Date: 2005 04 22
Docket: S-1-CR 2004000118

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

-and-

NEIL MICHAEL WOLEDGE

MEMORANDUM OF JUDGMENT

[1] The accused is charged in a three count indictment with aggravated assault, possession of cocaine for the purposes of trafficking (the "drug charge") and carrying a loaded shotgun for a purpose dangerous to the public peace (the "firearm charge"). His trial by jury is scheduled to take place commencing May 16, 2005 in Hay River.

[2] There are two pretrial applications before me. The first is an application for exclusion of certain evidence found by the police when they arrested the accused at his home. The second is an application for severance.

[3] The facts on the application for exclusion of evidence come from the testimony of Constable Carter. He testified that in the early morning hours of July 8, 2004, he was called to assist Constable Allan in an investigation. The investigation involved allegations that the accused had stabbed an individual who had come to his home with others to buy crack cocaine. The address of the home was known to Constable Carter, who had already been collecting information about the accused and drug trafficking with a view to obtaining a search warrant for that address. He put that information and the details supplied by Constable Allan together and attended before a justice of the peace, before whom he swore an information to obtain a search warrant under s. 11 of the *Controlled Drugs and*

Substances Act ("CDSA"). The justice of the peace granted the search warrant for the accused's home.

[4] Constable Carter and other police officers then went to the accused's house to execute the warrant. They knocked on the door and announced "Police" and "Search Warrant". They saw someone look out a window, but no one came to the door. The police made several attempts to break the door down with a sledgehammer. One of the officers observed an interior door open and that the accused was standing in the doorframe. He yelled for the accused to open the door and identified that they were police and had a search warrant, but there was no response. The door finally gave way to the sledgehammer and the officers entered the house.

[5] Constable Carter had his sidearm drawn as he entered, having learned during the course of his earlier investigations that the accused was in possession of firearms. As Constable Carter rounded a corner inside the house, he saw the accused standing with a shotgun in what he described as the "ready to carry" position, with the gun's barrel in the air, his one hand on the stock and the other on the bottom. Carter yelled at the accused to put the gun down and get down on the ground, which the accused did.

[6] As other officers physically secured the accused, Constable Carter checked elsewhere in the house and found seven other people upstairs. While other officers dealt with them, Carter came back to the accused and observed that the shotgun was a pump action shotgun that had four rounds in it, three of which were in the magazine, one in the chamber. He told the accused that he was under arrest for trafficking in cocaine and aggravated assault and that the police had a warrant to search for drugs. He gave the accused his right to counsel and the police caution and showed him the search warrant. A search of the accused's pockets turned up a vial with five pieces of cocaine inside individually wrapped, totalling two grams. In another pocket there was $875.00 in cash and a pocket knife with a three inch long blade.

[7] The accused was subsequently taken away and Constable Carter attended to obtaining a s. 487 *Criminal Code* warrant for forensic evidence in relation to the aggravated assault.

[8] The accused seeks to have the evidence resulting from the search of his person, that is, the two grams of cocaine and the pocketknife, excluded. He argues that the search was unreasonable because the arrest was illegal since the police did not have a s. 529 *Criminal Code* "*Feeney*" warrant. There is no dispute that the police did not have a s. 529 warrant, however the Crown argues that it was not required as the police did have the s. 11 *CDSA* warrant, which authorized their entry into the accused's home.

[9] I have concluded that in the circumstances of this case, the police did not require a warrant under s. 529 or related sections in order to arrest the accused, for the following reasons.

[10] Section 529 and the related *Criminal Code* sections (529.1 to 529.5) generally require the police to have judicial authorization to enter a private home for the purpose of arresting an individual, subject to certain exceptions. Those sections appear to have been enacted in response to the decision of the Supreme Court of Canada in *R. v. Feeney*, [1997] 2 S.C.R. 13. In *Feeney*, the Supreme Court made it clear that the privacy of the home is an important value that in general outweighs the interests of the police in entering a home to make an arrest without prior judicial authorization for the entry.

[11] In this case, the police did not enter the accused's home for the purpose of arresting him. They entered for the purpose of executing the s. 11 *CDSA* warrant. That warrant authorized them to enter the home and to do certain other things: search for and seize cocaine and other items. In obtaining that warrant, Constable Carter was required to, and did, demonstrate that the police had reasonable grounds to enter into the home to search for evidence of drug trafficking.

[12] Since the police had the *CDSA* warrant, they had judicial authorization to be in the accused's home and intrude on his privacy there. The point of a *Feeney* warrant would be to allow them to enter the home to make an arrest; they did not need that warrant since they already had judicial authorization to enter the home.

[13] In my view, based on the information the police had prior to entering the accused's home as disclosed in the Information to Obtain, filed as an exhibit on this application, the police had reasonable grounds upon which to arrest him at

the time they entered the premises, pursuant to s. 495(1)(a) of the *Criminal Code*. They were in possession of information which made it reasonable to believe that he was engaged in drug trafficking at his home and had assaulted one of the individuals who had come to his home to purchase drugs that night. Since they already had judicial authorization to enter the home in the form of the s. 11 *CDSA* warrant, there was no need for them to get further authorization to make the arrest.

[14] Nor were the police required to wait until their search was completed before they arrested the accused, since they already had the grounds to arrest him: *R. v. Le*, 2001 BCCA 658; [2001] B.C.J. No. 2341.

[15] Having arrested the accused on reasonable grounds, the police were entitled to search him as an incident of that lawful arrest: *R. v. Le*.

[16] Furthermore, in my view Constable Carter was entitled to arrest the accused when he observed him with a shotgun in hand after the announced entry into the home. He was entitled to arrest the accused because he was a threat to the safety of the police and also, pursuant to s. 495(1) of the *Code*, for the firearms offence. The police were also entitled to search him incidental to that arrest.

[17] Counsel for the accused made the point that when the police told the accused what he was under arrest for, they did not specify that it was because of the firearm, but for the drug and assault offences they were investigating. It was clear from Constable Carter's testimony, however, that the accused was secured and restrained because of the shotgun.

[18] Whether for safety purposes or as incidental to the arrest, the police were entitled to search the accused. Having already obtained the requisite judicial authorization to enter the accused's home, they needed no further or separate authorization to arrest and search him in these circumstances.

[19] For the foregoing reasons, the accused's application for exclusion of the evidence found in the search is dismissed.

[20] The accused also seeks severance of the aggravated assault charge from the other two charges in the indictment. He argues that the evidence the Crown will

present on the drug and firearm charges is irrelevant to the aggravated assault charge and will amount to evidence of bad character, painting the accused as a drug trafficker.

[21] Section 591(3)(a) of the *Criminal Code* provides that the court may, where it is satisfied that the interests of justice so require, order that an accused be tried separately on one or more counts in an indictment. The onus is on the accused to show on the balance of probabilities that the ends of justice require severance. A trial judge has considerable discretion when it comes to granting severance.

[22] The interests of justice include not only those of the accused, but also the Crown and the administration of justice: *R. v. Litchfield*, [1993] 4 S.C.R. 333; *R. v. August*, [1996] B.C.J. No. 836 (S.C.). In *August*, Romilly J. refers to a number of factors that should be considered in deciding whether to sever counts in an indictment. They are:

- the possibility of similar fact evidence

- general prejudice

- a factual and legal nexus between the counts

- the undue complexity of the evidence

- the possibility of inconsistent verdicts

- whether the accused intends to testify on one count but not another

- the desire to avoid multiplicity of proceedings

[23] Here, there is no suggestion that the Crown will seek to use evidence from one count as similar fact evidence on another. Nor is there any suggestion that the evidence will be unduly complex or that the accused wishes to testify on one count but not another. This factor is not determinative in any event: *August*. And it is not suggested that there is any possibility of inconsistent verdicts should separate trials be ordered.

[24] There is a factual and legal nexus between the counts. All the events occurred over a period of approximately twelve hours at the home of the accused. The allegation that the complainant was stabbed while trying to buy drugs from the accused led the police to seek the s. 11 *CDSA* search warrant. The execution of that warrant and the observation of the shotgun led to the police finding the knife on which the Crown says there is forensic evidence of the complainant's blood. Observations made at the home during the search led the police to obtain a further search warrant to seize other forensic evidence relevant to the assault charge. The searches are thus relevant to how the police found the evidence linking the accused to the assault.

[25] The evidence of the police officers involved in the searches will be relevant, therefore, to all three counts in the indictment. In my view it would be difficult, and it may create puzzling gaps for the jury, to separate out the evidence that relates only to the assault charge if that charge is tried separately. It would also mean having the witnesses testify about the searches at two separate trials rather than one.

[26] The accused intends to advance a defence of self defence on the assault charge. He argues that evidence about drug trafficking and his possession of the shotgun are irrelevant to that issue and highly prejudicial to him. But the context of the assault charge is that the complainant and others were at the accused's home for the purpose of buying drugs. There was evidence from one witness at the preliminary inquiry that shortly after arriving at the home she asked the accused for, and he offered her, a "hoot" from his crack cocaine pipe. This evidence, even though it may well be challenged by the accused, is part of the narrative of events leading up to the aggravated assault charge. So it is anticipated that the jury will hear evidence about the accused engaging in drug trafficking from the Crown witnesses on the aggravated assault charge itself. While this evidence is certainly adverse to the accused, it is not prejudicial in the sense of being unfair.

[27] The main point made by the accused is that the evidence about indicia of drug trafficking, especially from the proposed expert witness for the Crown, and the evidence about the shotgun, may lead the jury to conclude that the accused is guilty because he is the type of person who would commit assault. I agree that there is a potential risk but in my view it can be overcome by a proper instruction to the jury on the appropriate use of the evidence and on what evidence is

relevant to which count in the indictment. Juries are instructed in like fashion when, as frequently happens, there is evidence of an accused's criminal record before them. It should not be difficult for the members of the jury to understand and follow an instruction that they are to decide the issue of self defence based on the evidence relevant to the assault charge and not based on evidence about drug trafficking or carrying a shotgun in an incident after the alleged assault.

[28] To summarize, since the events in question are linked by time and place and because the drug search is relevant to how the police found the evidence linking the accused to the stabbing, it is in the interests of justice to deal with all three counts in the indictment in one trial. The interests of justice do not require severance. Any risk of prejudice can be dealt with by way of an appropriate instruction to the jury, which counsel will have the opportunity to address before the jury charge.

[29] For these reasons, the severance application is also dismissed.

Dated this 22nd day of April 2005.

[30] V.A. Schuler
[31] J.S.C.

Heard at Yellowknife, NT
April 4, 2005.

Counsel for the Crown: Shelley Tkatch
Counsel for the Accused: Hugh Latimer

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