

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- v -

KEITH LUCAS WASHIE
SONNY JAMES SIMPSON

Transcript of Oral Reasons for Decision delivered by the Honourable Justice K.M. Shaner, sitting in Yellowknife, in the Northwest Territories, on the 12th day of July, 2018.

APPEARANCES:

J. Potter:	Counsel for the Crown
N.E. Homberg:	Counsel for Keith Lucas Washie
C.B. Davison:	Counsel for Sonny James Simpson

(Both: Charge under s. 5(3)(a) of the *Controlled Drugs and Substances Act*)

(Simpson: Charges under s. 88 and s. 91(2) of the *Criminal Code*)

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1 **THURSDAY, JULY 12TH, 2018**

2
3 REASONS FOR DECISION

4 SHANER J. (Orally)

5
6 [1] Keith Washie and Sonny Simpson are charged
7 with possession of cocaine for the purpose of
8 trafficking, contrary to s. 5(3)(a) of the
9 *Controlled Drugs and Substances Act*. They are each
10 seeking an order to quash a search warrant and
11 excluding the evidence obtained through its
12 execution, pursuant to s. 8 and 24(2) of the *Charter*
13 *of Rights and Freedoms*.

14
15 [2] By way of background in this case, on June 2nd,
16 2017, the authorizing justice issued a warrant to
17 search the premises where each of Mr. Washie and
18 Mr. Simpson lived, respectively, House 625-B and
19 House 331 in Behchoko.

20
21 [3] The application for the warrant was supported
22 by an Information to Obtain sworn by Corporal
23 Frederick Leclerc of the RCMP. The warrant was
24 executed and a number of items were seized from the
25 residences, which are set out in the Agreed
26 Statement of Facts filed as Exhibit 1 in this *voir*
27 *dire* yesterday.

1 [4] A redacted copy of the ITO was provided to the
2 Court for this application. The Crown concedes, and
3 did so yesterday, that the redacted ITO provides an
4 insufficient basis to justify the search of
5 Mr. Simpson's residence and thus makes application
6 for this Court to review the unredacted version of
7 the ITO and the proposed judicial summary of the
8 nature of the redacted information in accordance to
9 what is referred to as the sixth step in *R. v.*
10 *Garofoli* decision, [1990] 2 S.C.R. 1421; 1990
11 CarswellOnt 119. I will return to that point later.
12 For now, however, the focus is on whether the
13 redacted version of the ITO can withstand *Charter*
14 scrutiny with respect to the search of Mr. Washie's
15 residence.

16
17 [5] The ITO contains information about and from
18 four confidential informants referred to as sources
19 "A", "B", "C" and "D". Not all of the sources
20 provided information respecting Mr. Washie for his
21 home. Source "A" did not provide information about
22 Mr. Washie. However, it is important to the
23 analysis to consider the details of all four of the
24 informants, and these details are as follows:

- 25
26 • As set out in the ITO, the length of time each
27 Informants "A", "B", "C" and "D" have acted as

1 a source. However, there is no information
2 about how long Informant "C" has done so.

- 3 • There is a statement that none of the sources
4 has ever provided information leading to an
5 arrest or a seizure or a charge in previous
6 investigations.
- 7 • There is a statement that the affiant believes
8 source "A" to be truthful, but there is no
9 equivalent statement respecting the other
10 three.
- 11 • There is a statement that each of the four
12 sources has a criminal record that does not
13 include any convictions for "reliability
14 related" offences.
- 15 • There is a statement that none of the four
16 sources has ever been financially compensated
17 for providing information.
- 18 • There is a statement respecting what the
19 affiant believes motivates each of the sources
20 to provide information. For source "A", it is
21 personal status gained through cooperation with
22 the police and community betterment; for source
23 "B", it is community betterment and
24 self-redemption; for source "C", it is
25 financial gain; and for source "D", it is
26 community betterment and self-preservation.
- 27 • Finally, there is a statement regarding how

1 each of the four sources is connected to the
2 drug trafficking element in the community.

- 3 • Additionally, there is a statement in
4 paragraph 8 of the ITO which states that the
5 information from the sources comes from their
6 own personal knowledge, which can be gained by
7 one of personally witnessing an event,
8 disclosure to the source from the individual
9 noted or the source overhearing a conversation.

10
11 [6] Under the heading "Investigation" in the
12 redacted ITO, the following information is provided
13 respecting Mr. Washie:

- 14
15 • On May 12th, 2017, the affiant learned from
16 Informant "C"'s handler that cocaine was being
17 cut at Mr. Washie's house.
- 18 • On an undisclosed date in May 2017, the affiant
19 learned through Informant "D" that crack and
20 powdered cocaine are sold for \$80 to \$100 a
21 gram; that crack and powdered cocaine are in
22 twisted clear Saran Wrap; that the cocaine is
23 cut at Mr. Washie's house at 625-B Behchoko;
24 and that Mr. Washie and another individual,
25 Mr. Adzin, sell drugs from their residences
26 and from Mr. Adzin's vehicle.
- 27 • On an undisclosed date in June of 2017, the

1 affiant learned through source "B" that
2 Mr. Washie worked selling drugs for Mr. Adzin;
3 that Mr. Adzin received a shipment of drugs;
4 that crack cocaine was taken to Mr. Washie's
5 house to be packaged for sale; and that within
6 the last week source "B" witnessed crack
7 cocaine being sold from Mr. Washie's house and
8 that crack was lately packaged in foil and was
9 selling for \$80 a gram.

- 10 • On May 30th, 2017, through his own queries on
11 police databases, the affiant confirmed that
12 Mr. Washie lives at House 625-B in Behchoko.
- 13 • On June 2nd, 2007, the affiant learned through
14 another RCMP officer, Constable Meko, that on
15 May 13th, 2017 the latter had attempted to
16 serve a subpoena on Mr. Washie at his residence
17 and that Mr. Washie had refused to open the
18 door and spoke to Constable Meko through a
19 window. He, being Mr. Washie, told Constable
20 Meko his reason for not opening the door was
21 that he had liquor in his residence. Constable
22 Meko told Mr. Washie liquor was no longer
23 prohibited, to which Mr. Washie apparently
24 replied, "Never know." Constable Meko thought
25 this behaviour was unusual.

26
27 [7] The legal framework for assessing an ITO on a

1 challenge like this is well known. The authorizing
2 justice must have reasonable and probable grounds to
3 issue a search warrant. In reviewing the decision
4 of an authorizing justice to issue a warrant, the
5 reviewing court must exercise deference.

6
7 [8] There are three things that must be examined in
8 determining whether there were reasonable grounds
9 for the authorizing justice to grant the warrant and
10 these are, first, whether the information is
11 compelling; second, whether the source of the
12 information is credible; and third, whether it is
13 corroborated.

14
15 [9] As has been noted in the jurisprudence from
16 this and other jurisdictions, these are not separate
17 requirements that must be met independently. It is
18 the totality of the circumstances that must be
19 considered. Weaknesses in one area may be
20 compensated by strengths in another. This is set
21 out in the cases of *R. v. Debot*, [1989] 2 S.C.R.
22 1140; 1989 CanLII 13, and it has also been set
23 out recently in the case of *R. v. Shivrattan*,
24 2017 ONCA 23.

25
26 [10] I do have, and I share defence counsel's
27 concerns, I have serious concerns of the credibility

1 and corroboration aspects of the ITO relating to
2 Mr. Washie, and so I will deal with those first.

3

4 [11] Other than confirmation that Mr. Washie lives
5 at House 625-B in Behchoko, there is no other police
6 corroboration of the information provided by sources
7 "B", "C" and "D" about Mr. Washie. The sources
8 corroborate each other to the extent that all three
9 indicate that cocaine is processed for sale, that
10 is, cut and packaged at Mr. Washie's house, but
11 given the problems with the ITO as it relates to the
12 authorizing justice's ability to assess credibility
13 with respect to the sources, that corroboration is
14 not particularly persuasive. And there does not
15 appear to have been any other steps taken by the
16 police to corroborate the information that was
17 obtained with respect to Mr. Washie.

18

19 [12] On the face of the redacted ITO, it is clear
20 that there are many issues related to the
21 credibility of the sources. Notably, none of the
22 sources has any sort of track record in providing
23 information to the police. Each has provided
24 information for less than a year and there have
25 been, as I said, no arrest, seizures or charges,
26 excluding those in the current case, which have
27 resulted from any of the information they provided.

1 I say this knowing that the absence of a track
2 record is not, in and of itself, fatal to
3 reliability, but what it means is that there is one
4 less tool available to assess reliability and
5 credibility amid the already scant information
6 relating to them in the redacted ITO.
7

8 [13] That the sources are all individuals who are
9 connected with or freely associate with individuals
10 involved in the drug trafficking activities in the
11 community is not unusual either. However, again,
12 it suggests that they may be engaged in criminal
13 activity themselves and this, of course, militates
14 against credibility and reliability. At the very
15 least, it augments the need for other compensating
16 factors, either compelling information or
17 independent corroboration or both to be present.
18

19 [14] What is most concerning to me is the
20 information the affiant provided and that which was
21 not provided to the authorizing justice about the
22 criminal records of each of the sources. Again, it
23 is not unusual for informants to have criminal
24 records, but our law recognizes that a criminal
25 record is something which may bear on credibility,
26 and this was certainly set out in *R. v. Gore*, 2017
27 ABQB 167, and *R. v. Uppal*, 2007 ABQB 373. It is an

1 important tool in assessing an informant's
2 credibility in this context.

3

4 [15] In this case, the authorizing justice was told
5 that the sources each had a criminal record, but the
6 details of those criminal records were not made
7 available in any form, redacted or otherwise, to the
8 authorizing justice. Moreover, the authorizing
9 justice was told that those records contained no
10 convictions for "reliability related offences."
11 This is particularly problematic.

12

13 [16] First, it is for the authorizing justice to
14 determine if the convictions on the record give rise
15 to credibility concerns about the informants. The
16 way the information was presented, including the
17 omission of specific information about the criminal
18 records, had the effect of usurping the authorizing
19 justice's role in determining credibility. It was
20 not the affiant's call to make.

21

22 [17] Second, I agree that the statement that "there
23 are no convictions for reliability related offences"
24 is misleading. Now I, hasten to add that in saying
25 this I do not mean to suggest that Corporal Leclerc
26 was being dishonest or attempting to hide something
27 from the authorizing justice. Indeed, it may be

1 that he was just trying to be helpful. However,
2 anyone reading the ITO could reasonably conclude
3 that there was nothing arising out of the criminal
4 records of any concern that would bear on
5 credibility, and that is misleading. The impact of
6 that was that the authorizing justice did not have
7 an opportunity to independently assess the
8 credibility of the informants, or the impact of
9 their criminal record on their credibility.

10
11 [18] Turning to whether the information itself is
12 compelling, it is my view that what the Informants
13 "B", "C" and "D" provided about Mr. Washie are
14 certainly serious allegations. What they were
15 saying was that hard drugs are being prepared and
16 trafficked out of his residence. Source "B" said
17 that Mr. Washie works for Mr. Adzin trafficking
18 drugs. There is, however, very little detail with
19 respect to these allegations. It is not clear how
20 the informants have come to know this information
21 other than the blanket statement contained in
22 paragraph 8 and very little details supplied, such
23 as when the events were alleged to have taken place,
24 when these observations were made, conversations
25 overheard and the like. In short, the information
26 is not particularly compelling and it is certainly
27 not compelling enough to overcome what I view as

1 serious deficiencies and concerns that arise with
2 respect to the credibility and corroboration
3 aspects.
4

5 [19] In short, the information based on the ITO that
6 was before the Court comes from unreliable, untested
7 and uncorroborated sources. It may be, of course,
8 that there was some detail in the unredacted version
9 of the ITO which was before the authorizing justice
10 which was sufficient to give rise to reasonable and
11 probable grounds to issue the warrant. That, of
12 course, calls for the sixth step in the *Garofoli*
13 analysis to be undertaken, and it may be that it is
14 possible to prepare a judicial summary which will
15 allow Mr. Washie and Mr. Simpson to make meaningful
16 submissions on whether the *Debot* criteria are
17 satisfied and, in particular, whether there is
18 information which is compelling enough to overcome
19 the other deficiencies I have identified.

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22 Certified Pursuant to Rule 723
23 of the Rules of Court
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26 Lynn Carrière
27 Court Reporter