Date: 1998 12 14
Docket: CR 03622

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

MARY-LOU SUTTON-FENNELL

Applicant

- and -

HER MAJESTY THE QUEEN

Respondent

Application to quash committal for trial after a preliminary inquiry.

Heard at Yellowknife, NT: December 10, 1998

Reasons filed: December 14, 1998

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.Z. VERTES

Counsel for the Applicant (Accused): Valdis Foldats

Counsel for the Respondent (Crown): Loretta Colton

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REASONS FOR JUDGMENT

[1] The applicant (accused) has been committed to stand trial on six charges: two of making false statements under oath (contrary to s.131(1) of the Criminal Code); two of theft (contrary to s.334 of the Code); and, two of fraud (contrary to s.380(1) of the Code). She now applies for an order in the nature of *certiorari* quashing the committal and the Indictment filed as a result thereof.

[2] Section 548 of the Criminal Code states that a justice presiding at a preliminary inquiry shall commit an accused to stand trial if there is "sufficient evidence" to put the accused on trial. The test of sufficiency, being the same as the test for a directed verdict of acquittal at trial, was set forth by the Supreme Court of Canada in *United States v. Shephard* (1977), 30 C.C.C.(2d) 424 (at p.427), as "any evidence upon which a reasonable jury properly instructed could return a verdict of guilty." The justice is required to commit the accused for trial in any case in which there is admissible evidence which could, if believed, result in a conviction. The corresponding onus on the Crown therefore is to "adduce some evidence of culpability for every essential definitional

element of the crime for which the Crown has the evidential burden": *R. v. Charemski* (1998), 123 C.C.C. (3d) 225 (S.C.C.), per Bastarache J. at p.229 (emphasis in original).

[3] Proceedings for an order in the nature of *certiorari* are available to review the committal of an accused for trial where there has been jurisdictional error. A committal in the absence of evidence capable of supporting a verdict of guilt beyond a reasonable doubt constitutes jurisdictional error.

[4] The evidence presented at the preliminary inquiry was summarized in the applicant's brief. The applicant, an employee of the Government of the Northwest Territories, was entitled, at the relevant times, to claim vacation travel assistance benefits ("VTA") twice annually for herself and her dependents (spouse and children). In applying for these benefits the applicant was required to complete a sworn declaration that the dependents for whom she was claiming did not receive similar benefits from any other source. The applicant's husband was also entitled to VTA benefits for himself and his dependents through his employment. In 1991 and 1992, the applicant's husband applied for and received benefits for the couple's two children. In both of those years, the applicant claimed VTA benefits for the same children. The claim forms included the sworn declaration described previously. In both years, by the time the applicant applied for the second set of benefits, her husband had already received the benefits he was entitled to and, thus, according to the Crown's theory, the applicant had fraudulently obtained benefits by swearing a false declaration that her children were not subject to any other benefit plan.

[5] It is accepted that the offences charged require proof that the applicant had knowledge that her husband received similar VTA benefits. Her husband did not testify at the preliminary inquiry since the presiding justice ruled that he was not a compellable witness (the reasons for that are not pertinent but it will suffice to say that the applicant and her husband are now separated). The presiding justice unfortunately did not specify the particular evidence relied on to justify the committal.

[6] The Crown acknowledges that there is no direct evidence of the applicant's knowledge that her husband had already claimed the benefits. Crown counsel submits, however, that there are five items of circumstantial evidence from which an inference as to her knowledge can be drawn. First, there is the fact of the marriage itself and that, at the relevant times, the spouses were living together. Second, there is evidence that the spouses maintained a joint bank account. Both of them had access to it and made entries in the cheque register regarding deposits, withdrawals, and cheques written, including the source of the deposits. Third, the applicant's husband applied for and received VTA

benefits in the amounts of $4,866.71 in 1991 and $5,497.66 in 1992. Fourth, the cheques for these benefits were deposited in the joint account. And, fifth, while these cheques were noted on the bank statements as simply a "payroll deposit" (in 1991) and a "deposit" (in 1992), the amounts of each cheque were significantly higher than other deposits noted in the bank statements as "payroll deposit" or simply "deposit". Crown counsel argues, therefore, that a reasonable, properly instructed jury could conclude from the totality of this evidence that the applicant was aware that her husband had received VTA benefits.

[7] Defence counsel notes that this evidence is merely indicative of the applicant's lack of knowledge. There was nothing on the cheques or on the bank statements to suggest that these were VTA benefits. Defence counsel also points to a document, entered as part of the Crown's exhibits at the preliminary inquiry, which he says is direct evidence of a lack of knowledge. This is a statutory declaration signed by the applicant in 1995 in the form of a memorandum to her employer's manager of personnel services. The defence did not raise any issue as to its admissibility (for example, whether it constitutes a statement to a person in authority) nor was there any explanation as to what in particular the memorandum was meant to address. In it, however, the applicant states that she was unaware that her husband had applied for and received VTA benefits. Defence counsel submits that there is no possibility of drawing an inference as to the applicant's guilty knowledge because that would require rejection of the only direct evidence on the issue of knowledge, that being this statement.

[8] I recognize that there is a distinction between drawing valid inferences and mere speculation (as there is between a very weak case and no case). When dealing with circumstantial evidence cases, however, the guilt of the accused need not be the only rational conclusion to draw from the evidence at the committal stage. It is sufficient if it is one of the possible inferences from the evidence presented. This was made clear by Bastarache J. in the *Charemski* case (noted above) when he wrote (at page 230): "...whether or not there is a rational explanation for that evidence other than the guilt of the accused, is a question for the jury." Bastarache J. was admittedly writing on behalf of a slim majority in that case, but a majority nevertheless.

[9] In my opinion, a jury could draw an inference from the totality of the evidence noted above that the applicant had the requisite knowledge. There is evidence capable of logically establishing and being consistent with that fact. Knowledge, like intent, must usually be established by drawing inferences from bits of circumstantial evidence. The fact that the element sought to be proven here by the Crown may test the limit of reasonable inference is not a question of sufficiency for a committal, but a question of

the trier of fact assessing the sufficiency of the evidence at a trial. The jury may indeed have to reject the direct evidence of lack of knowledge, contained in the applicant's memorandum, in order to convict. While the mere rejection of evidence from the accused is not positive evidence of guilt (see *R. v. Levy* (1991), 62 C.C.C.(3d) 97), it is open to the jury to reject it in whole or in part. That is what the Crown will invite them to do. But, even without this evidence, the other evidence, circumstantial as it may be, is theoretically capable of leading the trier of fact to the intended inference.

[10] Evidence that the applicant took an active role in maintaining the joint account may lead to the conclusion that she had an interest in knowing what went in and what went out. The deposit of large sums out of the ordinary may trigger, in those circumstances, some natural inquisitiveness on her part. Whether it did or not may be difficult to prove but it is not implausible or irrational to suggest that she must have known about the source of these funds. At the preliminary inquiry stage of the proceedings it is enough to say that there is <u>some</u> evidence capable of establishing guilt.

[11] For these reasons, the application is dismissed.

J.Z. Vertes,
J.S.C.

Dated at Yellowknife, NT, this
14th day of December 1998

Counsel for the Applicant (Accused): Valdis Foldats
Counsel for the Respondent (Crown): Loretta Colton

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