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COURT OF APPEAL FOR THE YUKON TERRITORY

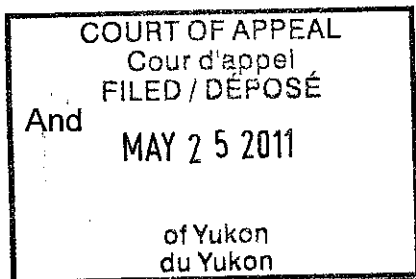
Citation: **R. v. Guan,**
2011 YKCA 3

Date: 20110211
Docket: YU0658

Between:

Regina

Respondent



Yao Lin Guan

Appellant

Before: The Honourable Madam Justice Ryan
The Honourable Mr. Justice Chiasson
The Honourable Madam Justice D. Smith

On appeal from: Supreme Court of the Yukon Territory, April 19, 2010,
(*R. v. Guan*, 2010 YKSC 16, Whitehorse Registry No. 09-01511)

Oral Reasons for Judgment

Counsel for the Appellant:

J.D. Spears
and W. Cam

Counsel for the Respondent:

L. Gouaillier

Place and Date of Hearing:

Vancouver, British Columbia
February 11, 2011

Place and Date of Judgment:

Vancouver, British Columbia
February 11, 2011

ORIGINAL

[1] **RYAN J.A.:** On April 19, 2010, the appellant Yao Lin Guan, was convicted by Mr. Justice Veale in the Supreme Court of Yukon Territory, of one count of possession of cocaine for the purpose of trafficking, contrary to s. 5(2) of the *Controlled Drugs and Substances Act*, 1996, c. 19, and one count of failing to stop in order to evade a police officer, contrary to s. 249.1 of the *Criminal Code*, R.S. 1985, c. C-46.

[2] Both offences were alleged to have occurred on September 30, 2009 in Whitehorse. The evidence on the trafficking count was entirely circumstantial.

[3] The central ground of appeal argued by the appellant is that the verdict for trafficking is unreasonable or cannot be supported by the evidence. Mr. Spears, counsel for the appellant, argues that if he succeeds on the trafficking count Mr. Guan should be acquitted of the offence of evading a police officer as well.

[4] The evidence disclosed that on September 29, 2009 at about 7:15 p.m., Corporal Walker of the RCMP, who was off-duty and on his way home, was stopped at a gas station when he observed a male in a phone booth near the McDonald's restaurant next door to the gas station. The male finished his call and waited outside the booth. Soon thereafter a Toyota Matrix drove past Corporal Walker and pulled up beside the waiting male. The standing male approached the passenger side of the Toyota, reached his hands into the vehicle, took something from the passenger, and shook hands with him. The Toyota drove off. Corporal Walker testified that the person in the passenger seat of the Toyota was Mr. Guan.

[5] Corporal Walker, believing that he had just witnessed a drug deal, recorded the licence plate of the Toyota. The next morning, at work, he ran a licence check of the vehicle and found that it was registered to the appellant with an address on Alexander Street in Whitehorse.

[6] Later that day, Corporal Walker drove past the Alexander Street address. He observed the Toyota pulling out of the driveway. He followed the car. The Toyota drove to Fourth Avenue, along Fourth Avenue and then right on Chilkoot Way and

right again into a shopping centre area. The driver passed the Canadian Tire Store, drove back towards Chilkoote Way, and stopped in front of some stores in a strip mall. Corporal Walker testified that the driver stopped the vehicle but did not get out. The officer drove by the vehicle to obtain a better look at the driver. He said that when he did so, he believed he made eye contact with Mr. Guan. Corporal Walker testified that Mr. Guan was the man he had seen the evening before as a passenger in the same car. Corporal Walker then turned his vehicle around and began to follow the Toyota, which by this time had driven back toward Chilkoote Way. When the Toyota drove through a stop sign at Chilkoote Way without stopping, Corporal Walker activated his siren and flashers and pursued the vehicle. The Toyota did not stop, but turned right through a red light at Fourth Avenue and then up Two Mile Hill, passing once again the entrance to the Canadian Tire Store.

[7] Corporal Walker testified that during the pursuit, the appellant seemed to be fumbling to the left of his body. The vehicle was speeding up and slowing down. The officer managed to pull up beside the Toyota, near the entrance of the Canadian Tire Store, and yelled for the driver to stop. The driver and passenger windows of the Toyota were open. The vehicle was not stopping, so Corporal Walker pulled in front of it and forced it to stop a short distance up Two Mile Hill.

[8] Corporal Walker arrested Mr. Guan. By this time, the driver's window was up and opened only a couple of inches. He searched the Toyota and found a cellular phone, and three sums of cash in different locations - 300, 60 and 5.

[9] A search was conducted of the area by another police officer with a dog. Ten to fifteen minutes after Mr. Guan's arrest, the police located a ziplock bag containing cocaine on the roadway leading to Canadian Tire. Later it was determined that the bag contained seven "spit balls" of cocaine, all weighing between one and two grams each.

[10] The next day near 5:00 p.m., Mr. Guan's cell phone, which was in the possession of Corporal Walker, rang. The call was answered by Corporal Walker. He had a conversation with the caller who asked, "Can you do McDonald's?" The

officer asked him what he needed, and he replied "three". About 25 minutes later, the caller called again, asking if Corporal Walker would be there. When the officer asked whether he meant three grams, the caller said no, he meant "spit balls".

[11] The officer then drove to McDonald's where he met the person who identified himself as the caller and confirmed that he was intending to purchase cocaine.

[12] The Crown led evidence with respect to the manner in which drugs are sold in Whitehorse, the price, etc. The transaction with the passenger on September 29 fit the profile, as did the fact that money was found in three places in the vehicle the next day. The expert said that drug money is usually kept apart from personal cash.

[13] Mr. Guan, a relatively recent immigrant from China, testified through an interpreter, he said that he does not speak English well enough to engage in a drug transaction. He said that his family lived in Vancouver, but he could not find work there, so he came to Whitehorse where he found a job in a restaurant as a kitchen helper. He worked for a Mr. Nip who had helped him obtain his cell phone. He said that he had had the cell phone so that he could communicate with his son in Vancouver. Mr. Guan said that on the day in question he went to Canadian Tire to buy a shovel but, as he did not know how to purchase anything in English, had decided to return to pick up his wife so that she could do it for him. He explained his erratic driving by saying that in China when a police car is encountered, the drivers pull away so as not to block the police car.

[14] The trial judge found a number of inconsistencies and contradictions in the appellant's evidence. He rejected Mr. Guan's evidence, and went on to decide whether the Crown had proved its case on the whole of the evidence.

[15] The trial judge listed a number of facts that he said supported the finding that Mr. Guan was in possession of cocaine for the purpose of trafficking. On this appeal, the appellant submitted that many of the facts relied on by the trial judge were themselves unsupported by the evidence. Mr. Spears recognized that it is the inference of guilt drawn from all of the facts which must be proved beyond a

reasonable doubt, not each fact that is offered to support the inference. That said, Mr. Spears suggested that if it could be shown that many of the facts were without substance, the inference of guilt would be unreasonable.

[16] Mr. Spears submitted that the evidence of identification of Mr. Guan as the passenger in the vehicle the day before Mr. Guan's arrest was not reliable. I disagree. Because he thought he had witnessed a drug deal, Corporal Walker made a point of observing who was in the Toyota on September 29. He said that he saw the same person the next day in the Toyota, now as driver, and that that person was Mr. Guan. This is not a case of a fleeting glance. Corporal Walker made a point of observing who was in the vehicles. In these circumstances the trial judge was entitled to accept and rely on Corporal Walker's observations as part of the overall circumstances of the case.

[17] Mr. Spears also took issue with the significance of the drugs being found on the roadway, after Mr. Guan was arrested. He submitted that there were many other explanations for a package of drugs to wind up on the road, particularly since a police officer had stated in the Crown's case that the area around Canadian Tire was often the site of drug activity. I agree that this evidence on its own might be open to question, but the trial judge, as he ought to, examined the evidence in context.

[18] The trial judge did not look at the individual items of evidence in isolation one from the other, but examined it as he is mandated to do, as a whole. When examined as a whole, the bits of evidence took on a larger meaning for the trial judge.

[19] In my view, the finding the Mr. Guan was in possession of cocaine for the purpose of trafficking was not unreasonable. Mr. Guan had been seen the day before as a passenger in his car, passing something to the male near the phone booth at McDonald's. This activity fit the profile of a drug transaction. The next day, Mr. Guan was chased by Corporal Walker, did not come to an immediate stop, but was fumbling around with something in his car. Ten to fifteen minutes later, the drugs were found on the road which Mr. Guan had just passed in his vehicle. When

he was stopped and searched, the police found cash and a cell phone. The next day Corporal Walker answered a call placed to Mr. Guan's telephone. The caller asked to purchase a "spit ball". Spit balls are what were found in the bag discovered on the roadway.

[20] On this evidence it was open to the trial judge to come to the conclusions that he did, and to reject any other explanation that might arise on the evidence.

Mr. Spears suggested that a reasonable alternative was the involvement of Mr. Nip, Mr. Guan's employer. I will not review the evidence of Mr. Nip's involvement with drugs that was placed before the trial judge. Here it is enough to say that there is no evidence that Mr. Nip could have been involved in placing the drugs on the street. As there is no evidence of that, it would not be a reasonable inference that he was the culprit.

[21] In spite of the able efforts of Mr. Spears to persuade us otherwise, I cannot say that the verdict is unreasonable or cannot be supported by the evidence. I would agree with Mr. Gouaillier, counsel for the Crown, that the verdict is sound. I would dismiss the appeal.

[22] **CHIASSEON J.A.:** I agree.

[23] **D. SMITH J.A.:** I agree.

[24] **RYAN J.A.:** The appeal is dismissed.

C.A. Ryan J.A.
The Honourable Madam Justice Ryan