ultimately found. Thus, in my view, it has been established that the magnetic key case and crack cocaine found under the counter were placed there by the accused.

[18] I leave aside the interesting issue of whether Mr. Naiker could have claimed a right to be secure from unreasonable search and seizure in respect of the second container since he had, in my view, effectively attempted to abandon it.

[19] So at the end of the day, I am satisfied that it has been proved that Mr. Naiker had possession of all of the cocaine in the two key containers. I am also satisfied from

the quantity of crack cocaine rocks found, their uniform size, and the absence of any indicia of personal use, that the cocaine was possessed for the purpose of trafficking.

[20] I should say that I would have reached this conclusion even without taking account of the second container of cocaine. In the result, I find the accused guilty.

[21] MR. MARCOUX: Your Honour, Mr. Naiker has no criminal record. I have discussed the matter with my friend and I think it would be in the best interest of both counsel and the Court if a pre-sentence report in this case would be ordered by the Court, in order to get more information about Mr. Naiker, because in this case the Crown will seek a significant prison term and I think it would be helpful.

[22] THE COURT: Mr. Van Wart?

[23] MR. VAN WART: I'm in agreement with that suggestion. I would ask that the matter be put to this Friday at 1:00 p.m. so we could find a time where Your Honour is available and both counsel is available.

[24] THE COURT: That matter will go to Friday at 1:00 to fix a date for a pre-sentence report and sentence.

[25] THE CLERK: Is Mr. Naiker consenting to his remand?

[26] MR. VAN WART: Yes. Perhaps -- he doesn't need to be present on Friday. He can just consent to his remand.