Date: 2004 07 06
Docket: S-1-CR-2004000012

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

ANNETTE NADINE WHITFORD

Ruling on a *voir dire* held to determine the legality of the accused's arrest and a search and seizure.

Heard at Yellowknife, NT, on June 23, 2004

Reasons filed: July 6, 2004

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

Counsel for the Crown: Shelley Tkatch

Counsel for the Accused: Hugh Latimer

R. v. *Whitford*, 2004 NWTSC 38

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REASONS FOR JUDGMENT

[1] The accused is charged with possession of cocaine for the purpose of trafficking. She brought this application seeking a stay of the charge against her or, alternatively, an order excluding certain real evidence seized as the result of a search conducted pursuant to a warrant issued under the *Controlled Drugs and Substances Act*. I gave my decision, dismissing the application, at the start of the trial and said that reasons would follow.

[2] The application was heard in a *voir dire* prior to trial. The evidence on the *voir dire* came from the testimony of RCMP Cst. Eric Irani who, at the material time, was the officer assigned as the "drug intelligence co-ordinator" for the Hay River detachment. Cst. Irani testified that, between August, 2002, and August, 2003, he had received information from a number of sources to the effect that the accused was bringing crack cocaine from Alberta and then selling it by the gram in Hay River.

[3] On August 16, 2003, at 9:30 a.m., Cst. Irani received a telephone call from a source who told him that he (the source) saw the accused travelling south in a black vehicle and that he observed the vehicle, and its occupants, at a gas stop in High Level, Alberta. There he saw an exchange of a package between an unidentified male and the male driver of the vehicle in which the accused was a passenger. He saw the driver put this package inside the car. Then, the vehicle left heading north. The source identified the male driver by name.

[4] Cst. Irani concluded that there was a reasonable likelihood that this was a pick-up of drugs so he instructed the RCMP highways officer to intercept the vehicle, arrest the

occupants on suspicion of transporting drugs, and impound the vehicle for a subsequent search. He also conducted a records search and ascertained that the identified driver owned a black Chrysler motor vehicle.

[5] At approximately 12:45 p.m., Cst. Irani was informed that the vehicle was detained and that the driver and two passengers, one of whom being the accused, were arrested. He was also informed that all three individuals had been cautioned and informed of their right to counsel and that no search had been conducted of the vehicle. The vehicle was then towed back to Hay River.

[6] Cst. Irani prepared an Information to Obtain a Search Warrant. A local Justice of the Peace attended at the RCMP detachment at 3:30 p.m. and granted a warrant to search the vehicle. The warrant was issued pursuant to s.11 of the *Controlled Drugs and Substances Act*.

[7] Cst. Irani then conducted a search. He located a black purse on the rear seat of the vehicle. It was admitted, for purpose of the *voir dire*, that the purse belongs to the accused. Inside the purse Cst. Irani found 48 grams of what appeared to be crack cocaine, separated into two individual baggies, plus cash totalling $3,070. The defence also admitted, for purpose of the *voir dire*, that the drugs seized are in fact crack cocaine.

[8] The first argument raised by the defence was that the stopping of the vehicle and the arrest of the accused were arbitrary and without justification. Defence counsel submitted that whatever suspicion Cst. Irani had was mere speculation.

[9] In the absence of some statutory authority to stop a vehicle, the stopping and detention of the occupants can only be justified if the police have some articulable cause for the detention: *R.* v. *Wilson* (1990), 56 C.C.C. (3d) 142 (S.C.C.). Later cases have defined articulable cause as "a constellation of objectively discernable facts which give the detaining officer reasonable cause to suspect that the detainee is criminally implicated in the activity under investigation" (as per the Ontario Court of Appeal in *R.* v. *Simpson* (1993), 79 C.C.C. (3d) 482) and "a demonstrable rationale ... which is sufficiently reasonable to have justified the detention" (as per the Manitoba Court of Appeal in *R.* v. *Campbell* (2003), 175 C.C.C. (3d) 452). And, as noted by Schuler J. of this court in *R.* v. *France*, [2002] N.W.T.J. No. 36, a court called upon to decide this issue has to determine whether the evidence supports an independent judgment that there was articulable cause to stop the vehicle and detain the accused.

[10] In my opinion, there was articulable cause in this case. Cst. Irani had received, from multiple sources over a lengthy period of time, information that the accused was

transporting and selling crack cocaine. He also received specific information from a particular source that the accused carried the cocaine in a "fanny pack" and that she was selling from a particular address. Cst. Irani testified that this particular source's information came from personal knowledge and that this source had provided information in the past which had led to the prosecution and conviction of others. The totality of this information, together with the observations by the other source of the exchange of a package, satisfies me that Cst. Irani's decision to stop and detain the accused was reasonable. There was evidence to suggest a need to move quickly in order to apprehend the accused and the suspected drugs. Hence, I conclude that the accused was not arbitrarily detained or arrested.

[11] Defence counsel also argued, as an alternative submission, that the manner of the arrest was unreasonable. The accused was kept handcuffed, along with the other suspects, in a police vehicle for approximately 1 ½ hours while the police waited for a truck to tow the seized vehicle back to Hay River. But the defence did not call evidence on this point on the *voir dire*. Suffice it to say that there was nothing in the evidence to demonstrate some wanton disregard, on the part of the police, for the health or well-being of the accused.

[12] The second argument raised by the defence was that the search warrant was invalid and that the results of the search should be held inadmissible. The complaint is not that there is a defect on the face of the warrant but that the Information provided to the Justice of the Peace was insufficient and misleading. Defence counsel submitted that there was no demonstrated probable cause to issue the warrant.

[13] The test for reviewing the sufficiency of a search warrant is well-known. It was articulated by Sopinka J., of the Supreme Court of Canada, in *R.* v. *Garofoli* (1990), 60 C.C.C. (3d) 161 (at p. 188):

> The reviewing judge does not substitute his or her view for that of the authorizing judge. If, based on the record which was before the authorizing judge as amplified on the review, the reviewing judge concludes that the authorizing judge could have granted the authorization, then he or she should not interfere. In this process, the existence of fraud, non-disclosure, misleading evidence and new evidence are all relevant, but, rather than being a prerequisite to review, their sole impact is to determine whether there continues to be any basis for the decision of the authorizing judge.

[14] Subsequent jurisprudence has focused on the question of the extent to which evidence provided on the review, provided *after the fact*, can be used to show that

reasonable and probable cause existed at the time the warrant was issued. This is the "amplification" referred to above when Sopinka J. wrote that the review is based on the record before the authorizing judge "as amplified" on the review. This is not a rehearing. The point of the exercise is to determine if there was sufficient reliable information on which the warrant could have issued. And, to do that, the reviewing judge can consider further evidence provided on the review. But it is not without limits.

[15] In this case, the defence argued that the Information to Obtain was misleading. This is based on the way Cst. Irani described his sources.

[16] Cst. Irani began by reciting information from someone he described as a reliable source. This individual was the source of Cst. Irani's information that the accused was selling crack cocaine and various particular details relating to that:

> - That the reliable confidential human source has stated that Annette WHITFORD travels to Edmonton, Alberta by vehicle to purchase cocaine and "crack cocaine" at the ounce level for sale and distribution in Hay River, Northwest Territories.
>
> - That the reliable confidential human source advised that Annette WHITFORD carries cocaine in her "fanny pack" on her waist belt. Annette WHITFORD distributes and sells the cocaine in Hay River, Northwest Territories .
>
> - That the reliable confidential human source stated that Annette WHITFORD sells "crack cocaine" by the gram. A gram of "crack cocaine" is sold for $120.
>
> - That the reliable confidential human source advised that Annette WHITFORD has been selling "crack cocaine" from the residence of Darlene ROSS at Number 7 Dessy Place in Hay River, Northwest Territories. One gram of cocaine is sold for $120.

[17] Cst. Irani then described the telephone call he received from a confidential source relating to the source's observations of the accused and the driver of the vehicle at High Level. After relating other aspects of the investigation, Cst. Irani then referred to a reliable confidential source who provided information in the past that the third occupant of the vehicle, another woman identified by name, is a drug user. Cst. Irani concluded the Information with the following statement:

> - That the source referred to in this information has provided information in the past to police that has been verified as correct by subsequent means on a number of occasions. Information provided by this source is consistent with other intelligence received by the Royal Canadian Mounted Police, and from the informant regarding drug trafficking. This source has not provided information in the past that has been proven to be misleading or false.

[18] On the *voir dire* Cst. Irani testified that the paragraphs in the Information refer to three different human sources. Thus, the last-quoted paragraph should have specified "sources", as opposed to "source"; but, as Cst. Irani said, the information supplied in that paragraph was applicable to each of the three sources. He testified that each of them provided information in the past that was corroborated by other investigations and proven valid. Also, as previously noted, the first source referred to by Cst. Irani had provided information in the past which led to the prosecution and conviction of others. And, that particular source had personal knowledge of the alleged trafficking by the accused.

[19] Crown counsel candidly acknowledged that the way the Information was drafted could mislead the issuing Justice of the Peace to think that there was only one source. But, in Crown counsel's submission, there was no evidence of any intent on the part of Cst. Irani to mislead nor that anyone was misled. Cst. Irani himself acknowledged that he made a mistake by relying on "boilerplate" wording instead of modifying it to the circumstances. He testified, however, that the statements in that last paragraph were nevertheless true.

[20] It is trite to observe that hearsay statements from a confidential source can provide the reasonable and probable grounds to justify issuance of a search warrant. As also noted in the *Garofoli* case, the reliability of the source's information must be assessed by considering the totality of the circumstances. The underlying circumstances, the degree of detail, and the proven reliability of the source in the past, are all relevant considerations. A bare allegation by an informer that a crime is being committed, by itself, would be insufficient. In my opinion, there was evidence to support the reliability of the sources' information in this case. There was sufficient detail and evidence of proven reliability in the past.

[21] The real question is whether any parts of the Information to Obtain were erroneous or misleading. If so, then the proper approach is to expunge any misleading or erroneous information and then make a determination, based on the totality of the circumstances, as to whether there is sufficient reliable information remaining that could support the warrant: *R.* v. *Araujo*, [2000] 2 S.C.R. 992. But even erroneous or

misleading information does not automatically vitiate a warrant. It may yet be saved by amplification on the review hearing.

[22] In this case I am not convinced that the deficiencies identified in Cst. Irani's Information to Obtain can be characterized as either "erroneous" or "misleading". The substance is correct; the drafting is poor. These are errors in language, not in content. The use of the "boilerplate" clause, in particular, could cause confusion. But, essentially, there is nothing erroneous or misleading here to excise.

[23] If I consider the record, as revealed in the Information, as well as the evidence provided on this *voir dire*, I am satisfied that there were reasonable grounds in fact that justify the issuance of the warrant. There were credible reasons to believe that the accused was engaged in drug trafficking and the exchange witnessed in High Level was probably a part of that activity. But this brings me back to the question posed earlier. To what extent can the evidence on the *voir dire* be used to support or explain the Information placed before the Justice of the Peace?

[24] In *R.* v. *Morris* (1999), 134 C.C.C. (3d) 539, Cromwell J.A., of the Nova Scotia Court of Appeal, explained (at pages 568-569) that, in conducting a review, the reviewing judge may hear and consider evidence relevant to the accuracy of and motivation for the material included in the Information. In general, the reviewing judge is entitled to consider all evidence bearing on the existence *in fact* of reasonable and probable cause shown to be in the knowledge of the police at the time the warrant was sought. However, such evidence cannot be used if the information placed before the issuing Justice was fraudulent or meant to be deliberately misleading. Also, evidence that was obtained by unconstitutional means cannot be considered. Evidence is admissible, though, to explain non-deliberate errors or omissions provided that the information was known to the police officers involved in obtaining the warrant at the time it was obtained. The question, at the end, is whether the issuing Justice of the Peace could have validly issued the warrant.

[25] The issue seems to be the good faith of the police. If the Information to Obtain a Warrant contains erroneous information, then it becomes a question of examining the reasons for that. If the police acted in good faith, without a deliberate attempt to mislead, then the evidence presented by way of amplification may serve to validate the warrant. In my opinion, this is the conclusion to draw from the judgment authored by Lebel J., on behalf of the Supreme Court of Canada, in *Araujo* (*supra*) at paras. 58-59:

> ... in looking for evidence that might reasonably be believed on the basis of which the authorization could have issued, the reviewing court must exclude erroneous information. However, if it was erroneous despite good

> faith on the part of the police, then amplification may correct this information.
>
> When using amplification, courts must strike a balance between two fundamental principles of search and seizure law that come into a rather unique tension in these kinds of situations: see *Morris, supra*, at pp. 567-68. As a result of this tension, the cases disclose divergent attitudes to incomplete or incorrect affidavits and amplification thereof: see *Morris*, at pp. 560-67; cf. *R.* v. *Madrid* (1994), 48 B.C.A.C. 271, at pp. 285-90, and *R.* v. *Harris* (1987), 35 C.C.C. (3d) 1 (Ont. C.A.), at pp. 23 and 27 (leave to appeal refused, [1987] 2 S.C.R. vii). The danger inherent in amplification is that it might become a means of circumventing a prior authorization requirement. Since a prior authorization is fundamental to the protection of everyone's privacy interests (*Hunter* v. *Southam Inc., supra*, at p. 160), amplification cannot go so far as to remove the requirement that the police make their case to the issuing judge, turning the authorizing procedure into a sham. On the other hand, to refuse amplification entirely would put form above substance in situations where the police had the requisite reasonable and probable grounds and had demonstrated investigative necessity but had, in good faith, made some minor, technical error in the drafting of their affidavit material. Courts must recognize (along with investigative necessity) the two principles of prior authorization and probable grounds, the verification of which may require a close examination of the information available to the police at the time of the application for a wiretap, in considering the jurisprudence on amplification. The approach set out earlier to erroneous information in an affidavit on a wiretap application attempts to reconcile these principles. Courts should take a similar approach to amplification.

[26] In the case before me, Cst. Irani was not careful in his drafting of the Information. He failed to specify that there were three sources, not one, and he failed to specifically associate the reasons he gave for their reliability to each of the three sources. So there was the potential to mislead the Justice of the Peace. However, I am satisfied that these errors were inadvertent, as opposed to a deliberate attempt to mislead, and that Cst. Irani acted in good faith throughout. But this case should serve as a warning about over-reliance on "boilerplate" wording. Nevertheless I am satisfied that, even with these errors, there was reliable evidence that might reasonably be believed so as to justify issuance of the warrant. The evidence provided by amplification, going as it does to the totality of the circumstances, reinforces this conclusion.

[27] There was a further submission by defence counsel relating to the fact that the Justice of the Peace attended at the RCMP detachment to receive Cst. Irani's Information

and issue the search warrant. In his submission, such an action leads to an appearance of favouritism.

[28] I agree that such conduct could lead to the impression that the Justice of the Peace is merely a functionary at the beck and call of the police. This, of course, is not the case. A Justice issuing a search warrant is performing a judicial act. As noted by Vancise J.A. in *R.* v. *Baylis* (1988), 43 C.C.C. (3d) 514 (Sask.C.A.), at p. 531: "A Justice required to decide whether there is sufficient evidence to justify issuing the search warrant must be unbiased, neutral, detached, as between the state and the citizen, and there must be no real or apprehended perception of partiality."

[29] I thought that the days when a Justice goes to the police station to carry out his or her duties were a thing of the past. I thought that everyone had been sufficiently warned of the dangers of such practices. And, by "everyone", I include the police. But the question to ask is whether a reasonable person would have a reasoned suspicion that the Justice authorizing the search could not assess the evidence presented to him or her in an impartial, neutral and detached manner.

[30] In my opinion, considering the circumstances in a small town such as Hay River, the mere fact that the Justice of the Peace in this situation attended at the police station could not lead a reasonable observer to form an apprehension of bias. The practice, however, should be avoided. It has the possibility of raising the bias issue so as to call into question the validity of the warrant.

[31] Finally, even if I am wrong and the search warrant in this case should not have been issued, thus rendering the vehicle search an illegal one and thereby presumptively unreasonable, I would not exclude, pursuant to s. 24(2) of the Charter of Rights and Freedoms, the drugs and cash seized during the search. The admission of this evidence would not render the trial unfair. It is non-conscriptive evidence, as that term was used in *R.* v. *Stillman*, [1997] 1 S.C.R. 607. In my view, as well, if there were errors by the police in the process of obtaining the search warrant, they were errors made in good faith. The items were found in a third party's vehicle, a place where the accused would have less of an expectation of privacy than her residence or, for example, even her own car. The evidence existed independently of any Charter violation. As to the effect the admission or exclusion of the evidence would have on the repute of the administration of justice, I am of the view that exclusion would cause more harm than admitting the evidence. Crack cocaine is a very dangerous drug and its proliferation in small northern communities has serious consequences.

[32] For these reasons, I dismissed the accused's application and ruled that the evidence seized as a result of the search was admissible.

J.Z. Vertes
J.S.C.

Dated this 6th day of July, 2004.

Counsel for the Crown: Shelley Tkatch

Counsel for the Accused: Hugh Latimer

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