McLean v. *H.M.T.Q.*, 2014 NWTSC 09

Date: 2014 01 15
Docket: S-1-CR-2012-000001

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

Garrett Malcolm McLean

Appellant

- and -

Her Majesty the Queen

Respondent

Appeal of conviction.

Heard at Yellowknife, NWT, on August 27, 2013.

Reasons filed: January 15, 2014

REASONS FOR JUDGMENT OF THE
HONOURABLE JUSTICE M. DAVID GATES

Counsel for the Appellant: Brian A. Beresh QC

Counsel for the Respondent: Ryan J. Carrier

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Introduction

[1] At trial, the Appellant was acquitted of possession of MDA (Ecstasy) for the purpose of trafficking, but was convicted of attempted possession for the purpose of trafficking contrary to s. 5(3)(b) of the *Controlled Drugs and Substances Act*, SC 1996, c 19 (*CDSA*) and s. 24 of the *Criminal Code*, RSC 1985, c C-46. He appeals his conviction, primarily arguing that the trial judge drew inappropriate inferences in relation to the elements of possession.

Facts

[2] Shaun Ross was an employee of Purolator in Yellowknife on March 30, 2010. Before noon, an individual identifying himself as Garrett McLean called to inquire about a package from British Columbia, and provided a tracking number. Ross knew the Appellant from Army Cadets and social activities in Yellowknife. Ross advised that the package had not arrived, but it had left British Columbia and would arrive either that day or the following day.

[3] Later that day, Ross noted an incoming package with the Appellant's name on it and contacted the Appellant to advise that a package had arrived "collect". The Appellant attended at Purolator.

[4] The Appellant asked for the description on the package and was told it read "docs samples" (phonetic). Ross testified that the Appellant initially stated "I want that", opened the package and pulled out a bag of what appeared to be pills in a Ziploc bag, saying it was "X". After examining the contents, he asked if he could take it with him. Ross told him that he had to pay the freight charge first. The Appellant asked if he could pay with a debit card. Ross refused and the Appellant left to get cash. In cross-examination, Ross agreed that someone present other than the Appellant may have said it was "E" or "X".

[5] Another employee, J.R. Beaulieu, testified that the Appellant attended the Purolator office with a Purolator "door knocker". A "door knocker" is notice of a package awaiting the customer with a tracking number which is left on the customer's home door.

[6] Beaulieu testified that he saw the pills because he looked into the package when it was opened, and there was no conversation regarding its contents.

[7] Beaulieau and a third employee present, Denischuk, testified that the Appellant then told them either to keep it quiet or not to tell anybody.

[8] The Appellant wanted to pay the freight with a bankcard but was told only cash would be accepted. His request to take the package and then return with the freight payment was refused.

[9] Ross put the pills back into the package and stapled the package closed. After the Appellant left the office, Ross phoned the police.

[10] The Appellant returned later that afternoon with $60 to pay for the package. Ross took the money but took his time in preparing the receipt to keep the Appellant on the premises until the RCMP arrived. As Ross was completing the paperwork, he noted that the Appellant's address was incorrect on the package. The package indicated the recipient as "Garrett McLean, 20 4915 - 48 Street, Yellowknife" and the sender as "Quentin James, Vineyard Drive, Kelowna"

[11] Ross knew the Appellant did not live at the downtown address indicated, and rewrote the address which the Appellant gave him on the new paperwork: 10 Braathen Avenue, Yellowknife. For the sender, he wrote: "Chad Craig, 4915 – 48 Street, Kelowna, BC". He testified that he did not know how he got this

information, but just threw what he could into the paperwork to delay until the RCMP arrived. The Appellant signed the receipt. The Appellant had not yet received change for his $60.

[12] Constable MacDonald of the RCMP then entered the Purolator office while the package was on the counter. On entering the office, Cst. MacDonald approached the Appellant and stated, "I heard you received an interesting package". The Appellant passed the package to Cst. MacDonald.

[13] Constable Long had entered the office by that time and told the Appellant he would be detained in relation to the investigation. Outside, Cst. MacDonald advised the Appellant that he was under arrest for possession of a controlled substance. He was later rearrested for possession for the purpose of trafficking and transported to the RCMP detachment. 896 MDA (Ecstasy) pills were seized at an estimated total value of $8,960.

[14] The RCMP officers located a notebook and a cellphone during a search incidental to arrest. Corporal Len Larson provided expert evidence that the notepad, which was open to a page consisting of written names and numbers, was a "scoresheet". The total of the numbers which were not crossed out was $9,270. Cpl. Larson testified that the quantity of MDA seized was not consistent with a purchase for personal use.

[15] At trial, counsel agreed that constructive or joint possession did not apply in the circumstances.

Trial Decision

[16] The trial judge reviewed the evidence and noted the main defence argument: when the Appellant briefly had physical contact and control of the package, he did not have knowledge of its contents, and once he had knowledge, he did not have true control because Ross would not have allowed him to remove the envelope until the freight charges were paid. When the Appellant handled the envelope again, it was to turn it over to the police and therefore he still lacked the ability to exercise control over it.

[17] Crown counsel argued that the interactions between the Appellant, Ross and the RCMP should be viewed as one transaction.

[18] The trial judge concluded that the Appellant's knowledge of the presence and quality of the substance was established. She inferred that the Appellant was

expecting to receive something when he called Purolator inquiring about the package with reference to its tracking number. She found that he was not surprised by the discrepancy between his home address (his parents' home) and the address appearing on the package. She inferred that he had some connection with the sender. She also inferred that the Appellant intended that this package not be received at his home because: he was inquiring about the parcel, the address on the parcel was not his home address, his home address was his parents' house, and he still wanted to take possession of the parcel notwithstanding the discrepancy.

[19] The trial judge accepted that the Appellant asked Ross for the content description, Ross read "docs samples" and the Appellant said "I want that" and opened the envelope. She inferred that the description meant something to the Appellant and that he knew the contents of the envelope. She noted a discrepancy between the three eyewitnesses with respect to the Appellant's reaction when he opened the envelope. She found that the various interpretations of the Appellant's reaction were unreliable. She inferred that the Appellant knew or believed the tablets to be Ecstasy once he looked at the contents of the envelope, intended to take possession of the envelope and its contents, and asked Ross if he could take it on the spot.

[20] The trial judge stated that at this point, the Appellant's behaviour towards the envelope was consistent with a conclusion that he knew what it contained, and she inferred from the totality of these circumstances that the address of the sender, the address of the recipient and the package description were deliberately wrong. She inferred that the Appellant opened the envelope in order to confirm that it contained what he expected to receive.

[21] Finally, the trial judge found that the Appellant performed some acts of control when he opened the parcel, when he gave money to Ross and when he was awaiting the signed receipt. She held that at the moment when he was legally entitled to take possession of the parcel, the RCMP walked in and he turned over the envelope to them. When he did this he had knowledge and control of the substance, he handled it, but he was apparently no longer consenting to be in possession. When he checked the contents, his purpose was to see what was inside, not to traffic in an illegal substance. However, the judge inferred, based on all of the evidence, that the Appellant had taken a preliminary step toward being in possession for the purpose of trafficking, the step being to acquire drugs. She expressly viewed the evidence as an evolving situation rather than a series of distinct and disconnected actions.

[22] The trial judge concluded that the Appellant knew there were drugs in the envelope, and he wanted to be in possession of the drugs, but the actions of Ross and the RCMP prevented him from achieving this objective. She found that the *mens rea* of possession was established, but the *actus reus* was incomplete because of the intervention of third parties. But for this intervention, the Appellant would have been in full possession. There was evidence of conduct for the purpose of carrying out the intention: calling and inquiring about a parcel, providing the tracking number, coming to the office to retrieve the parcel, asking to take it immediately, getting money to pay the freight charge, and handing over the money to pay the freight charge so that he could take the package.

[23] As previously indicated, the trial judge acquitted the Appellant of possession for the purposes of trafficking, but convicted him of the lesser included offence of attempted possession for the purposes of trafficking.

Standard of Review

[24] The standard of review is palpable and overriding error regarding questions of fact, and correctness on questions of law. The standard of review for questions of mixed law and fact is palpable and overriding error unless the trial judge made an extricable error of law, in which case the standard is correctness: ***Housen v Nikolaisen***, 2002 SCC 33, [2002] 2 SCR 235.

[25] The standard of review for factual inferences is palpable and overriding error. Appellate courts may not interfere unless an inference is clearly wrong, unsupported by the evidence or otherwise unreasonable: ***Housen*** at para 23; ***R v Clarke***, 2005 SCC 2, [2005] 1 SCR 6 at para 9. The fact that a particular factual inference may not be the only inference that one could draw from the evidence does not make the trial judge's inference unreasonable: ***HL v Canada (Attorney General)***, 2005 SCC 25, [2005] 1 SCR 401, ***R v Vokurka***, 2013 NLCA 51, ***R v Henderson***, 2012 NSCA 53, ***R v DH***, 2008 ABCA 233 at para 12.

[26] Apprehension of evidence may be reviewed for error only where it goes to the substance rather than to the detail, and is material rather than peripheral to the reasoning of the trial judge. Further, any such errors must play an essential part not just in the narrative of the judgment but in the reasoning process resulting in a conviction: ***R v Lohrer***, 2004 SCC 80, [2004] 3 SCR 732 at para 2.

[27] The standard of review of verdicts based on circumstantial evidence is whether a properly instructed jury, acting judicially, could have reasonably

concluded that the guilt of the accused is the only rational conclusion to be reached from the whole of the evidence: ***R v Biniaris***, 2000 SCC 15 at para 36, [2000] 1 SCR 381, ***R v Yebes***, [1987] 2 SCR 168 at paras 22-26.

[28] The question whether an act or omission by a person who intends to commit an offence is or is not mere preparation to commit the offence, or is too remote to constitute an attempt to commit the offence, is a question of law: s. 24, *Criminal Code*. That issue is, accordingly, reviewed for correctness.

Appellant's Position

[29] The Appellant concedes that the evidence established that he briefly physically handled the package containing the pills. However, he points out that the trial judge recognized that the physical handling did not co-exist with the element of control.

[30] The Appellant argues that the prosecution had to establish that the Appellant's conduct was for the purpose of gaining possession of Ecstasy for the purpose of trafficking. Therefore, the Crown had to prove the *mens rea* for possession, and an intention to traffic, before the trial judge could consider whether the conduct extended beyond mere preparation. The Appellant argues that there was no basis in the evidence to conclude that the Appellant knew that the package contained Ecstasy. In particular, the evidence did not support the factual inferences that:

- the Appellant knew about or was expecting the package prior to receiving the "door knocker"
- the Appellant was not surprised that the sender got his address wrong
- the Appellant had a connection to the sender
- the Appellant knew what the package contained
- once the Appellant looked at the contents, he knew or believed the tablets to be Ecstasy.

Crown's Position

[31] Crown submits that the "door knocker" evidence is peripheral. Only Beaulieu testified about it, and only in cross-examination. Ross was never asked whether the Appellant gave him one. Neither counsel addressed the issue in their submissions. Therefore, it is not surprising that the trial judge did not address it.

[32] Further, the Crown points to Ross' evidence that the package had not arrived when the Appellant phoned him with the tracking number. Therefore, there would have been no opportunity for a door knocker to be delivered to the Appellant advising him that a package had arrived. To now suggest that the Appellant learned the tracking number through a door knocker simply invites speculation.

[33] While the Crown concedes that the trial judge erred in assessing the evidence regarding the Appellant's lack of surprise regarding the wrong address, the inference that the Appellant had a connection to the sender nevertheless flows logically from the conclusion that he knew the package had been sent. Prior to the package arriving at the Purolator office, he could only have come into possession of the tracking number through the sender.

[34] Further, the Crown argues that the conclusion that the Appellant deliberately had wrong information put on the package is unnecessary to establish that he had knowledge of its contents. The Appellant had prior knowledge that a package would be arriving, asked about the content description; was told it was "docs samples"; said "I want that"; and then opened the envelope. Essentially, this evidence confirmed for the Appellant that he had received the package he was expecting. His reaction before or after is irrelevant, and the trial judge did not err in finding that the evidence in this regard was unreliable.

[35] Crown submits that the trial judge's comments make it clear that it was the Appellant's behaviour that led her to conclude that he knew that the envelope contained drugs. The evidence of Ross, Beaulieu and Denischuk was all consistent with a finding that the Appellant knew the pills were Ecstasy.

[36] Crown argues that if the judge erred in concluding that the Appellant was not surprised at the incorrect address and that he deliberately supplied the wrong information, neither error is overriding given the entirety of the evidence. They are peripheral details.

[37] Finally, the Crown submits that the Appellant had done everything he could to obtain full possession; he required only his change and a copy of the receipt, and this was sufficient to prove attempted possession for the purpose of trafficking.

Analysis

[38] On a charge of possession of MDA (Ecstasy) for the purpose of trafficking under s. 5(2) of the *CDSA*, the Crown must establish that:

- the Appellant was in possession of a substance;
- the substance was MDA;
- the accused knew that the substance was MDA; and
- the accused had possession of MDA for the purpose of trafficking in it.

[39] There is no dispute that the nature of the substance in this instance was established through expert evidence.

[40] Further, given the expert evidence, the trial judge was entitled to infer from the quantity of pills that they were not for personal use. In other words, the quantity supported an inference that any possession of that quantity of such pills would be for the purpose of trafficking. This inference was also supported by the expert evidence regarding the “score sheet”.

[41] That essentially leaves the issue of the elements of attempted possession.

[42] In order to prove possession, the Crown would be required to establish that:

- the Appellant physically possessed the drugs
- he knew that he had actual physical possession of the drugs
- he exerted control over the drugs while he had actual physical possession of them.

[43] The Appellant argues that there was no basis upon which to infer that he knew the nature of the substance; in particular, the evidence did not support the factual inferences drawn by the trial judge that:

- the Appellant knew about or was expecting the package prior to receiving the “door knocker”
- the Appellant was not surprised that the sender got his address wrong
- the Appellant had a connection to the sender
- the Appellant knew what the package contained
- once the Appellant looked at the contents, he knew or believed the tablets to be Ecstasy.

[44] I am satisfied that all but the last of these factual inferences drawn by the trial judge are peripheral.

[45] The elements of the trial judge’s reasoning which are essential, in my view, to her decision on the issue of attempted possession are the following:

- the Appellant called Purolator, seeking a package to be delivered from British Columbia to Purolator in Yellowknife, citing the tracking number

- the same day, the Appellant attended at Purolator after being advised that such a package had arrived
- the Appellant said “I want that” after being told the description was “docs sample”
- the Appellant opened the package and pulled out a Ziploc bag containing pills
- someone present identified the pills as “E” or “X”, from which the trial judge inferred knowledge on the part of the Appellant of the nature of the substance
- the Appellant wished to take the package with him right away but was told he would have to pay the freight charge first
- the Appellant left and returned a short time later with cash to pay the freight charge and signed the receipt.

[46] The evidence of the “door knocker” was raised by only one witness, and not by or with Ross, who had dealt directly with the Appellant. Whether or not a “door knocker” was produced at some point, the evidence more than supported a finding that the Appellant was seeking a particular package from British Columbia and attended the same day to retrieve a package from British Columbia which identified him as the intended recipient.

[47] The trial judge inferred that the mistaken address was a subterfuge. It may or may not have been, but that was not a material finding; nor was the Appellant’s reaction, if any, to the mistaken address.

[48] The trial judge was entitled to infer that the Appellant had some sort of a connection to the sender by virtue of the fact that the sender sent a package with the Appellant’s name on it as recipient, which the Appellant was expecting and wished to retrieve. That is a logical inference. However, whether or not he had a connection to the sender, the evidence supported a finding that he was clearly expecting the package.

[49] It was also open to the trial judge to find on the evidence that the Appellant removed the Ziploc bag containing pills from the package described as “docs sample”, that the pills were visible at that point, and that someone present in the room audibly referred to them as “E” or “X”. In my view, it was open to the trial judge to infer from this that the Appellant knew what the package contained.

[50] The trial judge found that the evidence did not support a finding that the Appellant physically possessed the drug, nor that he exerted control of it while he had physical possession. However, she did conclude that he had taken steps toward possession sufficient to constitute attempted possession.

[51] Under s. 24 of the *Criminal Code*, an attempt to commit an offence requires: an intention to commit the offence, and conduct which is more than mere preparation and is undertaken to carry out the intention. The distinction between preparation and attempt involves a common sense judgment: ***Deutsch v The Queen***, [1986] 2 SCR 2 at paras 27-27.

[52] In ***R v Root***, 2008 ONCA 869, the Watt J.A. for the Court held:

> 96 In every case of an attempt to commit an offence, the *mens rea* of the substantive offence will be present and complete. In every attempt, what is incomplete is the *actus reus* of the substantive offence. But incompleteness of the *actus reus* of the substantive offence will not bar a conviction of attempt, provided the *actus reus* is present in an incomplete, but more than preparatory way…
>
> …
>
> 98 To determine on which side of the preparation/attempt divide an accused's conduct falls, a trial judge should consider the relative proximity of that conduct to the conduct required to amount to the completed substantive offence. Relevant factors would include time, location and acts under the control of the accused yet to be accomplished. ***Deutsch*** at p. 23

[53] The Appellant referred to ***R v Chan*** (2003), 66 OR (3d) 577 (CA) as an example of a case of attempted possession. That case involved a "controlled delivery" where the police removed most of the drugs prior to the delivery proceeding as planned. Defence counsel points out that all of the elements of possession were established in that case. The incomplete element was that Chan did not realize he only possessed a small portion of the drug.

[54] The Appellant also referred to ***R v Osmani*** (1992), 131 AR 56 (CA). In that case, the accused called the hotel, describing in detail a package left in his room. He attended at the hotel, identified the package from a distance of 10 feet, and commented on its importance. In very brief reasons, the majority of the Court of Appeal overturned the conviction because the evidence did not support attempted possession.

[55] During oral argument, the Appellant acknowledged that the decided cases are not of great assistance in determining what conduct or activity amounts to mere preparation. What I take from this acknowledgement is the recognition that whether or not conduct extends beyond mere preparation is largely, if not entirely, fact-driven. As such, while both ***Chan*** and ***Osmani*** provide valuable context and

goalposts within which to consider this issue, the ultimate result reach in these cases is not of any great assistance here.

[56] The Appellant also relied in oral argument on the Court of Appeal decision in ***R v. Kusk***, 1999 ABCA 491. Having now had an opportunity to fully consider this decision of the Court of Appeal, I am not persuaded that it has any application to the within matter.

[57] In this instance, the trial judge was required to consider the relative proximity of the Appellant's conduct to the conduct required to amount to the completed substantive offence. In this regard, she referred to the following facts:

- the Appellant had physical contact with the substance between 12:00 and 12:58 p.m.
- he stated that he wanted to take the envelope
- he paid the freight
- he was waiting for the receipt.

[58] The trial judge found that at the time the Appellant opened the envelope, he was momentarily in possession, but not for the purpose of trafficking. However, she concluded that but for RCMP intervention at the ultimate stage of the process of acquiring a quantity of drugs, the Appellant would have been in full possession.

[59] The Appellant contends that the evidence suggested the Appellant still had the $60 because it was seized on arrest. Whether or not the Appellant or Purolator was holding the $60 at the precise moment the officers walked in, the trial judge was entitled to infer from the evidence that the transaction was well in progress at the time. In other words, the Appellant was taking the final steps to complete the transaction and acquire full possession of the package.

[60] I find that the trial judge did not err in her determination that attempted possession was established. The Appellant had handled the package, actually opening it and briefly examining the contents. It was reasonable to infer that he would have removed the package at the time of his initial attendance, had Purolator not required him to pay the freight first. The Appellant obtained cash, paid or was in the process of paying the freight and signed the receipt. In the normal course, he would have removed the package once he was given a copy of the receipt. There was no evidence to raise a reasonable doubt that he intended to gain possession of the package, and would have gained possession of the package, but for the arrival of the police. In my view, this was more than mere preparation and, as such, more

than sufficient to support a conviction for attempted possession for the purposes of trafficking.

Conclusion

[61] The appeal is dismissed.

Heard at Yellowknife on the 27th day of August, 2013
Dated at Calgary, Alberta, this 6th day of January, 2014.

M. David Gates
J.S.C.N.W.T.

Appearances:

Ryan J. Carrier for the Respondent/Crown

Brian A. Beresh, QC for the Appellant/Accused

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