SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Murphy*, 2018 NSSC 310

Date: 2018-12-05
Docket: Hfx. 473588
Registry: Halifax

Between:

Her Majesty the Queen

v.

Jay Cecil Paul Murphy

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	August 13, October 30 and November 27, 2018, in Halifax, Nova Scotia
Counsel:	Jeff Moors, for the Federal Crown Joshua Nodelman, for the Defence

By the Court:

Introduction

[1] Mr. Murphy is charged that he on 16th day of May 2017, at Halifax, did have in his possession for the purpose of trafficking, cocaine, and did thereby commit an offence contrary to Section 5(2) of the *Controlled Drugs and Substances Act* (*CDSA*); on the same indictment, he was charged that being bound by an October 3, 2016 probation order (which was extant May 16, 2017), he did "wilfully fail without reasonable excuse to comply with such order" contrary to Section 733.1(1) *Criminal Code of Canada*.[1]

Background facts

[2] I note that counsel admitted: continuity of any exhibits that were seized; service of [2] and the truth of the factual contents of all Certificates of Analysis; the identity of Mr. Murphy. Counsel also admitted that Mr. Murphy was bound by a probation order[3] for a period of 12 months as of October 3, 2016, and that if he were found guilty of possession for the purpose of trafficking, or the included offence of simple possession (s. 4(1) *CDSA*) that would be sufficient for him to be found guilty of the breach of his probation order. The evidence heard by the court in the *voir dire* regarding the admissibility of the search of Mr. Murphy and a vehicle was not agreed to be considered by the court in the trial proper, and I will disregard it.

[3] The following facts are not disputed, and I find them to have been proved to the necessary standards. On May 16, 2017, officers in the West Quick Response Unit of Halifax Regional Police Services were alerted to be on the lookout for a Ford Escape vehicle, Nova Scotia license DDR 165, as it was believed to be driven by Nadia Gonzalez , accompanied by a male named "Jay", that they were selling illegal drugs from the vehicle, and that it was headed to 14 Randall Avenue, Halifax.

---

[1]For some time now, the *Criminal Code* has not been worded so that it is an essential element of this offence that an offender "wilfully" fails to comply with the order as it was previously- see *R. v. Docherty*, [1989] 2 S.C.R. 941. Therefore, the word "wilfully" should not appear in such charges, and I will consider it surplusage.

[2] Which strictly speaking is no longer required *per se*-see ss. 44 – 45 *CDSA*, which remain, but the previous Section 51 was repealed.

[3] Exhibit 12.

[4] Numerous members of the West Quick Response Unit of Halifax Regional Police Services set up surveillance of the area in unmarked police vehicles.

[5] The Ford Escape vehicle was pulled over. I found there were reasonable grounds for the arrest, search incident to arrest and search of the vehicle.[4] Mr. Murphy was the driver and sole occupant.

[6] While he was being handcuffed by Constable Chad McNamara beside the police car he appeared to drop something onto the ground which turned out to be wrapped in black plastic – it is exhibit number one and did not contain any illegal drugs.

[7] The Constable also seized from Mr. Murphy the following:

1. From the front right pocket of his jacket – what I accept was a crack pipe – glass tubular item with what appeared to be a residue consistent with the smoking of crack cocaine on its inside [it was not made an exhibit];
2. From the left front pocket of his jacket – a pill bottle [Exhibit 3] which contained .5 g of crack cocaine (see Exhibit 4 – Certificate of analysis). Detective Constable Patrick O'Neill testified that crack cocaine is created when cocaine and baking soda are mixed together using heat – in contrast to powdered cocaine, crack cocaine tends to take on a hardness similar to wax in colour and texture, and is commonly heated and inhaled; and
3. From the left front pocket of his jacket – a so-called "score sheet" [Exhibit 5].

[8] Sgt. Ken Burton assisted with the arrest and search. He seized the following from Mr. Murphy:

1. From his right-side sock, a .3 g chunk of crack wrapped in tinfoil [see Exhibit 2-Certificate of analysis];
2. From his left side sock, a plastic Kinder surprise egg container [Exhibit 6] which contained 8 individually (wrapped in tinfoil) crack chunks weighing 2.4 g including the tinfoil – two chunks were removed having a wrapped weight of .7 g and sent for analysis to

[4] *R. v. Murphy*, 2018 NSSC 91.

Health Canada and found to contain cocaine [see Exhibit 9- Certificate of analysis];

3. From his left side sock, a plastic bag containing 7 chunks of crack cocaine wrapped in tinfoil weighing 3 g [Exhibit 8] – two of those chunks weighing .8 g, were sent for analysis to Health Canada and found to contain cocaine [see Exhibit 7 – Certificate of analysis];

4. Exhibit 5 – what was referred to as a "score sheet", seized from Mr. Murphy's left front jacket pocket.

[9] Constable Craig Smith was involved in the search of the vehicle and found:

1. In the door pocket on the front passenger side "dime baggies" within a larger bag with the Apple logo [Exhibit 10]; and

2. In the front glove compartment on the passenger side, a so-called "score sheet" [Exhibit 11].

[10] On May 17, 2017 Detective Constable Gregory Stevens weighed all 17 chunks of crack cocaine seized from Mr. Murphy's person, which he determined to be 6.2 g in total (although 16 of the individual chunks of crack cocaine were packaged in tinfoil, he did not remove the tin foil before weighing took place). Individually, he had weighed crack cocaine from what became the following trial exhibits:

1. Exhibit 2– .3 g chunk of crack cocaine in tinfoil – it was sent away to Health Canada and found to contain cocaine – some of the chunk remained in police custody;

2. Exhibit 4– .5 g chunk of crack cocaine found in a green pill bottle being Exhibit 3;

3. Exhibit 6 – initially 8 chunks of crack cocaine individually wrapped in tinfoil, total wrapped weight of 2.4 g;[5]

4. Exhibit 8 – initially 7 chunks of crack cocaine individually wrapped in tinfoil, total wrapped weight of 3 g.[6]

[11] In summary, seized from Mr. Murphy's person were 17 separate chunks of crack cocaine having an initial total wrapped weight of 6.2 g.

[5] Two of those were used for sampling by Health Canada.
[6] Two of those were used for sampling by Health Canada.

[12] At trial, Detective Constable Patrick O'Neill was qualified by the court "to provide expert evidence in relation to cocaine and the possession of cocaine for the purpose of trafficking, and qualified in the pricing, quantities, paraphernalia, distribution, usage, purchasing, availability, sale and value of cocaine." His CV is Exhibit 14.

[13] On October 29, 2018, in court, he used a weigh scale exclusively used by the Halifax Regional Police to weigh drugs, which was accurate to 500 g weights and precise to 1/10 of 1 g.

[14] That weigh scale registered, for:

1. Exhibit 6 – the Kinder egg surprise found in Mr. Murphy's left sock, the contents being the six chunks of crack remaining *each of them* weighed .3 g for a total of 1.8 g;
2. Exhibit 8 – the plastic baggie found in Mr. Murphy's left sock, the contents being the five chunks of crack remaining, *each of them* weighed .4 g for a total of 2 g; and
3. Exhibit 4 – the chunk of crack found in the pill bottle was .5 g .

[15] At the request of Mr. Murphy's counsel, on our return to court on November 27, 2018, Detective Constable O'Neill returned with a more precise digital scale, being accurate to a 400 g maximum weight, and precise to 1/100 of 1 g.

[16] Using that instrument that day, he found the following weights for each wrapped chunk of crack [with foil/the crack itself/the foil itself]:

1. Exhibit 6 – six chunks:
    a. .33 g/.28 g/.04 g;
    b. .31 g/.27 g/.03 g;
    c. .31 g/.25 g/.05 g;
    d. .28 g/.24 g/.04 g;
    e. .30 g/.25 g/.04 g;
    f. .29 g/.25 g/.04 g.
2. Exhibit 8 – five chunks of crack:
    a. .41 g/.35 g/.04 g;
    b. .39 g/.33 g/.05 g;

c. .43 g/.38 g/.05 g;

d. .41 g/.35 g/.04 g;

e. .40 g/.35 g/.04 g.

[17] This weighing confirmed that generally speaking, the tinfoil accounted for .04 g:

1. Approximately 15% of the total weight of the chunks of cocaine wrapped in Exhibit 6 [initially found by Detective Constable O'Neill to weigh .3 g *each*]; and
2. Approximately 10% of the total weight of the chunks of cocaine wrapped in Exhibit 8 [initially found by Detective Constable O'Neill to weigh .4 g *each*].

[18] I keep in mind that samples for analysis by Health Canada were taken from Exhibits 2, 4, 6 and 8. Since we are unaware of the weight of each sample taken, there is no way now to confidently estimate the initial weight of the crack from each of those exhibits using the more precise scale.

[19] 16 chunks of crack cocaine were wrapped in tinfoil. At .04 g average weight of tinfoil, total weight of tinfoil is .6 g. One chunk of crack cocaine was not wrapped in tinfoil and weighed .5 g [Exhibit 4]. Therefore, the overall weight of crack cocaine seized from Mr. Murphy was .5 g plus (6.2 g less .5 g, equals 5.7 g for the wrapped 16 chunks, less .64 g total tinfoil weight equals) 5.06 g, or 5.56 g of crack cocaine in total.

[20] Nevertheless, as Detective Constable O'Neill stated, "on the street" buyers and sellers would consider this effectively to be a total weight of 6.2 g of crack cocaine, and therefore I conclude that 6.2 g of crack cocaine is the appropriate amount to consider to have been the initial weight of the 17 chunks of crack cocaine found on the person of Mr. Murphy.

[21] I find that the different lots of crack cocaine found on Mr. Murphy's person were easily distinguishable by virtue of their seized location. That is, including the tinfoil wrapping:

1. All eight of the chunks found in the Kinder egg container in Mr. Murphy's left sock each weighed .3 g;
2. All seven of the chunks found in the Ziploc bag in Mr. Murphy's left sock each weighed .4 g;

3. The only chunk of crack cocaine in his right sock weighed .5 g;

4. The only chunk of crack cocaine (and it had no tinfoil wrapping) in the pill bottle recovered from his front left jacket pocket weighed .5 g.

[22] Mr. Murphy does not challenge that he was knowingly in possession of crack cocaine, and therefore could properly be found guilty of an offence pursuant to Section 4(1) *CDSA* – simple possession. He argues there is not proof beyond a reasonable doubt here that he had possession of this crack cocaine for the purpose of trafficking.

[23] In order to convict Mr. Murphy of the Section 5(2) *CDSA* offence I must be satisfied beyond a reasonable doubt that:

1. He was in possession of cocaine;

2. He knew that the substance was cocaine;

3. He had possession of cocaine for the purpose of trafficking cocaine.

[24] I am satisfied beyond a reasonable doubt that each of these chunks that Mr. Murphy had on his person were "cocaine" and that he knew this. The controversial issue here is whether he should be found guilty of having possession of these items for the purpose of trafficking?

[25] Next, I will turn to an examination of that issue.

Is there proof beyond a reasonable doubt that Mr. Murphy had possession of cocaine "for the purpose of trafficking"?

[26] By Section 2 of the *CDSA* , to "traffic" in a drug includes, to sell, administer, give, transfer, transport, send, or deliver, the drug to someone, or offer to do so.

[27] The Crown argues that the court should find beyond a reasonable doubt that Mr. Murphy had the crack cocaine for the purpose of trafficking in it because, *inter alia*:

1. The 17 chunks of crack cocaine were seized from different locations on his person, and arranged so they could be easily and quickly distinguished, as if each were a different "shelf in a store", where each item located there weighed the same amount, and a different amount from items found in different locations;

2. Each chunk of crack cocaine was packaged in tinfoil for the retail resale market, [save Exhibit 4, the .5 g chunk in the pill bottle];

3. All chunks of crack cocaine were available for a very quick cash transaction – a "handoff" as it were, which Detective Constable O'Neill testified was typical in street level trafficking, and often involves delivery of drugs by vehicle;

4. All chunks of crack cocaine were in sizes that were readily saleable "on the street" – Detective Constable O'Neill testified that depending on the individual, typically "street level dealers" will sell a range of weights between .3 (and unusually in much higher amounts including) up to 100 g, with weights of .3 to 3.5 g (an "eightball" being 1/8 of an ounce) being common, and "20 to 40 stone" or .2 to .4 g being the most common. He testified that in HRM crack cocaine generally sells for $100 per gram or $10 per "one stone" or .1 g. As larger amounts of grams are purchased in one transaction, typically there will be discounts from the $100 per gram retail starting point price;

5. In response to the defence argument that these really were for personal use, which is supported in some respects by Mr. Murphy's possession of a crack cocaine pipe, the Crown would say:

    a. This is at odds with the packaging for resale seen here;

    b. Street level dealers generally prefer not to sell in bulk, and therefore, typically at a discount per gram in bulk quantities, (i.e. the crack is not packaged or prepared for immediate resale), because they could make more money simply reselling small amounts themselves – therefore it is unlikely that Mr. Murphy bought these individually wrapped balls of crack cocaine from a dealer for his own personal consumption because it would be expected to involve paying a materially higher amount per gram of crack cocaine;

    c. Detective Constable O'Neill testified that crack users are not uncommonly also minor street level traffickers, and that crack users typically do not stockpile their own drugs for later consumption – they buy as they need to consume crack;

    d. The amounts packaged seen here are for resale to multiple users, who individually tend to consume in small amounts. In his experience Detective Constable O'Neill

testified that typically a crack cocaine user would consume 1 g. per day, and an upper limit of the amount that a crack cocaine user might buy is an "eight ball" or 3.5 g if they are "on a binge" and have the money, but he is not aware of such a purchase actually having taken place in his experience;

e. The amount of money to have purchased these items from a dealer on a retail level would involve $10 per .1 g of crack cocaine, or approximately $620 worth of crack cocaine – and it would be unexpected that a dealer would sell the crack cocaine in that form at a discount to Mr. Murphy;

f. The presence of a score-sheet on Mr. Murphy's person corroborates that he is a dealer.

[28] I found the evidence of Detective Constable O'Neill to be credible, reliable and compelling. He has extensive knowledge regarding the crack cocaine market in HRM, gained from police and civilian sources on the street, human and electronic surveillance, as well as his own personal policing experience. I accept all of his generalized opinion statements, and agree that Mr. Murphy had possession of the crack cocaine for the purpose of trafficking.

[29] Let me explain why.

[30] I find the following facts more likely than not:

1. Mr. Murphy did not hide the crack in the various locations on his person (from where it was seized) in the immediate time interval after he noticed he was being pulled over by the police and before the search of his person. I have no reason not to infer that he had the crack cocaine in those various locations before he was aware of the police presence that day. He was continuously driving the vehicle, which required at least one hand to be on the steering wheel, and his attention to be on the road. While his counsel suggests that he may have put the crack in those multiple locations *on his person* merely in an effort to hide the crack cocaine from the prying eyes of the police (by placing it in his right sock, his left sock, and his left front pocket of his jacket), I conclude that is very unlikely;
2. Mr. Murphy did not buy the crack cocaine from a dealer as a bulk purchase for his own personal consumption, in the form (individually

wrapped, and in the weights of .3, .4 and .5 grams) it was found on his person;

3. Exhibit 5 is a "scoresheet" which reflects crack cocaine amounts sold and customer identification references. Detective Constable O'Neill testified that such score sheets involving crack cocaine typically contain numbers divisible by 5 and 10 (bearing in mind the going price of crack cocaine: $10 per .1 g, and decimal increments that are popular on the street – .2 g, .3 g, .4 g and .5 g) and the names of individuals. In his opinion this exhibit was consistent with a street-level crack cocaine drug dealer's "scoresheet";

4. Exhibit 11 is a customer list. In Detective Constable O'Neill's opinion Exhibit 11 was consistent with a street-level crack cocaine drug dealer's "customer list" and directions to their locations.

[31] Having made these preliminary factual findings, I will go on to assess whether in all the circumstances there is proof beyond a reasonable doubt that Mr. Murphy had possession of the crack cocaine for the purpose of trafficking. I do not have direct evidence regarding that essential element of the possession for the purpose of trafficking offence. Therefore, I must examine the indirect or circumstantial evidence in the case.

[32] Justice Cromwell has recently canvassed the jurisprudence on circumstantial evidence, and synthesized its principles in *R. v. Villaroman*, 2016 SCC 33.[7]

[33] These are helpfully summarized recently in *R v Delege*, 2018 BCCA 200 by Justice Newbury:

> 28 In *Villaroman*, the Supreme Court of Canada emphasized that it was for the trial judge to decide whether the evidence against the appellant in that case, considered in light of human experience and the evidence as a whole (including the absence of evidence), excluded all reasonable inferences other than guilt. It was not for the Court of Appeal to raise "purely speculative possibilities" in order to fill in "gaps" in the Crown's evidence. (At paras. 69 -- 70.) As we stated in *Robinson*:
>
> > In circumstantial cases, *as in non-circumstantial cases*, the appellate court may not interfere if the verdict is one that a properly instructed jury could reasonably have rendered. (*Yebes*, at 186.) It is generally the task of the finder of fact to draw the line between reasonable doubt and speculation. (*Villaroman*, at para. 71.) It is not open to a court of appeal to conceive of

[7] See most recently *R. v. Youssef*, 2018 SCC 18.

> inferences or explanations that are not reasonable possibilities; nor to attempt to revive evidence or inferences that the trial judge reasonably rejected... If an appellant is to succeed, an inference other than guilt must be "reasonable given the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense." (*Villaroman*, at para. 36.) [*Robinson*, at para. 38; emphasis by underlining added.]

In *Robinson*, the appellant had raised other possibilities to explain his conduct, but the trial judge did not accept his explanation of discrepancies between his testimony and other evidence, including video evidence. Similarly, in *R. v. Grover* 2007 SCC 51, the trial judge had rejected the accused's testimony. The Supreme Court of Canada agreed with the Court of Appeal that it was not open to "acquit the respondent on the basis of speculation about a possible explanation of his conduct that was flatly contradicted by his own testimony." (At para. 3.)

29 In the case at bar, the appellant did not testify. However, the trial judge did consider "other possibilities" consistent with innocence. He found them to be highly unlikely at best. Considering the whole of the evidence, he then concluded that the Crown had proven that the appellant had assisted in the establishment of the grow operation, in possession of the marihuana for purposes of trafficking, and in the theft of the electricity. The question for us on the appeal is whether the trial judge, acting judicially, could reasonably be satisfied that the appellant's guilt was the only reasonable inference available on the totality of the evidence. In my view, while this case is close to the line, it does not meet the standard for an unreasonable verdict. Applying *Villaroman*, it cannot be said that the trial judge's conclusion, assessed logically and "in light of human experience", was one that a properly instructed jury could not reasonably have rendered on the whole of the evidence.

[34] Counsel for Mr. Murphy implores the Court that although the circumstances here may make his client superficially look like a street-level crack cocaine trafficker, I must find him not guilty because although superficially the whole of the evidence may be consistent with guilt, it is not also inconsistent with any other (innocent) conclusion.

[35] To decide this issue, reference is best had to Justice Cromwell's own words in *Villaroman*:

> The issue with respect to circumstantial evidence is the range of reasonable inferences that can be drawn from it. If there are reasonable inferences other than guilt, the Crown's evidence does not meet the standard of proof beyond a reasonable doubt.
>
> …

…a reasonable doubt "is a doubt based on reason and common sense which must be logically based upon the evidence or lack of evidence": para. 30 (emphasis added). A certain gap in the evidence may result in inferences other than guilt. *But those inferences must be reasonable given the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense.*

…

When assessing circumstantial evidence, the trier of fact should consider "other plausible theor[ies]" and "other reasonable possibilities" which are inconsistent with guilt.

…

I agree with the appellant that the Crown thus may need to negative these *reasonable* possibilities, but certainly does not need to "negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused": *R. v. Bagshaw*, [1972] S.C.R. 2, at p. 8. "Other plausible theories" or "other reasonable possibilities" must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation.

38 Of course, **the line between a "plausible theory" and "speculation" is not always easy to draw. But the basic question is whether the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty.**

39 I have found two particularly useful statements of this principle.

40 The first is from an old Australian case, *Martin v. Osborne* (1936), 55 C.L.R. 367 (H.C.), at p. 375:

> In the inculpation of an accused person the evidentiary circumstances must bear no other reasonable explanation. This means that, according to the common course of human affairs, the degree of probability that the occurrence of the facts proved would be accompanied by the occurrence of the fact to be proved is so high that the contrary cannot reasonably be supposed. [Emphasis added.]

41 While this language is not appropriate for a jury instruction, I find the idea expressed in this passage - that to justify a conviction, the circumstantial evidence, assessed in light of human experience, should be such that it excludes any other reasonable alternative - a helpful way of describing the line between plausible theories and speculation.

42 The second is from *R. v. Dipnarine*, 2014 ABCA 328, 584 A.R. 138, at paras. 22 and 24-25. The court stated that **"[c]ircumstantial evidence does not have to totally exclude other conceivable inferences"; that the trier of fact should not act on alternative interpretations of the circumstances that it considers to be unreasonable; and that alternative inferences must be reasonable, not just possible.**

> 43 Where the line is to be drawn between speculation and reasonable inferences in a particular case cannot be described with greater clarity than it is in these passages.

[36] I bear in mind that not all possible indicia of possession for the purpose of trafficking are present in the circumstances. For example, there is no direct evidence of actual drug transactions involving Mr. Murphy.

[37] Nevertheless, I am satisfied beyond a reasonable doubt that he had possession of this crack cocaine for the purpose of trafficking. Regarding the line between speculation and reasonable inferences, I conclude that while there is circumstantial evidence that could support an inference that Mr. Murphy was a crack cocaine user, when Mr. Murphy suggests that the evidence is consistent with his having possession of these 17 chunks of crack cocaine not for the purpose of trafficking, although they are of weights commonly expected for that purpose, packaged and located on his person as "ready for sale" on a "handoff" based transaction, and a "scoresheet" is also found on his person, his is not a reasonable inference; and I can think of no other reasonably possible inference based on the evidence, or the absence of evidence, other than guilt.

Conclusion

[38] On the whole of the evidence that I accept, and bearing in mind the absence of evidence, I am satisfied beyond a reasonable doubt that Mr. Murphy is guilty of possession of cocaine for the purpose of trafficking, and therefore also breach of probation for failing to keep the peace and be of good behaviour.

Rosinski, J.