*R. v. Hopkins, 2017 NWTSC 32* **S-1-CR-2015-000030**

# 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.

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**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
28. who is more likely to know what is going on in
29. the residence which we are actually dealing with.
30. The defence is objecting to this, claiming that
31. the evidence is inadmissible as propensity
32. evidence.
33. I have to balance the probative value of the
34. evidence against any unfair prejudice to the
35. accused. This case is somewhat unique in this
36. regard because the evidence is helpful, but it is
37. not just helpful to the Crown. It is helpful in
38. my assessment of the possible inferences that I
39. can reasonably draw from the evidence. I find
40. that the evidence is admissible in the specific
41. circumstances of this case. It gives me a more
42. complete, factual background from which I can
43. assess the circumstantial evidence and, as I have
44. said, the reasonable inferences to be drawn from
45. it.
46. Moving, then, to the case itself. This is a
47. circumstantial case, and I can do no better than
48. to quote from Justice Cromwell of the Supreme
49. Court of Canada in the case of *Villaroman*,
50. 2016 SCC 33, discussing the test that the court
51. should apply when dealing with circumstantial
52. evidence. Referring to paragraph 37:
53. When assessing circumstantial evidence, the trier of fact should
54. consider “other plausible theo[ries]” and “other reasonable possibilities”
55. which are inconsistent with guilt... I agree with the appellant that the
56. Crown thus may need to negative these

*reasonable* possibilities, but

1. certainly does not need to “negative every possible conjecture, no matter
2. how irrational or fanciful, which might be consistent with the
3. innocence of the accused”...

“Other plausible theories” or “other

1. reasonable possibilities” must be based on logic and experience applied
2. to the evidence or the absence of evidence, not on speculation.

8

9 Paragraph 38:

1. Of course, the line between a “plausible theory” and “speculation”
2. is not always easy to draw. But the basic question is whether the
3. circumstantial evidence, viewed logically and in light of human
4. experience, is reasonably capable of supporting an inference other than
5. that the accused is guilty.
6. To sum up the case generally
7. and the level of proof required on the issue of
8. who had possession, was there co-participation
9. such that both parties were in a position to
10. exercise even a small measure of control over the
11. drugs, I find that both accused were present in
12. the apartment at some point with the drugs. The
13. question is whether they were in possession
14. jointly, and if not, in whose possession the
15. drugs were in. In the context of this
16. circumstantial case, does the evidence reasonably
17. support any inference other than their collective
18. guilt? That is really the issue that I had to
19. struggle with in this case.
20. In terms of the evidence relied on and the
21. facts found, I will say at the outset that I
22. accept as proven that the roughly 37 grams of
23. crack cocaine found in the two baggies on the
24. ground outside of the apartment building came
25. from Unit 405 in the Fort Garry apartments. It
26. was possessed for the purpose of trafficking
27. indicated not only by the amount of drugs, which
28. is beyond what would be expected for personal
29. consumption, but from the presence of assorted
30. drug trafficking paraphernalia -- scales, score
31. sheets, and doctored baggies. I also find that
32. both Mr. Hopkins and Mr. Mathers were in the
33. apartment just prior to entry by the police.
34. This case was part of a larger investigation
35. that went on for a number of months. There was
36. an extensive investigation and surveillance of a
37. number of individuals. Mr. Hopkins was seen on a
38. number of occasions in the company of other
39. suspected individuals around both an apartment of
40. interest at Bison Holdings and in the general
41. area of the Fort Garry apartments. Mr. Mathers
42. was not mentioned other than in passing either in
43. connection with Mr. Hopkins or at any of the
44. other locations of interest or persons of
45. 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
46. that he fell from a third-floor balcony and being
47. found a short distance away mere minutes after
48. the events in question. He was taken to the
49. hospital. He was actually quite badly injured.
50. His injuries included a cracked vertebrae. What
51. appears to have happened and what I accept
52. happened is he attempted to scale the balcony.
53. There was an unstable surface on the balcony
54. railing below because of a number of planters.
55. One of the planters was dislodged as a result of
56. that, and this resulted in the fall.
57. The bedroom window upon entry into the
58. bedroom was open, and a roughly 65-pound Pitbull
59. mix was halfway out the window with its rear legs
60. hung up on the window sill. It had apparently
61. been panicked by the flash-bang, had voided
62. itself in the room, and was attempting to flee.
63. After the dog had been removed from the window,
64. police looked outside. They could see the screen
65. lying on the ground, and they could see three
66. plastic baggies in a radius of approximately 5
67. feet in the area basically below the window.
68. They found Mr. Hopkins' identification in
69. his wallet on the coffee table in the living
70. room. When he was found, he had no shoes on, no
71. socks, certainly not dressed for minus-40-degree
72. weather. He was not wearing a coat. Again, I
73. take from this that he fled the residence very
74. quickly.
75. On the coffee table, in the area of the
76. coffee table near the couch was found a wallet,
77. scales, 1.9 grams of crack cocaine divided into
78. four separate pieces, basically street grams. Of
79. the three baggies found outside, two contained
80. what were found to be cakes of crack cocaine, one
81. contained powder that was believed to be cocaine
82. but was never actually tested. So what I was
83. left with is approximately 37 grams of cake crack
84. cocaine found outside the residence. There was
85. loose cash on the coffee table. There was also
86. loose cash on the bedside table where Mr. Mathers
87. was found, and there was also $700 in
88. Mr. Mathers' jacket.
89. Score sheets were found in the kitchen
90. cupboard. There was no evidence before me of
91. whose handwriting produced the score sheets.
92. There is no evidence of any fingerprints having
93. been found on the score sheets.
94. There was a pistol found under the fridge.
95. It was tested for DNA and was found to not be
96. connected to either one of the accused.
97. Likewise, I had no evidence linking the accused
98. to a rifle that was found or a crossbow.
99. 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,
100. even though there was evidence that a lot of
101. other people had access to that apartment,
102. Mr. Hopkins at least had some control over the
103. apartment in terms of the payments for the
104. utilities and taking care of that issue.
105. Mr. Hopkins was also found to have similar sort
106. of control over two other apartments, including
107. the Bison Holdings apartment that was referred to
108. in the voir dire.
109. Finally, again, there was very little time
110. between the time that these individuals became
111. aware of the police presence and the entry by the
112. police. I have had to take this into account in
113. considering what reasonable possibilities I can
114. draw from the evidence. Neither one of these men
115. had an opportunity to do very much. I have to
116. take that into account.
117. I move on, then, to plausible theories
118. suggested by the evidence. The first one, the
119. one essentially suggested by the Crown, is that
120. Mr. Hopkins escapes over the railing while
121. Mr. Mathers dumps the drugs out of his window.
122. Mr. Hopkins is fully aware of the drugs, and they
123. are, therefore, both guilty. This inference is
124. supported by the location of the drugs, by the
125. evidence of trafficking in the apartment -- the
126. scales, the baggies, the cocaine packaging and
127. scale in the living room where Mr. Hopkins was --
128. also with Mr. Hopkins' connection to the
129. apartment. This is also borne out by his wallet.
130. Another plausible scenario: Mr. Hopkins
131. escapes over the railing with the drugs. This is
132. supported by the location of the scales close to
133. the baggy, the saleable pieces, Mr. Hopkins'
134. clear connection to ongoing drug trafficking on
135. the basis of the evidence allowed in the voir
136. dire, and basically the evidence generally
137. pointing to his active involvement. He either
138. throws the drugs to one side from the balcony
139. before attempting to climb down or more likely
140. throws the drugs away once he is injured and
141. realizes he is not going to be able to get away.
142. He is going to be apprehended.
143. This is plausible because the drugs were
144. found only 10 feet or so from where Mr. Hopkins
145. apparently hit the ground. It was a disturbed
146. area, and it was obvious that this was where
147. Mr. Hopkins had fallen.
148. I am able to make the inference reasonably
149. that the drugs were not thrown from the bedroom
150. window based on the following evidence: I found
151. that there was evidence that smoking went on in
152. the room and that the window might have been
153. open. The fan would be indicative of this as
154. well as the lack of any indication of a smoking
155. smell in the room. The dog may well have knocked
156. the screen out. This possibility would normally
157. be absurd, but for the fact that the dog was
158. actually found halfway out the window by the
159. police.
160. In the above scenario, either Mr. Mathers
161. knows about the drugs and has at least a small
162. measure of control or he does not. Based on his
163. presence in the unit, the cash in his jacket and
164. on the bedside table, it is plausible that he
165. knew about the drugs. In that event, they would
166. both be guilty.
167. Or Mr. Mathers is just staying in the
168. apartment and has no involvement with the drugs.
169. This is plausible because of a lack of any
170. evidence of continuing occupation, connection to
171. the unit through paperwork, or any surveillance
172. evidence linking Mr. Mathers and Mr. Hopkins.
173. There is evidence of many other occupants or
174. persons with connections to the unit. It is
175. reasonably possible Mr. Mathers and Mr. Hopkins
176. are not closely connected.
177. The location of the money in various
178. discrete places, not mingled, is also suggestive
179. of something other than a joint enterprise, as is
180. the quantum of the drugs. We are dealing with
181. something shy of 40 grams of cocaine. While it
182. is a significant quantity of drugs, it is not
183. such a large quantity of cocaine that it would
184. immediately bring me to the conclusion that
185. knowledge of the drugs must have been shared.
186. This lack of evidence of connection between
187. the two accused leads me to the final theory,
188. that Mr. Mathers threw the drugs out of the
189. window, that Mr. Hopkins tried to escape because
190. of his involvement with the other unit and the
191. drug trade generally, and an outstanding warrant
192. in another jurisdiction for dangerous driving.
193. On this scenario, Mr. Hopkins either does not
194. know or is not connected to Mr. Mathers'
195. activities with the larger quantity of drugs.
196. The evidence forming the basis for this scenario
197. is the evidence that I have just referred to
198. about the lack of connection between these two
199. men.
200. Over an extended period of surveillance,
201. there was no surveillance indicative of any
202. contact between the two of them. There is no
203. indication in any of the documentary evidence
204. that was found in the residence that Mr. Mathers
205. had anything to do with the place other than the
206. fact that he was found in there at 5:10 in the
207. morning on December the 6th. Again, the location
208. of the money, divided; loose money in the bedroom
209. where Mr. Mathers is staying, loose money in the
210. living room, $700 in Mr. Mathers' jacket pocket
211. points to a lack of connection. There is an
212. absence of evidence as well. There is no
213. fingerprint evidence; there is nothing on the
214. baggies apart from the mere fact that they are
215. found. This is the least likely scenario. I
216. struggled with whether the possible inference was
217. reasonably supported by the evidence or lack of
218. it, or was I engaging in improper speculation?
219. Mr. Hopkins' clear involvement in the
220. cocaine business, his location close to the
221. scales, the small quantity of cocaine apparently
222. packaged for sale, his financial control of the
223. unit all suggest involvement no matter who threw
224. the drugs to the ground. If the bedroom window
225. was not open, there would be no question. If the
226. drugs had been found anywhere other than under
227. the open window, again, no question. If
228. Mr. Hopkins' fingerprints had been found on the
229. baggies, no question. If there was no other
230. plausible reason for Mr. Hopkins to attempt to
231. climb down the outside of the apartment building,
232. again, no question. And if there was any
233. evidence beyond the mere presence of being in the
234. apartment at the time of the raid connecting
235. these two men, again, I would find Mr. Hopkins
236. guilty.
237. In the end, I have no doubt that Mr. Hopkins
238. was in possession of the 1.9 grams on the coffee
239. table. I do have a doubt about his possession of
240. the drugs found outside of the apartment. It is
241. not a large doubt, but it is not trifling. The
242. police expert would not conclusively say that the
243. 1.9 grams was for the purpose of trafficking.
244. The circumstances would highly suggest it, but
245. the amount is simply too small. While it is
246. tempting to go beyond the expert's opinion, I
247. have to concur.
248. I find Mr. Mathers not guilty. I find
249. Mr. Hopkins not guilty of the charge as laid but
250. guilty of the lesser and included offence of
251. simple possession of the 1.9 grams of cocaine.
252. Crown, do you have any submissions to make
253. with respect to the money that was found in the
254. residence?
255. MR. PRAUGHT: With respect to forfeiture,
256. Your Honour?
257. THE COURT: With respect to forfeiture.
258. MS. PICHE: Yeah, I may. I'm not sure
259. what my friend's position is with respect to the
260. timing of sentencing.
261. 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
262. later this morning.
263. MS. OJA: I would prefer to have a
264. couple of days just to get some submissions
265. together, Your Honour.
266. THE COURT: Okay. I just leave you that
267. opening. I was not pushing it. I have civil
268. chambers on Friday morning.
269. MS. OJA: And I'm in a trial -- a
270. Territorial Court trial on Friday morning, but it
271. should be fairly brief. And so Friday afternoon.
272. THE COURT: Why don't we say 1:30 Friday
273. afternoon.
274. MS. OJA: Sure.
275. THE COURT: Actually, I have got a --
276. let's say 1:30 Friday afternoon.
277. There will be an order remanding the accused
278. to 1:30 Friday afternoon -- or the convict to
279. Friday afternoon at 1:30, Form 19 to that time
280. and date.
281. Mr. Mathers, you are free to go.
282. MS. OJA: Thank you very much,
283. Your Honour.
284. MR. PRAUGHT: I don't know if Mr. Sheriff is
285. here to escort Mr. Hopkins downstairs.
286. Otherwise, I can ask the RCMP to come.
287. THE COURT: Why don't we continue court
288. until we have that --
     1. THE SHERIFF: It will be addressed,
     2. Your Honour.

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

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6 **CERTIFICATE OF TRANSCRIPT**

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1. I, the undersigned, hereby certify that the
2. foregoing pages are a complete and accurate
3. transcript of the proceedings taken down by me in
4. shorthand and transcribed from my shorthand notes
5. to the best of my skill and ability.
6. Dated at the City of Edmonton, Province of
7. Alberta, this 11th day of May, 2017. 15
8. Certified Pursuant to Rule 723
9. Of the Rules of Court. 18

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1. Joanne Leah McKenzie
2. RPR, CRR, CRC, RSA, CSR(A)
3. Court Reporter

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