

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- v -

MICHAEL HOPKINS AND CHRIS MATHERS

Transcript of the Reasons for Judgment delivered by The Honourable Justice A.M. Mahar, sitting in Yellowknife, in the Northwest Territories, on the 29th day of March, 2017.

APPEARANCES:

Mr. D. Praught: Counsel for the Crown
Ms. K. Oja: Counsel for the Accused

(Charges under s. 5(2) of the *Controlled Drugs and Substances Act* and 91(1) of the *Criminal Code of Canada*)

1 THE COURT: I will deal first with the
2 issue of the voir dire. I indicated that I would
3 give more formal reasons at the time of the
4 actual decision. There is an Agreed Statement of
5 Facts that was filed. It is an exhibit, and it
6 will be made an exhibit to this decision. I will
7 say at the outset that I reserve the option of
8 significantly editing this decision if I choose
9 to do so. If I do choose to do so, the edited
10 version is the final decision. It is not going
11 to impact in terms of what I am doing, but it
12 might impact in terms of how much information I
13 put in the decision.

14 First, with respect to the voir dire, what
15 is essentially at issue is evidence of cocaine
16 possessed for the purpose of trafficking and
17 actual trafficking at another location which was
18 raided on the same day as the residence at issue
19 in this trial. While Mr. Hopkins was not
20 charged, there is surveillance evidence as well
21 as documentary evidence that ties him to that
22 location. The Crown is seeking admissibility to
23 show knowledge in the context of the narrative of
24 the case, not strictly speaking propensity
25 evidence but evidence that Mr. Hopkins is
26 somebody who is aware of the cocaine trade and
27 knows what is going on and is, therefore, someone

1 who is more likely to know what is going on in
2 the residence which we are actually dealing with.
3 The defence is objecting to this, claiming that
4 the evidence is inadmissible as propensity
5 evidence.

6 I have to balance the probative value of the
7 evidence against any unfair prejudice to the
8 accused. This case is somewhat unique in this
9 regard because the evidence is helpful, but it is
10 not just helpful to the Crown. It is helpful in
11 my assessment of the possible inferences that I
12 can reasonably draw from the evidence. I find
13 that the evidence is admissible in the specific
14 circumstances of this case. It gives me a more
15 complete, factual background from which I can
16 assess the circumstantial evidence and, as I have
17 said, the reasonable inferences to be drawn from
18 it.

19 Moving, then, to the case itself. This is a
20 circumstantial case, and I can do no better than
21 to quote from Justice Cromwell of the Supreme
22 Court of Canada in the case of *Villaroman*,
23 2016 SCC 33, discussing the test that the court
24 should apply when dealing with circumstantial
25 evidence. Referring to paragraph 37:

26 When assessing circumstantial
27 evidence, the trier of fact should
consider "other plausible theo[ries]"
and "other reasonable possibilities"

1 which are inconsistent with guilt...
2 I agree with the appellant that the
3 Crown thus may need to negative these
4 reasonable possibilities, but
5 certainly does not need to "negative
6 every possible conjecture, no matter
7 how irrational or fanciful, which
8 might be consistent with the
9 innocence of the accused"...
10 "Other plausible theories" or "other
11 reasonable possibilities" must be
12 based on logic and experience applied
13 to the evidence or the absence of
14 evidence, not on speculation.

15 Paragraph 38:

16 Of course, the line between a
17 "plausible theory" and "speculation"
18 is not always easy to draw. But the
19 basic question is whether the
20 circumstantial evidence, viewed
21 logically and in light of human
22 experience, is reasonably capable of
23 supporting an inference other than
24 that the accused is guilty.

25 To sum up the case generally
26 and the level of proof required on the issue of
27 who had possession, was there co-participation
28 such that both parties were in a position to
29 exercise even a small measure of control over the
30 drugs, I find that both accused were present in
31 the apartment at some point with the drugs. The
32 question is whether they were in possession
33 jointly, and if not, in whose possession the
34 drugs were in. In the context of this
35 circumstantial case, does the evidence reasonably
36 support any inference other than their collective
37 guilt? That is really the issue that I had to

1 struggle with in this case.

2 In terms of the evidence relied on and the
3 facts found, I will say at the outset that I
4 accept as proven that the roughly 37 grams of
5 crack cocaine found in the two baggies on the
6 ground outside of the apartment building came
7 from Unit 405 in the Fort Garry apartments. It
8 was possessed for the purpose of trafficking
9 indicated not only by the amount of drugs, which
10 is beyond what would be expected for personal
11 consumption, but from the presence of assorted
12 drug trafficking paraphernalia -- scales, score
13 sheets, and doctored baggies. I also find that
14 both Mr. Hopkins and Mr. Mathers were in the
15 apartment just prior to entry by the police.

16 This case was part of a larger investigation
17 that went on for a number of months. There was
18 an extensive investigation and surveillance of a
19 number of individuals. Mr. Hopkins was seen on a
20 number of occasions in the company of other
21 suspected individuals around both an apartment of
22 interest at Bison Holdings and in the general
23 area of the Fort Garry apartments. Mr. Mathers
24 was not mentioned other than in passing either in
25 connection with Mr. Hopkins or at any of the
26 other locations of interest or persons of
27 interest.

1 At approximately 5:10 a.m. on December the
2 6th, 2013, police executed a search warrant at
3 Apartment 405 in the Fort Garry Apartments. They
4 did this in the early hours of the morning in
5 order to surprise the occupants and maintain any
6 evidence that was present in the residence. They
7 attended at 5:10 a.m. They announced their
8 presence, forced the door with a ram, and threw a
9 flash-bang or a distractionary device into the
10 residence. I was told -- and I have no reason to
11 doubt -- that it took only a matter of seconds
12 for the police to enter the residence. When they
13 entered, they found the bedroom door to the right
14 ajar with Mr. Mathers' hands around the door.
15 Mr. Mathers was indicating that there was a dog
16 in the bedroom and simply wanted the police to be
17 aware of that so that the situation did not
18 escalate. The police could not say if the
19 balcony door was open. They did, however, find
20 evidence of a disturbance at the railing and on
21 the ground below.

22 Mr. Hopkins was found injured a short
23 distance away in another apartment alcove. While
24 there might have been some suggestion of other
25 possibilities, I find it improbable to the point
26 of impossible that any other set of circumstances
27 could have resulted in Mr. Hopkins indicating

1 that he fell from a third-floor balcony and being
2 found a short distance away mere minutes after
3 the events in question. He was taken to the
4 hospital. He was actually quite badly injured.
5 His injuries included a cracked vertebrae. What
6 appears to have happened and what I accept
7 happened is he attempted to scale the balcony.
8 There was an unstable surface on the balcony
9 railing below because of a number of planters.
10 One of the planters was dislodged as a result of
11 that, and this resulted in the fall.

12 The bedroom window upon entry into the
13 bedroom was open, and a roughly 65-pound Pitbull
14 mix was halfway out the window with its rear legs
15 hung up on the window sill. It had apparently
16 been panicked by the flash-bang, had voided
17 itself in the room, and was attempting to flee.
18 After the dog had been removed from the window,
19 police looked outside. They could see the screen
20 lying on the ground, and they could see three
21 plastic baggies in a radius of approximately 5
22 feet in the area basically below the window.

23 They found Mr. Hopkins' identification in
24 his wallet on the coffee table in the living
25 room. When he was found, he had no shoes on, no
26 socks, certainly not dressed for minus-40-degree
27 weather. He was not wearing a coat. Again, I

1 take from this that he fled the residence very
2 quickly.

3 On the coffee table, in the area of the
4 coffee table near the couch was found a wallet,
5 scales, 1.9 grams of crack cocaine divided into
6 four separate pieces, basically street grams. Of
7 the three baggies found outside, two contained
8 what were found to be cakes of crack cocaine, one
9 contained powder that was believed to be cocaine
10 but was never actually tested. So what I was
11 left with is approximately 37 grams of cake crack
12 cocaine found outside the residence. There was
13 loose cash on the coffee table. There was also
14 loose cash on the bedside table where Mr. Mathers
15 was found, and there was also \$700 in
16 Mr. Mathers' jacket.

17 Score sheets were found in the kitchen
18 cupboard. There was no evidence before me of
19 whose handwriting produced the score sheets.
20 There is no evidence of any fingerprints having
21 been found on the score sheets.

22 There was a pistol found under the fridge.
23 It was tested for DNA and was found to not be
24 connected to either one of the accused.
25 Likewise, I had no evidence linking the accused
26 to a rifle that was found or a crossbow.

27 In the bedroom where Mr. Mathers was found

1 was found some marijuana and some cigarettes.
2 There was evidence of smoking. A fan was
3 present. The police could not indicate that
4 there was any strong odour of tobacco or
5 marijuana in the room indicating that while
6 smoking had been taking place, there had been at
7 least an attempt made to empty the smoke out of
8 the room.

9 Also found in the residence were the
10 identification of a number of other individuals,
11 approximately five. The apartment is in another
12 party's name. There were personal items found
13 throughout the apartment from other parties
14 including autographed posters on the walls.
15 There were no personal items apart from the ID
16 that was found for Mr. Hopkins and some clothing
17 attributable to either one of these accused. So
18 basically no indication that either one of them
19 was living there for any extended period of time,
20 apart from documentary evidence which indicates
21 that for a fair period of time Mr. Hopkins had
22 been responsible for payments on the residence.

23 I take the Crown's evidence as proving that.
24 Mr. Praught did a very good job of taking me
25 through the chronology of the documentary
26 evidence which clearly establishes that even
27 though the apartment was in somebody else's name,

1 even though there was evidence that a lot of
2 other people had access to that apartment,
3 Mr. Hopkins at least had some control over the
4 apartment in terms of the payments for the
5 utilities and taking care of that issue.
6 Mr. Hopkins was also found to have similar sort
7 of control over two other apartments, including
8 the Bison Holdings apartment that was referred to
9 in the voir dire.

10 Finally, again, there was very little time
11 between the time that these individuals became
12 aware of the police presence and the entry by the
13 police. I have had to take this into account in
14 considering what reasonable possibilities I can
15 draw from the evidence. Neither one of these men
16 had an opportunity to do very much. I have to
17 take that into account.

18 I move on, then, to plausible theories
19 suggested by the evidence. The first one, the
20 one essentially suggested by the Crown, is that
21 Mr. Hopkins escapes over the railing while
22 Mr. Mathers dumps the drugs out of his window.
23 Mr. Hopkins is fully aware of the drugs, and they
24 are, therefore, both guilty. This inference is
25 supported by the location of the drugs, by the
26 evidence of trafficking in the apartment -- the
27 scales, the baggies, the cocaine packaging and

1 scale in the living room where Mr. Hopkins was --
2 also with Mr. Hopkins' connection to the
3 apartment. This is also borne out by his wallet.

4 Another plausible scenario: Mr. Hopkins
5 escapes over the railing with the drugs. This is
6 supported by the location of the scales close to
7 the baggy, the saleable pieces, Mr. Hopkins'
8 clear connection to ongoing drug trafficking on
9 the basis of the evidence allowed in the voir
10 dire, and basically the evidence generally
11 pointing to his active involvement. He either
12 throws the drugs to one side from the balcony
13 before attempting to climb down or more likely
14 throws the drugs away once he is injured and
15 realizes he is not going to be able to get away.
16 He is going to be apprehended.

17 This is plausible because the drugs were
18 found only 10 feet or so from where Mr. Hopkins
19 apparently hit the ground. It was a disturbed
20 area, and it was obvious that this was where
21 Mr. Hopkins had fallen.

22 I am able to make the inference reasonably
23 that the drugs were not thrown from the bedroom
24 window based on the following evidence: I found
25 that there was evidence that smoking went on in
26 the room and that the window might have been
27 open. The fan would be indicative of this as

1 well as the lack of any indication of a smoking
2 smell in the room. The dog may well have knocked
3 the screen out. This possibility would normally
4 be absurd, but for the fact that the dog was
5 actually found halfway out the window by the
6 police.

7 In the above scenario, either Mr. Mathers
8 knows about the drugs and has at least a small
9 measure of control or he does not. Based on his
10 presence in the unit, the cash in his jacket and
11 on the bedside table, it is plausible that he
12 knew about the drugs. In that event, they would
13 both be guilty.

14 Or Mr. Mathers is just staying in the
15 apartment and has no involvement with the drugs.
16 This is plausible because of a lack of any
17 evidence of continuing occupation, connection to
18 the unit through paperwork, or any surveillance
19 evidence linking Mr. Mathers and Mr. Hopkins.
20 There is evidence of many other occupants or
21 persons with connections to the unit. It is
22 reasonably possible Mr. Mathers and Mr. Hopkins
23 are not closely connected.

24 The location of the money in various
25 discrete places, not mingled, is also suggestive
26 of something other than a joint enterprise, as is
27 the quantum of the drugs. We are dealing with

1 something shy of 40 grams of cocaine. While it
2 is a significant quantity of drugs, it is not
3 such a large quantity of cocaine that it would
4 immediately bring me to the conclusion that
5 knowledge of the drugs must have been shared.

6 This lack of evidence of connection between
7 the two accused leads me to the final theory,
8 that Mr. Mathers threw the drugs out of the
9 window, that Mr. Hopkins tried to escape because
10 of his involvement with the other unit and the
11 drug trade generally, and an outstanding warrant
12 in another jurisdiction for dangerous driving.
13 On this scenario, Mr. Hopkins either does not
14 know or is not connected to Mr. Mathers'
15 activities with the larger quantity of drugs.
16 The evidence forming the basis for this scenario
17 is the evidence that I have just referred to
18 about the lack of connection between these two
19 men.

20 Over an extended period of surveillance,
21 there was no surveillance indicative of any
22 contact between the two of them. There is no
23 indication in any of the documentary evidence
24 that was found in the residence that Mr. Mathers
25 had anything to do with the place other than the
26 fact that he was found in there at 5:10 in the
27 morning on December the 6th. Again, the location

1 of the money, divided; loose money in the bedroom
2 where Mr. Mathers is staying, loose money in the
3 living room, \$700 in Mr. Mathers' jacket pocket
4 points to a lack of connection. There is an
5 absence of evidence as well. There is no
6 fingerprint evidence; there is nothing on the
7 baggies apart from the mere fact that they are
8 found. This is the least likely scenario. I
9 struggled with whether the possible inference was
10 reasonably supported by the evidence or lack of
11 it, or was I engaging in improper speculation?

12 Mr. Hopkins' clear involvement in the
13 cocaine business, his location close to the
14 scales, the small quantity of cocaine apparently
15 packaged for sale, his financial control of the
16 unit all suggest involvement no matter who threw
17 the drugs to the ground. If the bedroom window
18 was not open, there would be no question. If the
19 drugs had been found anywhere other than under
20 the open window, again, no question. If
21 Mr. Hopkins' fingerprints had been found on the
22 baggies, no question. If there was no other
23 plausible reason for Mr. Hopkins to attempt to
24 climb down the outside of the apartment building,
25 again, no question. And if there was any
26 evidence beyond the mere presence of being in the
27 apartment at the time of the raid connecting

1 these two men, again, I would find Mr. Hopkins
2 guilty.

3 In the end, I have no doubt that Mr. Hopkins
4 was in possession of the 1.9 grams on the coffee
5 table. I do have a doubt about his possession of
6 the drugs found outside of the apartment. It is
7 not a large doubt, but it is not trifling. The
8 police expert would not conclusively say that the
9 1.9 grams was for the purpose of trafficking.
10 The circumstances would highly suggest it, but
11 the amount is simply too small. While it is
12 tempting to go beyond the expert's opinion, I
13 have to concur.

14 I find Mr. Mathers not guilty. I find
15 Mr. Hopkins not guilty of the charge as laid but
16 guilty of the lesser and included offence of
17 simple possession of the 1.9 grams of cocaine.

18 Crown, do you have any submissions to make
19 with respect to the money that was found in the
20 residence?

21 MR. PRAUGHT: With respect to forfeiture,
22 Your Honour?

23 THE COURT: With respect to forfeiture.

24 MS. PICHE: Yeah, I may. I'm not sure
25 what my friend's position is with respect to the
26 timing of sentencing.

27 THE COURT: What I was going to suggest in

1 terms of the forfeiture, because it is something
2 that I put my mind to, the money, like the drugs,
3 is difficult to connect specifically to one
4 individual. It is easy to connect to
5 trafficking. Well, not easy. I will leave it to
6 you, Mr. Praught. I will just say that you'll
7 have a sympathetic audience in terms of a
8 forfeiture application. I will leave that to you
9 and Ms. Oja.

10 Ms. Oja, I can indicate that in terms of
11 Mr. Hopkins' status, the Court is seriously
12 considering a very short period of incarceration
13 and any adjournment is going to leave Mr. Hopkins
14 in custody. So I am prepared to hear the matter
15 later this week. I am prepared to hear it later
16 this afternoon.

17 MS. OJA: I am unfortunately unable to
18 speak to this this afternoon, and I'm in a prelim
19 tomorrow. But potentially Friday afternoon would
20 be --

21 THE COURT: Do you want to take a break
22 and do it later this morning? I mean, Supreme
23 Court tends to take a very different route than
24 Territorial Court would. But most of my practice
25 as a lawyer and most of my sitting as a judge has
26 been in a very different environment. If you are
27 prepared to deal with it quickly, we can do it

1 later this morning.

2 MS. OJA: I would prefer to have a
3 couple of days just to get some submissions
4 together, Your Honour.

5 THE COURT: Okay. I just leave you that
6 opening. I was not pushing it. I have civil
7 chambers on Friday morning.

8 MS. OJA: And I'm in a trial -- a
9 Territorial Court trial on Friday morning, but it
10 should be fairly brief. And so Friday afternoon.

11 THE COURT: Why don't we say 1:30 Friday
12 afternoon.

13 MS. OJA: Sure.

14 THE COURT: Actually, I have got a --
15 let's say 1:30 Friday afternoon.

16 There will be an order remanding the accused
17 to 1:30 Friday afternoon -- or the convict to
18 Friday afternoon at 1:30, Form 19 to that time
19 and date.

20 Mr. Mathers, you are free to go.

21 MS. OJA: Thank you very much,
22 Your Honour.

23 MR. PRAUGHT: I don't know if Mr. Sheriff is
24 here to escort Mr. Hopkins downstairs.

25 Otherwise, I can ask the RCMP to come.

26 THE COURT: Why don't we continue court
27 until we have that --

1 THE SHERIFF: It will be addressed,
2 Your Honour.

4 PROCEEDINGS ADJOURNED TO MARCH 31, 2017, AT 1:30 P.M.

6 **CERTIFICATE OF TRANSCRIPT**

7
8 I, the undersigned, hereby certify that the
9 foregoing pages are a complete and accurate
10 transcript of the proceedings taken down by me in
11 shorthand and transcribed from my shorthand notes
12 to the best of my skill and ability.

13 Dated at the City of Edmonton, Province of
14 Alberta, this 11th day of May, 2017.

15
16 Certified Pursuant to Rule 723
17 Of the Rules of Court.

18
19
20
21 _____
22 Joanne Leah McKenzie
23 RPR, CRR, CRC, RSA, CSR(A)
24 Court Reporter
25
26
27