

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Johnson, 2008 NSPC 1

Date: 11Jan2008

Docket:1815230

1815231

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Registry: Halifax

Her Majesty the Queen

v.

James Allen Johnson, Karen Dooks
and Cindy Curran

Judge: The Honourable Judge Castor H. Williams

Decision: January 11, 2008

Charge: 5(2) CDSA; 5(2) CDSA; 5(2) CDSA;
5(2) CDSA; 5(2) CDSA; 5(2) CDSA;
145(3) CC; 145(3) CC

Counsel: Shaun O'Leary for the Crown
Roger Burrill for the Defendant Johnson
Geoff Newton for the Defendant Curran
Cameron McKeen for the Defendant Dooks

Introduction

[1] At about 2358 hours on September 11, 2006, a police search team under the authority of a ***Controlled Drugs and Substances Act*** search warrant, forcibly breached the front entrance door of a basement apartment located at 5663 Falkland Street in the Halifax Regional Municipality. Upon entry they located the accused Karen Dooks reposed in the front living room. In the rear and only bedroom they located, laying on a bed fully clothed and awake, the accused persons, James Johnson and Cindy Curran.

[2] On a search incidental to his arrest the police found in the pocket of the accused Johnson, quantities of drugs that were analyzed as cocaine. The total weight of the drugs was 29.20 grams that included 14 pieces of crack cocaine individually wrapped in pieces of tin foils. Also, the police found that he had in his pocket C\$605.00 in cash. Additionally, in his pocket, they found a prescription bottle that contained pills which upon analysis included a number of dihydromorphinone tablets.

[3] Referring to the accused person Curran, the police found that she only had in her actual possession C\$160.00 in cash. However, concerning the accused Dooks they found that she had no drugs or money in her actual possession. All the same, the police removed from the top of a refrigerator an envelope that displayed the name of Dooks directed to the search address. In addition, the police located and seized from a night stand near the bed in the bedroom, an operational digital scale with white flakes that were analyzed as cocaine. Also, from near the scale they seized five small pieces of one and one quarter inch tin foil squares. As well, they found in the bedroom near the bed two larger irregular pieces of tin foil and a partial roll of tin foil.

[4] Based on these findings the police have charged the accused persons with possession of cocaine and di-hydromorphone for the purposes of trafficking. However, the accused Johnson testified that he was a greedy indiscriminate drug addict and that the drugs found in his possession were for personal use only and the quantity was because he had access to some money that facilitated his quantitative acquisition. The two other accused persons did not testify.

Expert Testimony

[5] Constable Tony Carlisle was qualified to give opinion evidence on the use, availability, quantities, distribution, packaging, sale, price, value, jargon and paraphernalia of cocaine/crack cocaine. In his opinion, the value of one ounce of cocaine was between \$1,300.00 and \$1,800.00. He discussed the hierarchical distributional flow of drugs and prices and the manner of packaging. Important to this case was the packaging of the drugs in individual tin foil wrapping called “eight balls,” the tin foil squares and the presence of digital scales. The existence of these paraphernalia and the quantity of drugs found on Johnson suggested, *prima facie*, drug dealing activities. Absent, however, from the usual mix of trafficking indicia were a “score sheet” and cash in small denominations.

Position of the Parties

(a) *the Crown*

[6] The Crown’s theory was that the quantity of drugs and the associated

paraphernalia were consistent only with the conclusion and inconsistent with any other rational conclusion but that the accused persons had joint possession of the drugs for the purpose of trafficking.

(b) *The accused*

[7] Johnson was the only accused person who testified. He admitted to a lengthy criminal record that consisted, for the greater part, of property related offences and a drug trafficking conviction in 2005. Likewise, he admitted being a greedy, indiscriminate user and self-indulgent drug addict. In any event, September 8, 2007 was his fiftieth birthday and, unemployed, he was celebrating this milestone at a local hotel with his common law spouse of five years, Cindy Curran, by self-gratification in a weekend binge of imbibing alcohol and street drugs. The accused Dooks was also present at this celebration but it was Curran who looked after all the expenses.

[8] Using monies that either Curran gave him or which he withdrew from her bank or Visa account Johnson purchased large quantities of drugs for self-consumption. He contacted street dealers and after negotiations purchased “rocks,” cocaine and pills. Additionally, he went to a pharmacy and obtained

prescribed drugs, methadone, diazepam and dilaudid. Going to the home of Dooks, who did not know that they had in their possession the illegal substances, Johnson and Curran retired to the apartment's rear bedroom. There, Johnson went on a binge of smoking the various drugs utilizing some available tin foils and a pipe that he claimed belonged to Curran.

[9] Johnson admitted that Curran either gave him the money to purchase the illegal substances or facilitated his acquisition of them. Likewise, she knew that he had the illegal substances and what he had were hers and vice versa. Furthermore, as he used her moneys to purchase the illegal substances she was entitled to share and to participate in their consumption. He did share them with her by giving her some of the purchases. However, the physical evidence does not support this point. On the other hand, Dooks had no pecuniary interest in the illegal purchases so she could and did not share or participate in their consumption.

[10] Put another way, the theory of the Defence was that because of his selfish, voracious and indiscriminate use and needs for street drugs and the availability of a source of "free" money, Johnson was making the most of the presently favourable situation to acquire and stock illegal substances for his

own personal consumption.

Discussion

[11] I do not doubt that the illegal substances found on the person of Johnson when analyzed was cocaine and/or crack cocaine. However, the pills when analyzed, I do not doubt were hydromorphone(dihydromorphinone) and not Di-hydromorphone as stated in the Information. As a result, the accused persons made motions objecting to the Crown's motion, at the end of its case for an amendment under the ***Criminal Code*** s.601.

[12] The Court ruled that the crown had not proved that the drug stated on the Information was one included in *Schedule 1* of the ***Controlled Drugs and Substances Act***. Furthermore, as the crown had relied upon the Certificates of Analysis under the ***Controlled Drugs and Substances Act***, ss. 45, 50 and 51 as proof of the illegal substances, it had the opportunity, prior to the leading any evidence, to seek the appropriate amendment. Consequently, such an amendment ought not to be made at the end of its case as that would be unfair, unjust and prejudicial to the accused persons who had made full

answer and Defence and had relied upon the evidence as presented. The Court denied the crown's motion to amend and, as a result, all the accused persons were discharged with respect to the second count on the Information tried before the Court.

[13] Similarly, the crown conceded that, on the evidence it presented there was no reasonable chance of a conviction on the charge of possession for the purpose of trafficking or the included offence of possession against the accused person Dooks. As a result, it withdrew this charge against Dooks and upon motion she was discharged.

Analysis

[14] The real issue, in the Court's opinion, is whether the cocaine found on Johnson, when added to the other *prima facie* indicia of drug trafficking was consistent only with the rational conclusion that he was trafficking in cocaine and inconsistent with any other rational conclusion but that he had the cocaine in his possession solely for the purpose of trafficking in cocaine.

[15] Here, there is some uncontradicted evidence based on Johnson's

testimony that he gave some of the cocaine that he bought with Curran's money to her. The crown's initial position was that the purchase of the illegal substance belonged to both of them as joint possessors and the quantity and the present paraphernalia made the joint possession one for the purpose of trafficking thus making them both joint traffickers. However, that position appears to have shifted in its final submissions as the total evidence disclosed that Johnson's testimony, if believed, also pointed to the possibility that his possession of the illegal substance was for personal use. As a result, the crown's final argument was that by giving some of the conceded to and admitted joint ownership and possession of the cocaine to Curran, the other joint owner and possessor, Johnson is captured by the broad definition of "traffic" and is therefore guilty of possession for the purpose of trafficking.

[16] Even if the Court were to accept that Johnson's explanation of the quantity of drugs and how he consumed them had an air of reality, given his uncontradicted version of events that is supported by the evidence of the "rocks," crack pipe, tinfoil, scale and cash, and his own drug addiction, it must still determine whether the doctrine of conjugal unity would apply in these set of circumstances to prevent a conviction of possession for the purpose of trafficking. However, assuming that Curran had constructive possession of

the narcotics and that they were purchased with her money and with her knowledge, the evidence is not clear that he transported any drugs to Dook's residence to be consumed jointly by him and Curran. **R.v. O'Connor** (1975) 23 C.C.C. (2d) 110 (B.C.C.A.).

[17] Nonetheless, the evidence is that Johnson and Curran were both in bed at the time of the apprehension. Therefore, assuming, on the proven facts, that the narcotics found on Johnson were also in Curran's constructive possession and that the narcotics were also for personal use, there was no evidence of any movement of the narcotics from Johnson to Curran or between them that would be captured by the terms, "transfer" or "transport" as included in the definition of "traffic" in the **Controlled Drugs and Substances Act**, s.2(1)(a). There is no evidence that either or one of them was promoting the distribution of any narcotic to another person or even to the other that would make either of them liable for possession for the purpose of trafficking. See: **R. v Gardner** (1987), 35 C.C.C. (3d) 461 (Ont. C.A.).

[18] First, in the Court's opinion the gravamen of the offence here is possession plus the intent or purpose of physically making the narcotic

available to Curran. *R. v. Taylor* (1974), 17 C.C.C.(2d) 36.(B.C.C.A.). Critically, however, on the evidence, could it be said that Johnson had possession of the narcotics for the purpose of trafficking? In the Court's opinion the proved facts of the existence of the scale, quantity of drugs and tin foil and on Johnson's explanation that was not based on conjecture but was supported by the proven facts was just as consistent with the fact that he had the narcotics for his personal use and also for sale. However, the absence of other usual indicia of trafficking such as score sheets, cash in small denominations and surveillance of or direct evidence of sale, raises doubts as to his intent and purpose of making the narcotics available to others and the Court finds that it is reasonable to draw a rational conclusion, from the proven facts and not based on speculation, that Johnson's possession could have been for his personal use as he has asserted.

[19] Second, in the Court's opinion, the evidence is unclear as to whether Curran knew or had knowledge that Johnson was in possession of the narcotics when at Dooks' residence. The only evidence on this point is Johnson's. He, however, is ambivalent, vague and imprecise as to when if at all, he gave or shared any of the narcotics that he purchased from the dealers who came to Dook's residence with anyone. Also, the evidence is clear and

the Court accepts and finds that he did not transport any narcotic to Dooks' residence to give to Curran. Furthermore, it was his uncontradicted testimony that it was he alone who was consuming the various drugs at the residence with no intention of sharing them. Thus, in the Court's opinion, any transportation was incidental to his own personal use of the narcotic and did not include part of a transaction involving others. See: *R. v Young* (1971), 2 C.C.C. (2d) 560 (B.C.C.A).

[20] Third, there was some suggestive testimony, without more, that Dooks' residence may be a "flop house" where people drop in to use narcotics and that could explain the drug paraphernalia such as the scale. This view appears to find some support in the crown's evidence, which was not developed, that "found in," a person or persons that were not the prime target were located at the residence.

Conclusion

[21] It is this Court's opinion that the crown has not on the above analysis proved beyond a reasonable ground that the accused persons, Johnson and

Curran, were in possession of cocaine for the purpose of trafficking. However, on the same analysis, this Court finds and concludes that both accused persons were in simple possession of cocaine. Johnson was in actual possession and Curran was in constructive possession with knowledge of and facilitating the purchases by providing the money to do so with knowledge that it was being done.

[22] This Court therefore finds them both guilty of simple possession of cocaine and will enter convictions on the record.

J.