

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Cite as: R. v. Zahrebelny, 2010 NSPC 92

Date: October 5, 2010

Docket: 2058489

Registry: Halifax

Between:

Her Majesty the Queen

v.

Tony Zahrebelny

Judge: The Honourable Judge Marc C. Chisholm

Heard: June 7, 2010; July 15, 2010; September 13, 2010 &
September 21, 2010

Written decision: October 5, 2010

Charge: CDSA 5(2)

Counsel: Jeff Moors for the Crown
Nicole Campbell for the Defense

The Charge:

[1] The accused is charged that he, at or near Halifax, Nova Scotia on or about the 11th day of June 2009, did unlawfully possess cannabis marihuana for the purpose of trafficking contrary to s.5(2) of the Controlled Drugs and Substance Act.

The Issue:

[2] The sole issue in this case is “*mens rea*”. The Defense acknowledges that Mr. Zahrebelny was in possession of cannabis marihuana but submits that the Crown has failed to prove beyond a reasonable doubt that his possession of the cannabis marihuana was for the purpose of trafficking. The Crown relies on evidence of items found on the accused and in his apartment and the opinion of an expert witness in urging the Court to find that the accused’s purpose, at least in part, was to traffic in cannabis marihuana.

Summary of the Facts:

[3] On June 11, 2009, at 5:50 p.m. the police executed a search warrant at 38 Vimy Avenue, Apt. 304, the accused’s residence. Various items were

located in the residence and on Mr. Zahrebelny's person. Among the items seized were two cell phones admittedly belonging to the accused.

[4] Text messages and a record of Outgoing, Incoming and Missed Calls were retrieved from one of the cell phones.

[5] The Crown called Det. Cst. Michael Willett, who after a qualification hearing, was accepted by the Court as an expert in various aspects of the illegal drug trade including the jargon, pricing, packaging and distribution of illegal drugs. Det. Cst. Willett offered an opinion on the meaning of terms and phrases in the text messages and an overall opinion that Mr. Zahrebelny possessed cannabis marihuana for the purpose of trafficking.

Items found in Mr. Zahrebelny's apartment:

[6] The following items were found in the diningroom area of the accused's apartment:

- \$435.00 Canadian currency - found on the accused
- 29.47 grams of bulk cannabis marihuana in a zip lock plastic bag. Exhibit 8.
(There is no dispute that the substance was cannabis marihuana.)
- a set of digital scales. The scales were tested and found to be working
- two operational cell phones. One with a broken view screen.
- a box for one of the cell phones.
- a small pair of scissors.
- a box of aluminium tinfoil.
- a number of cannabis marihuana cigarette butts ("roaches").
- several dime bags (small zip lock bags)

- a grinder
- several loose cigarettes.

[7] Also found in the diningroom were items of food and drink, dirty dishes, magazines, a coffee mug, a can of shaving cream, sunglasses, keys, a personal computer, playing cards, deodorant and an eastlink bill in the accused's name.

[8] There, was no drug "scoresheet", no smaller packages of cannabis marihuana in the apartment and no weapons.

The Evidence from the Cell Phone:

[9] The following are the relevant communications found on the accused's cell phone.

Between the Accused's Cell Phone and "Scotts super"

Outgoing Call (Exhibit 17)

Text # 183 (Item number)
Scotts super
1-902-292-9752
8:00P Tue June09

Old Text Messages (Exhibit 18)

Text # 259-260
Scotts super
Do u gOt 5 green up there

6:23P Wed Jun 10

Text # 258

Scotts super

U do 5 for 35

7:05P Wed Jun 10

Text #256-257

Scotts super

kOOl thanks bud r u hOme

7:08P Wed Jun 10

Text # 254-255

Scotts super

kOOl I be up im just waitng for my buddy tO drOp mOney he Owes me and I be up !!

(no date/time stamp)

Text # 249-250

Scotts super

Im leavn my place in 5min

7:51P Wed Jun 10

Between the accused's cell phone and "Jed"

Text # 241-242

Jed

Lol. People with old cel phones would love 2 b u.

19024764304

10:41P Wed Jun 10

Text # 239-240

Jed

Im having problems sending messages 2 u. They keep failing?

10:43P Wed Jun 10

Outgoing Call (Exhibit 17)

Text # 170

Jed

902-476-4304

10:44 P Wed Jun 10

Old Text Messages (Exhibit 18)

Text # 238

Jed

Oh can you get d s?

10:57P Wed Jun 10

Text # 236

Jed

Did u leave yet?

11:08P Wed Jun 10

Text # 234-235

Jed

If not lets hook up 2morow noon ish. I forgot u working

11:08P Wed Jun 10

Text # 233

Jed

Didnt c it was this late

11:09P Wed Jun 10

Text # 232

Jed

We can do 2morow rite?

11:09P Jun 10

Text # 231

Jed

Cancl it

11:11P Wed Jun 10

Text # 230

Jed

Ill have ds 2morow

11:11P Wed Jun 10

Text # 229

Jed

I share?

11:12P Wed Jun 10

Text # 227-228

Jed

If I don't do 1 2nite im gonna pass out. I aint got.

11:13P Wed Jun 10

Text # 226

Jed

Didnt think it was this late

11:13P Wed Jun 10

Text # 223-224

Jed

We can 2morow. Im outta d s so im passin out lol

11:14P Wed Jun 10

Text # 222

Jed

U workin 2morow?

11:14P Wed Jun 10

Text # 219

Jed

Ill text u.

11:25P Wed Jun 10

Text # 218

Jed

Good nite.

11:26P Wed Jun 10

Text # 202, 203 & 204

Jed

Sorry had company all day. & they're still here

8:10P Thu Jun 11 & 8:11P Thu Jun 11

Text # 197-198

Jed

I know scott called the cops on u. I heard 4 sure. All personal so things will b fine just stay honest babe. Chin up :)

2:22P Fri Jun 12

The Evidence of Det. Cst. Willett:

[10] Det. Cst. Willett expressed the opinion that each of the following items found in the accused's apartment was consistent with the accused having a purpose to traffic in cannabis marihuana but was not conclusive thereof;

29.47 grams of cannabis marihuana
aluminum foil
dime bags
a digital scale
two cell phones
a grinder
\$435.00 cash

[11] Det. Cst. Willett expressed the opinion that the presence of each of the following items in the accused's apartment was consistent with personal use by the accused:

29.47 grams of cannabis marihuana
dime bags
a grinder
two cell phones
\$435.00 cash
smoked cannabis marihuana cigarettes (roaches)
loose cigarettes
scissors

[12] Det. Cst. Willett testified that if all he had to base his opinion on the evidence found on the accused and in his apartment he would not have opined that the accused possessed cannabis marihuana for the purpose of trafficking. The information found on the cell phones was the "tipping factor".

[13] In relation to the evidence retrieved from the accused's cell phone Cst.

Willet offered the following opinions:

- the term "green" (Text #260, Exhibit. 18) is commonly used on the street to refer to cannabis marihuana
- the price of cannabis marihuana is between \$7.00 - \$10.00 per gram
- \$35.00 would be a reasonable price for 5 grams of cannabis marihuana
- 5 units of cocaine or crack would cost much more than \$35.00
- 5 prescription pills, depending on the drug and its strength, could sell on the street for \$35.00
- the term "d s" or "ds" is a common street term for dilaudid
- the use of the term "d s" or "ds" by "Jed" in Texts 238 and 230 could be a reference to anything, but in his opinion these were references to dilaudid.

[14] Cst. Willett testified that the text messages were the factor which, in addition to all the other evidence, convinced him that the accused's possession of cannabis marihuana was for the purpose of trafficking.

[15] Cst. Willett offered the opinion that the accused was operating just above a street level trafficker.

[16] Cst. Willett stated that in his experience weapons were more likely to be found at the residence of higher level dealers.

[17] Cst. Willett testified that scoresheets would not be expected to be found unless the seller was "fronting" the drugs to the user (for later payment) which low end dealers, generally, don't do.

The Defense Arguments:

[18] The Defense advanced the following arguments:

- 1) The messages could have been unsolicited, providing no basis upon which to impute an intention to the accused;
- 2) The messages may not have been opened and read by the accused;
- 3) The accused may not have responded to any of the texts;
- 4) The text messages may not have been about drugs and even if they were, without knowing what, if any, response the accused made the Court should not draw an inference regarding the accused's intention from the statements of others;

Defense's 1st Argument:

Were the Text Messages Unsolicited

[19] In addition to the text messages in Exhibit 18 there are two outgoing calls in exhibit 17 of relevance:

Text # 183

Scotts super

1-902-292-9752

8:00P Tues Jun 09

and

Text # 170

Jed

902-476-4304

10:44P Wed Jun 10

[20] These records show that a telephone call was made from the accused's cell phone to "Jed" one minute after "Jed" sent a text message (exhibit 18 Text 239-240) to the accused's cell phone indicating a problem send a text message. The number called by the person using the accused's cell phone

was the telephone number listed for “Jed” on his text to the accused’s cell phone. I do not believe that the timing of the call from the accused’s phone to Jed was coincidental. Clearly the call was a response to the text message.

[21] Similarly an outgoing call (Text # 170) from the accused’s phone on June 9th to Scotts super is to the telephone number listed for Scotts super on all the Scotts super texts of June 10th.

[22] On June 11, 2009 the accused’s cell phones were found in his apartment. The evidence suggests he did not share the apartment with anyone. An eastlink bill found in the apartment was in his name. In these circumstances I am convinced that the accused was in possession of his cell phones on June 9-11, 2009.

[23] Based upon this evidence and the content of the text messages I am convinced that “Jed” and “Scotts super” were persons known to the accused as of June 10, 2009. While perhaps unsolicited the relevant text messages were not from persons unknown to the accused.

Defense Argument # 2:

Did the Accused Read the Relevant Text Messages?

- [24] On the evidence before me it appears that when a text message is delivered to this cell phone it bears a heading “New Message”. When the message is opened the cell phone automatically changes the heading to “Old Text Msg”.
- [25] Counsel for Mr. Zahrebelny challenged the reliability of the heading “Old Text Msg” as an indication that the accused opened the relevant text messages. Defense contended that someone, other than the accused could’ve opened the text messages.
- [26] Defense counsel referred to exhibit 18, Text 202-204, Text 199 - 201 and Text 197-198.
- [27] Those text messages bear the heading “Old Text Msg” but each is date stamped June 11th and time stamped after 8:00 p.m..
- [28] The accused’s cell phones were seized by the police between 5-6 p.m. on June 11, 2009, so, therefore, the accused could not have opened and read those text messages. The investigating officer Det. Cst. Li testified that he did not open the text messages. He stated that he turned the cell phones over to David Gallagher of the RCMP crime lab. Mr. Gallagher testified that his examination of the accused’s cell phones and the extraction of data therefrom did not change the data or the headings. I believe him. Exhibit 18 Texts 207-208, still bear the heading “New Message”. If Mr. Gallagher’s

examination of the cell phones caused a change to the headings of the text messages those text message's headings should've also changed. They didn't. The only reasonable conclusion is that someone other than the accused opened texts 197-204.

[29] I find the "Old Text Msg" heading is not a reliable indication of whether a text message was opened by the accused before the phone was seized by the police.

Defense Argument # 3:

Did the accused respond to any of the texts?

[30] In Text 239-240, exhibit 18 sent on June 10th "Jed" indicates that he is having difficulty texting messages to the accused's phone. One minute later a call is made using the accused's phone to "Jed's" phone number. As indicated previously, I do not believe that the timing on the phone call to "Jed" was coincidental. I find that the phone call to "Jed" was in response to his text message to the accused's cell phone. This leads me to the conclusion that the accused opened and read that June 10th 10:43 p.m. text from Jed. Based on that fact and content of Jed's subsequent text messages I believe that the accused reviewed and read all of Jed's texts.

[31] Did the accused receive and read the June 10, 2009 texts from Scotts super or was there a problem with his phone as suggested in Jed's message at 10:43 p.m. June 10th. Although Jed perceived a problem it appears Jed's text were received by the accused's phone. Also, in Text message #256-257 (exhibit 18) Scotts super expressed Thanks to the accused. That would suggest some communication from the accused. The content of Scotts super's subsequent text messages suggest that the accused received text messages, opened them and responded, however, this evidence is not conclusive.

[32] On all of the evidence before me, while I believe it was highly likely that the accused opened, read and responded to Scotts super's text messages of June 10, 2009 I find the evidence inconclusive.

Defense Argument # 4:

Meaning of the Texts

[33] When considered in context, I am of the view that the reference to "d s" by Jed was very likely a reference to dilaudid; that the reference to "u got 5

green” by Scotts super was very likely a reference to 5 grams of cannabis marihuana; That Scotts super’s phrase “u do 5 for 35” very likely related to the price of 5 grams of cannabis marihuana. To determine the intent of such references the Court must consider them in the context in which they were used.

[34] The language in these two and the other text messages from Scotts super is stilted. Short phrases are used rather than complete sentences. There is limited use of punctuation. Even grammatically correct written communications are capable of being mis-interpreted. In my view there is an even greater risk of misinterpreting “text“ language communications such as found in exhibit # 18.

[35] What meaning is to be attributed to the word “do” in Text # 258? Considered in context of the evidence before me I find it highly likely that Scotts super meant “sell” when he used the word “do” in Text # 258. Was that text an inquiry if the accused would sell 5 grams of cannabis marihuana for \$35.00 with an implied offer to buy at that price? Again, considering the context I find that interpretation to be highly likely. But, what if, the accused is a friend and advisor of Scotts super who is a new dealer in drugs including cannabis marihuana and what if the Text #258 was an inquiry

regarding whether \$35.00 for 5 grams of cannabis marihuana was a fair price. I'm not saying that I find such an interpretation at all likely. I have considered Det. Cst. Willett's opinion in considering the interpretation of and inferences to be drawn from these text messages. Even if the Court concluded that Det. Cst. Willett's interpretation of Text messages # 258 and 259 was correct (that Scotts super was asking to buy 5 grams of cannabis marihuana for \$35.00), without knowing how, if at all, the accused responded, can the Court be convinced he had an intention to sell cannabis marihuana?

[36] The word "Thanks" in the Text 256-257 sent just 3 minutes after Text 258-259 supports the Crown's position but, only if the expression of thanks relates to the discussion of buying and selling drugs.

[37] What if the accused declined Scotts super's request and changed the subject? The Thanks could've related to something other than drugs.

[38] The reason why Scotts super (apparently) went to the accused's apartment may have been an entirely different reason than that discussed in texts 259-260 and 258.

[39] To assess the meaning of any individual reference in any individual message or consider what, if any, inference is to be drawn therefrom, the Court must

consider the message in the context of all apparently related messages and the entirety of the evidence.

[40] Facts may be proven by direct evidence or circumstantial evidence.

Circumstantial evidence can be equally as persuasive as direct evidence. An inference may be drawn from facts proven by direct or circumstantial evidence. An inference ought be drawn only when the Court is satisfied beyond a reasonable doubt that it is proper to do so.

[41] I am conscious of the need to exercise great care and caution in assessing whether or not it is appropriate to draw an inference from proven facts.

[42] I am conscious of the burden on the Crown to prove the allegation against the accused beyond a reasonable doubt.

[43] A finding of an accused's intention, absent a statement of intention by the accused, normally requires the Court to draw an inference from proven facts. In most cases such an inference is drawn from actions of the accused. In this case the Court is asked to infer that the accused, possessed cannabis marihuana for the purpose of trafficking, based, to a significant degree on the interpretation of the words of other persons.

[44] The Crown submits that because the accused was receiving such messages, given all of the evidence, the Court should conclude that he possessed

cannabis marihuana for the purpose of trafficking. Alternatively, if the fact of receipt of the messages, alone, in the context of all the other evidence is insufficient, the Court should infer a positive response by the accused to the text messages and based on that inferred positive response and all the other evidence conclude that the charge has been proven beyond a reasonable doubt.

[45] Since the accused was a user of drugs I do not find it surprising that he may receive messages regarding drugs from other persons who are users or dealers or both. However, because of my previously stated concerns regarding the meaning of these text messages, they, in concert with all of the evidence, do not persuade me beyond a reasonable doubt that the accused possessed cannabis marihuana for the purpose of selling.

[46] There are no text messages from the accused to Scotts super on the accused's phone or texts from the accused to Jed. If the accused responded to the text messages there is no evidence of his response (s). If there were responses made by the accused they may have affected the overall meaning of the conversation. The Court is not engaging in speculation but rather a means of assessing the strength of the evidence when applying the test of proof beyond a reasonable doubt. On the evidence in this case I am not

persuaded that the Court should infer a positive response by the accused to the text messages of Scotts super.

[47] In summary, while I am of the view that Cst. Willett's interpretation of the text messages is very likely correct and on the totality of the evidence it is highly likely that the accused possessed cannabis marihuana, in part at least, for the purpose of trafficking the evidence has not persuaded me of that beyond a reasonable doubt.

[48] I find the accused not guilty of possession of cannabis marihuana for the purpose of trafficking but guilty of the included offence of possession of cannabis marihuana.