*R v Mohamed*, 2018 NWTSC 64 **S-1-CR-2015-000113**

# IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

**IN THE MATTER OF:**

**HER MAJESTY THE QUEEN**

**- v -**

**HASSEN ABDUL KERIM MOHAMED**

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_** Transcript of the Reasons for Judgment delivered by The Honourable Justice S.H. Smallwood, sitting in Yellowknife, in the Northwest Territories, on the 25th day of September, 2018.

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**APPEARANCES:**

Mr. D. Praught: Counsel for the Crown

Ms. J. Cunningham (by teleconference):

Counsel for the Accused

(Charges under s. 354(1) of the *Criminal Code*, s. 5(2) x3 of the *Controlled Drugs and Substances Act*)

1. THE COURT: Hassen Abdul Kerim Mohamed
2. faces four charges: possession of property
3. obtained by crime contrary to section 354(1) of
4. the *Criminal Code*, possession of fentanyl for the
5. purpose of trafficking contrary to section 5(2)
6. of the *Controlled Drugs and Substances Act*,
7. possession of cocaine for the purpose of
8. trafficking contrary to section 5(2) of the
9. *Controlled Drugs and Substances Act*, and
10. possession of marijuana in an amount not
11. exceeding 3 kilograms for the purpose of
12. trafficking contrary to section 5(2) of the
13. *Controlled Drugs and Substances Act*.
14. On April 15th, 2015, the RCMP executed a
15. search warrant at 6236 Finlayson Drive, in
16. Yellowknife, Northwest Territories. The RCMP
17. were looking for drugs and evidence of drug
18. trafficking. When the police executed the
19. warrant, Mr. Mohamed was one of two people who
20. had been inside the residence.
21. Mr. Mohamed was arrested in an upstairs
22. bathroom, and William Nelson Castro was arrested
23. outside the residence, having jumped out of an
24. upstairs bedroom window. Inside the residence,
25. the police found fentanyl pills, cocaine,
26. marijuana and cash.
27. The trial was held before me from August
    1. 27th to 31st this year. The Crown called a
    2. number of witnesses: Sergeant Richard Brown,
    3. Constable Nick LeBlanc, Constable Jason Hume,
    4. Constable Darcy Driscoll, Corporal Jim
    5. Strowbridge, Constable Warren Hudym, Corporal
    6. Andy Bezanson, Constable Douglas Melville,
    7. Constable Nathan Smith, and Corporal James Lai as
    8. witnesses during the trial. The Crown and
    9. defence also agreed that some of the evidence of
    10. Sergeant Brown and Constable Melville during the
    11. *voir dire* would be admissible and applicable to
    12. the trial.
    13. There were 13 exhibits entered as evidence:
    14. an agreed Statement of Facts, eight exhibits of
    15. photographs, two disks with videos, receipts, and
    16. a conviction record of William Castro.

# The Crown and Defence Positions

* 1. There are a number of things which are not
  2. in issue: the identity of the accused, the date
  3. and place of events, the nature of the substances
  4. which were found in the residence, that the
  5. fentanyl and the cocaine found on the coffee
  6. table are consistent with possession for the
  7. purpose of trafficking.
  8. What is in issue is whether the cocaine
  9. located in the upstairs bathroom is consistent
  10. with being for the purpose of trafficking, and

1. whether Mr. Mohamed was in possession of the
2. drugs.
3. The Crown's position is that Mr. Castro and
4. Mr. Mohamed were occupying the residence and
5. engaged in trafficking drugs. The Crown argued
6. that Mr. Mohamed was in possession of the drugs
7. located in the residence, and that the cash was
8. the accused's profit from selling drugs.
9. The Crown called an expert witness who
10. testified that the cocaine and fentanyl were
11. possessed for the purpose of trafficking, but
12. that he could not come to that same conclusion
13. for the marijuana which was located.
14. The defence position is that Mr. Mohamed did
15. not have the requisite control over the drugs to
16. be considered in possession of the drugs, that
17. any knowledge he might have had about the cocaine
18. does not equate to control over the cocaine.
19. The defence argues knowledge of the presence
20. of the fentanyl or the nature of the fentanyl
21. cannot be inferred to the accused. The defence
22. also argues that the cocaine in the bathroom
23. could be possessed for personal use. The defence
24. also points out that there is no link between the
25. cash and the trafficking, and that there is an
26. alternative, reasonable explanation available.

# Presumption of Innocence

* 1. At the outset, I want to refer to two
  2. foundational principles that must be kept in
  3. mind.
  4. First is that Mr. Mohamed is considered
  5. innocent throughout the case. The presumption of
  6. innocence means that the burden of proof is on
  7. the Crown, and always remains on the Crown.

# Requirement for Proof Beyond a Reasonable Doubt

* 1. The second principle is the requirement for
  2. proof beyond a reasonable doubt, and this is a
  3. high standard of proof. Probable or likely guilt
  4. is not proof of guilt beyond a reasonable doubt.
  5. A reasonable doubt is not an imaginary,
  6. farfetched or frivolous doubt. It is not a doubt
  7. based on sympathy or prejudice. Instead, it is a
  8. doubt based on reason and common sense. It is a
  9. doubt that comes logically from the evidence, or
  10. that comes from the absence of evidence.
  11. If, after considering all of the evidence
  12. and the lack of evidence, I am sure that the
  13. accused committed the offence or offences
  14. charged, then I would be satisfied beyond a
  15. reasonable doubt and must find him guilty of that
  16. offence or offences. If I am not sure, then I
  17. have a doubt and must find him not guilty.

# Direct and Circumstantial Evidence

* 1. In this case, some of the evidence is
     1. circumstantial. The Supreme Court of Canada
     2. considered the issue of circumstantial evidence
     3. in *R v Villaroman*, 2016 SCC 33.
     4. A verdict of guilt based on circumstantial
     5. evidence cannot be reached unless the trier of
     6. fact is satisfied beyond a reasonable doubt that
     7. guilt is the only reasonable inference to be
     8. drawn from the whole of the evidence. In
     9. deciding whether the only reasonable inference is
     10. that the accused is guilty, the trier of fact
     11. must consider whether there are other reasonable
     12. possibilities that are inconsistent with guilt.
     13. If there are reasonable inferences other than
     14. guilt, then the Crown's evidence does not meet
     15. the standard of proof beyond a reasonable doubt.
     16. The Alberta Court of Appeal in *R v*
     17. *Dipnarine,* 2014 ABCA 328, at paragraph 24 held
     18. that:

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20 Alternative inferences must be reasonable and rational, not just possible.

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1. A trier of fact cannot base a decision on
2. irrational or unreasonable inferences.

# Possession for the Purpose of Trafficking

1. In order to find Mr. Mohamed guilty of any
2. of the counts of possession for the purpose of
3. trafficking, the Crown must prove each of the
4. essential elements of the offence beyond a
5. reasonable doubt:
6. First, that the substance was a controlled
7. substance, namely fentanyl for count 2, cocaine
8. for count 3, and marijuana for count 4;
9. Second, that Hassen Mohamed was in
10. possession of the substance;
11. Third, that Hassen Mohamed knew the nature
12. of the substance;
13. And, fourth, that Hassen Mohamed possessed
14. the substance for the purpose of trafficking.
15. In considering whether the substance was a
16. controlled substance, a controlled substance is
17. any substance that a person cannot legally buy,
18. sell or possess without government authorization.
19. Fentanyl, cocaine and marijuana are all
20. controlled substances under the *Controlled Drugs*
21. *and Substances Act*, and in this case, there is no
22. issue that the substances seized were fentanyl,
23. cocaine and marijuana.

# Possession of the Substance

1. For possession of the substance,
2. "Possession" is defined in Section 4(3) of the
3. *Criminal Code*, which reads:

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1. 4(3) For the purposes of this Act,
   1. a person has anything in possession
2. when he has it in his personal possession or knowingly
3. (i) has it in the actual possession or custody of another person, or
4. (ii) has it in any place, whether or not that place belongs to or is occupied by
5. him, for the use or benefit of himself or of another person; and
6. (b) where one of two or more persons, with the knowledge and consent of the rest, has
7. anything in his custody or possession, it shall be deemed to be in the custody and
8. possession of each and all of them.

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1. There are three ways, then, that a person
2. can be in possession: personal, constructive, or
3. joint.
4. To prove possession, the Crown must prove
5. beyond a reasonable doubt both knowledge and
6. control by the accused of the substances. This
7. can be done by direct and/or circumstantial
8. evidence. The Court must consider the evidence
9. as a whole and consider the totality of the
10. evidence.
11. Personal possession is where someone has
12. actual, physical control of a substance, for
13. example, by holding it in their hand, or keeping
14. it in their pocket. What is required is that an
15. accused person is aware that they have physical
16. custody of the substance, and must be aware of
17. what it is. Both elements also require control.
18. *R v Morelli,* 2010 SCC 8, at paragraph 16.
19. A person can also be in constructive
20. possession. A person who knowingly has a
21. substance in the actual possession of somebody
22. else, or in some place, for the use or benefit of
23. herself or somebody else, has that substance in
24. their possession provided that they have some
25. measure of control over the substance.
26. Constructive possession thus requires that
27. an accused have knowledge of the character of the
28. object, knowingly puts or keeps the object in a
29. particular place, whether or not that place
30. belongs to him, and intends to have the object in
31. the particular place for his use or benefit or
32. that of another person. *Morelli, supra*, at
33. paragraph 17.
34. Knowingly means that the person is aware of
35. the possession or custody of the substance by
36. another, or in another place, and does not act
37. through ignorance, mistake or accident.
38. Knowledge is more than quiescent knowledge, and
39. the accused must have some measure of control
40. over the substance: *R v Pokojoy*, 2013 ABQB 69, at
41. paragraphs 22-23.
42. In *Drug Offences in Canada*, 3rd ed., which
43. is cited in *R v Smith,* 2012 NBCA 99, at paragraph
44. 16, it states:

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1. In *residential cases* of constructive possession, it should also be noted that
2. where a person occupies a room, such occupation constitutes some evidence from
3. which an inference may be drawn that the person was aware of the presence and had
4. control of a drug found within the room. However, a rebuttable presumption of
5. possession because of tenancy or occupancy does not exist at common law or under the
6. *Controlled Drugs and Substances Act*, and a decision by a trial judge to analyze the
7. evidence on a presumptive basis constitutes a reversible error.

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Whether and to what extent any particular

1. accused can be tied to drugs found in residential premises will depend on a range
2. of factors, including: whether the accused lived there or regularly stayed over;
3. whether others lived there or stayed over, and the frequency; clothing and other
4. *indicia* of living arrangements; who paid the rent or mortgage; in whose name are the
5. various utility accounts; frequency of attendance based on surveillance; and
6. relationship between individuals appearing to live in the premises. This is not, of
7. course, an exhaustive list. For example, knowledge and control over openly visible
8. drugs can and often will be inferred where the accused are the only ones living in the
9. premises. [Citations omitted]

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1. With respect to control for constructive
2. possession, the Crown must prove that the accused
3. had the ability to exercise some power (some
4. measure of control) over an item in issue, and it
5. is not necessary for the Crown to prove that such
6. power was, in fact, exercised. That is *R v Wu,*
7. 2010 BCCA 589, at paragraph 20.
8. There can also be joint possession, where
9. two or more persons are in joint possession of
10. the same substance. When any one of two or more
11. persons, with the knowledge and agreement of
12. others, has a substance in their possession, all
13. of them are in possession of that substance
14. provided that they have some measure of control
15. over the substance. However, mere indifference
16. or doing nothing does not constitute consent.
17. The common thread running through all elements of
18. possession are that knowledge and control are
19. required.

# Knowledge of the Nature of the Substance

1. Knowledge of the nature of the substance is
2. also required, and knowledge is a state of mind,
3. the state of mind of the accused. Knowledge can
4. be established in one of three ways: by actual
5. knowledge, by recklessness, or by willful
6. blindness.
7. Actual knowledge is established if the Crown
8. proves beyond a reasonable doubt that the accused
9. knew or was aware of the nature of the substance,
10. or that he thought it was some other substance in
11. which trafficking is also prohibited.
12. Knowledge can also be established if the
13. Crown proves beyond a reasonable doubt that the
14. accused was aware of the indications about the
15. illegal nature of the substance, but deliberately
16. chose to ignore those indications, or not to
17. inquire because he did not want to know the
18. truth.
    1. Willful blindness imputes knowledge to a
    2. person whose suspicion is aroused to the point
    3. where they see the need for further inquiries,
    4. but deliberately chooses not to make those
    5. inquiries.
    6. Knowledge can also be established if the
    7. Crown proves beyond a reasonable doubt that the
    8. accused saw risk that the substance was illegal,
    9. but decided to take the risk.

# Possession for the Purpose of Trafficking

* 1. The Crown must also prove beyond a
  2. reasonable doubt that the accused possessed the
  3. substance for the purpose of trafficking.
  4. Trafficking simply means to sell, administer,
  5. give, transfer, transport, send, or deliver
  6. something to someone. To decide whether
  7. possession was for the purpose of trafficking,
  8. the Court has to consider all of the evidence,
  9. including anything said or done in the
  10. circumstances.

# EVIDENCE

* 1. Turning to the evidence: the RCMP began
  2. investigating William Nelson Castro in November
  3. 2014. In December 2014, Mr. Castro rented a
  4. storage locker at Pack Rat Storage in Kam Lake,
  5. here in Yellowknife. The investigation led the
  6. RCMP to install a camera at Pack Rat Storage on

1 March 31, 2015.

* + 1. Between March 31, 2015 and April 15, 2015,
    2. Mr. Castro accessed the locker two to three times
    3. a week. He was the only person to access the
    4. locker during this period.
    5. The RCMP obtained a warrant to covertly
    6. access and search the locker on multiple
    7. occasions. The first time they accessed it was
    8. on April 15, 2015, and they found substantial
    9. quantities of drugs, which they seized. Located
    10. in the locker was 538 grams of crack cocaine, 175
    11. grams of powder cocaine, 503 fentanyl tablets,
    12. and cutting agents.
    13. In April 2015, Mr. Castro was the tenant and
    14. a resident of a townhouse located at 6236
    15. Finlayson Drive, in Yellowknife.
    16. On April 15, 2015, at approximately 8:00
    17. p.m., the RCMP executed a search warrant at 6236
    18. Finlayson Drive. Two persons were arrested at
    19. the residence during the execution of the search
    20. warrant: the accused, Hassen Mohamed, and William
    21. Nelson Castro.
    22. During the execution of the search warrant,
    23. the RCMP found and seized cash and controlled
    24. substances, along with other items. A number of
    25. exhibits were sent for analysis and determined to
    26. be cocaine, powder cocaine, cannabis marijuana,

1. crack cocaine, and fentanyl.
2. The RCMP entered the residence using the
3. emergency response team (ERT). The ERT team made
4. entry into the residence just before 8:00 p.m.
5. that night.
6. Mr. Mohamed was located inside the residence
7. in the upstairs bathroom. Constable LeBlanc was
8. the first officer up the stairs in the residence.
9. He observed the accused in the bathroom, and told
10. him to get on the ground. The accused did not
11. immediately comply, and so he told him again he
12. was under arrest and to get on the ground. The
13. accused did not comply, and Constable LeBlanc was
14. told to keep going to clear the rest of the
15. upstairs of the residence.
16. He was followed closely after by Sergeant
17. Brown, who testified that he was second up the
18. stairs after Constable LeBlanc. He addressed the
19. accused, who was in the process of getting down
20. on the ground. He stood over the accused and
21. cleared the rest of the bathroom behind the
22. accused. Sergeant Brown remained in the
23. bathroom.
24. He testified that a couple of minutes later,
25. Constable Hume pointed out a bag of what appeared
26. to be cocaine or crack between the legs of the
27. accused. Sergeant Brown did not touch it, and
28. waited until Constable Melville arrived.
29. Photographs of the accused in the bathroom
30. were entered as an exhibit, and show the bag of
31. cocaine between his legs and in between two bath
32. mats on the floor of the bathroom. No other
33. illegal drugs or drug paraphernalia were located
34. in the bathroom.
35. Constable Hume testified that he entered the
36. bathroom when the accused was on the ground. He
37. put plexi cuffs on the accused and patted the
38. accused down. He observed a small baggy between
39. the accused's legs while he was in the bathroom,
40. but testified that he was not sure exactly when
41. he noticed the small baggy.
42. The accused was searched by Constable
43. Melville, who located a cell phone, wallet, key
44. to the Lexus, and cash on him. Following the
45. arrest of the accused and Mr. Castro, who was
46. arrested in front of the residence after exiting
47. out an upstairs bedroom window, the police
48. searched the residence.
49. In the kitchen, a bag of green pills, which
50. were subsequently identified as fentanyl, were
51. located in a bag, in a glass jar, on top of the
52. refrigerator. The glass jar appeared to have
53. been used to burn a candle.
54. Three separate bags of marijuana were
    1. located in the fridge: in the butter section of
    2. the door, on a shelf, and in a crisper drawer.
    3. Three cell phones were found on the kitchen
    4. table, still in their packaging.
    5. In the living room, there was $1,000 in cash
    6. on the coffee table; marijuana in a jar; keys;
    7. six pieces of crack cocaine in baggies, with the
    8. corners twisted off; loose crack cocaine on the
    9. table; scissors; a plate with what appeared to be
    10. cocaine residue on it; two coffee grinders;
    11. cigarettes; a digital scale; and rolling papers.
    12. On the TV stand in the living room, there
    13. was a bag of marijuana. A Blackberry was found
    14. under the lamp on a table, as well as a wallet
    15. and identification.
    16. In an upstairs bedroom, a large safe was
    17. found in the closet, and a key was found nearby.
    18. Inside the safe, there was a bag of powder
    19. cocaine, $212,955 in cash, and the birth
    20. certificate of William Castro. In that same
    21. bedroom, there were two cell phones, cash,
    22. cocaine, and identification and other documents
    23. of William Castro.
    24. Documents were found inside the kitchen,
    25. which indicated that William Castro was the
    26. tenant of the property. In other places in the
    27. residence, there were other documents and items
55. with other people's names on them, so names of
56. people other than William Castro or Hassen
57. Mohamed.
58. William Castro was convicted of possession
59. for the purpose of trafficking of fentanyl,
60. possession for the purpose of trafficking of
61. cocaine, possession for the purpose of
62. trafficking of marijuana, and possession of the
63. proceeds of crime for the items that were located
64. in the storage locker in Kam Lake and at the
65. residence at 6236 Finlayson Drive. He received a
66. sentence of six years less credit for remand
67. time.
68. The cocaine located in the upstairs
69. bathroom, where Mr. Mohamed was, was in a baggy,
70. with two hard pieces individually wrapped in an
71. outer layer, and eight soft pieces individually
72. wrapped in an inner layer. The two hard pieces
73. each weighed 0.5 grams, and the two soft pieces
74. weighed between 0.6 to 0.7 grams.
75. There were also 4.8 grams of loose crack
76. cocaine on the coffee table in the living room,
77. and six wrapped pieces of crack cocaine on the
78. coffee table, weighing a total of 6.4 grams. Not
79. all of the white substance on the coffee table
80. was analyzed, but I infer that it was cocaine.
81. It was located on a table, in very close
82. proximity to other similar pieces that were
83. analyzed and determined to be crack cocaine.
84. There were three bags of marijuana in the
85. fridge, and a bag and a jar of marijuana in the
86. living room.
87. There were 90 pills of fentanyl located
88. above the fridge. The fentanyl was in nine
89. baggies, which each contained ten pills.
90. The main issue with respect to the
91. controlled substances is whether the accused had
92. knowledge and control of the cocaine located in
93. the upstairs bathroom and on the coffee table
94. downstairs, the fentanyl above the fridge, and
95. the marijuana in the fridge and in the living
96. room.

# Accused's Ties to the Residence

1. Looking at the accused's ties to the
2. residence: the accused, Mr. Mohamed, was not a
3. target of the investigation. The police were
4. focused on William Castro and another individual
5. during the investigation. Mr. Mohamed was only
6. observed by the surveillance team in the days
7. leading up to the execution of the search
8. warrant.
9. Mr. Castro had been observed driving a black
10. Lexus during the investigation. Mr. Mohamed had
11. been observed entering and leaving 6236 Finlayson
12. Drive on multiple occasions on April 14 and 15,
13. 2015, both with William Castro and alone. The
14. accused was also observed going outside the
15. residence to smoke. He was observed driving the
16. Lexus, and observed with keys to the residence,
17. appearing to lock and unlock the front door of
18. the residence while he was alone. Also, when he
19. was with William Castro on one occasion as they
20. were leaving the residence, it appeared that he
21. followed Mr. Castro out, and the accused was the
22. person who was closing and securing the front
23. door.
24. Inside a bedroom in the residence, there was
25. a blowup camping bed and a red duffel bag.
26. Inside the red duffel bag, there were documents
27. inside with the accused's name on it and a bottle
28. of pills with the accused's name on it. The
29. documents were an itinerary, which indicated that
30. the accused was scheduled to fly from Vancouver
31. to Calgary to Yellowknife on April 7 and 8 of
32. 2015. A second itinerary indicated that the
33. accused was to fly from Vancouver to Calgary to
34. Yellowknife on April 4, 2015.
35. In that same bedroom, inside a shoe, $1,000
36. in cash was found, along with the passport of the
37. accused. A cell phone was also located in the
38. bedroom.
    1. Constable Smith also later located the
    2. accused's medication in the upstairs bathroom
    3. where the accused had been arrested. He had been
    4. requested to locate the accused's medication and
    5. found three pill bottles with the accused's name
    6. on it in a shower bag behind the bathroom door.
    7. Those were not seized but were put with the
    8. accused's belongings so that he could take his
    9. medication.
    10. The accused was arrested in the residence
    11. where the drugs were located. He was exiting the
    12. bathroom on the second floor when he was arrested
    13. and where the cocaine was located in plain view
    14. between his legs when he was on the floor.
    15. I am satisfied that the evidence established
    16. that the accused was occupying the residence at
    17. the time. His personal belongings were in the
    18. spare bedroom, and his shower bag was in the
    19. upstairs bathroom. Pill bottles in his name were
    20. located in the red duffel bag, on the nightstand,
    21. and in a shower bag in the upstairs bathroom.
    22. His passport was located in a shoe in the spare
    23. bedroom. He was observed coming and going from
    24. the residence multiple times on April 14th and
    25. 15th. He had keys to the residence and was seen
    26. driving the Lexus.
    27. While I am satisfied that the accused was
        1. occupying the residence at the time the search
        2. warrant was executed, it is not clear how long he
        3. had done so. The presence of a blowup camping
        4. bed in the bedroom and lack of other personal
        5. items, which might indicate a more permanent
        6. presence, as well as the itinerary, indicates
        7. that the accused might have flown up to
        8. Yellowknife as late as April 8th, leading me to
        9. conclude that his occupancy of the residence was
        10. relatively recent.
        11. The accused was clearly not on the same
        12. footing as William Castro, who was the registered
        13. tenant of the residence, occupied the master
        14. bathroom and bedroom, and had been observed by
        15. the surveillance at the residence earlier in the
        16. investigation. However, even a relatively recent
        17. occupant of the residence can have knowledge of
        18. what is located in a residence, and can have some
        19. measure of control over the contents of the
        20. residence.

# Knowledge of the Cocaine

* + 1. With respect to the cocaine, it was located
    2. in the upstairs bathroom, and on the coffee table
    3. in the living room, both of which are common
    4. areas of the residence in which it can be
    5. expected that an occupant, even a recent
    6. occupant, of the residence would have regular

1. access to.
2. The cocaine in the upstairs bathroom was
3. located in plain view, where the accused was
4. arrested. The drugs were between the accused's
5. legs. The accused had apparently just used the
6. bathroom, and there was evidence that he had used
7. the bathroom, the shower bag, with the medication
8. that had his name on it being located on the back
9. of the door of the bathroom.
10. The cocaine on the coffee table in the
11. living room was located in plain view, along with
12. a number of items on the table. On the table
13. were keys with a white tab, and the accused had
14. accessed the residence under surveillance with
15. the keys that appear to have a white tab on at
16. least one occasion that day.
17. The accused was observed smoking on the step
18. of the residence. When the accused was arrested,
19. no cigarettes were located on his person, and the
20. only other cigarettes located in the residence
21. were on the living room table, where the
22. marijuana and cocaine were found, and in the
23. master bedroom, which was occupied by William
24. Castro.
25. In addition, the accused was observed
26. wearing sunglasses during the surveillance. When
27. he was arrested, there were no sunglasses on his
28. person, but sunglasses were located on the coffee
29. table in the living room.

# Knowledge of the Marijuana

1. With respect to the marijuana, it was
2. located in the refrigerator and in the living
3. room. The refrigerator was in the kitchen, which
4. is an area of the house where it would be
5. expected that an occupant of the residence would
6. have access to. It is a commonly used area. As
7. well, the refrigerator is a type of appliance
8. which is commonly used to store food and
9. beverages, and it can be expected that an
10. occupant, even one who had only recently begun to
11. occupy the residence, would access it regularly,
12. if not several times a day.
13. Inside the refrigerator, some of the
14. marijuana was in plain view, once the door of the
15. refrigerator was opened. The other marijuana was
16. in a crisper drawer, which likewise, is in an
17. area that it would be expected that an occupant
18. of the residence could access regularly.
19. The marijuana in the living room was located
20. in a jar on the coffee table, and in a bag on the
21. television stand, both of which were in plain
22. view to anyone in the living room. Also on the
23. coffee table were rolling papers and a grinder.
24. I am satisfied beyond a reasonable doubt,
    1. based on the circumstances that I have described,
    2. that the accused had knowledge of the cocaine and
    3. marijuana. The drugs were in plain view and
    4. readily accessible. They were not hidden or
    5. locked away. Taking into account the
    6. circumstances, I am also satisfied beyond a
    7. reasonable doubt that the accused would have had
    8. knowledge of the nature of the cocaine and
    9. marijuana.

# Control Over the Cocaine & Marijuana

* 1. Considering whether the accused had some
  2. measure of control over the cocaine and
  3. marijuana, the defence has argued that the
  4. accused lack the requisite control over the
  5. drugs, that his brief amount of time in the house
  6. was not sufficient for him to have control over
  7. the drugs located in the residence, and that the
  8. occupancy is not enough to establish that he had
  9. control over the drugs.
  10. Considering the cocaine located in the
  11. upstairs bathroom, I am satisfied that the
  12. accused had some measure of control over the
  13. cocaine. It was located between his legs, in a
  14. bathroom that he had just used, and he had used
  15. the bathroom as I mentioned before.
  16. With respect to the cocaine and marijuana
  17. located downstairs in the living room and

1. kitchen, I have considered that the accused
2. appears to be a relatively recent occupant of the
3. residence. There are a number of documents in
4. the residence with other people's names on them,
5. so the names of people other than Mr. Castro or
6. the accused. It is not clear who these people
7. are, or what connection they have to the
8. residence, but there is also no evidence that
9. these other individuals were accessing the
10. residence in the days leading up to the execution
11. of the search warrant. The surveillance by the
12. police of the residence showed Mr. Castro and the
13. accused as the two individuals who were entering
14. and leaving the residence regularly.
15. As well, the accused had access to the
16. residence both with Mr. Castro and alone. He was
17. seen with the keys to the residence and observed
18. entering and exiting the residence, as well as
19. going outside for a smoke.
20. The drugs in the residence were openly
21. visible, and in areas that would be regularly
22. accessed by an occupant of the premises.
23. In the circumstances, I am satisfied beyond
24. a reasonable doubt that the accused had some
25. measure of control over the drugs, and in saying
26. that, I am cognizant that the Crown is not
27. required to prove complete or exclusive control
28. over the drugs, or that the accused actually
29. exercised power over the drugs, but instead that
30. the accused had some ability to exercise some
31. power over the drugs.

# Knowledge of Fentanyl

1. With respect to the fentanyl pills, which
2. were located in a glass jar on top of the fridge,
3. the Crown argues that it is reasonable to expect
4. that a resident would know what was in the
5. kitchen, and the fentanyl was in plain view. The
6. fentanyl pills were located on top of the fridge,
7. in an area that an occupant would have easy
8. access to. However, the fentanyl pills were in a
9. jar that appeared to have candle residue on the
10. sides, which obscured the contents of the jar
11. from being readily visible. Looking at the
12. photographs, it is not apparent what the contents
13. of the jar were if you were to look at it from
14. the side.
15. Considering this, and that the accused had
16. only occupied the residence relatively recently,
17. and that there were no other indications of
18. fentanyl trafficking or possession in the
19. residence, I am not satisfied beyond a reasonable
20. doubt that the accused had knowledge of the
21. fentanyl.

# Possession for Purpose of Trafficking

* 1. Looking at possession for the purpose of
  2. trafficking: the defence does not contest that
  3. the cocaine on the coffee table or the fentanyl,
  4. that possession of those items would be for the
  5. purpose of trafficking.
  6. Corporal Lai was qualified to give opinion
  7. evidence on whether the drugs located in the
  8. residence would have been possessed for the
  9. purpose of trafficking. I have considered
  10. Corporal Lai's evidence, and I am satisfied that
  11. the cocaine on the coffee table would be
  12. possessed for the purpose of trafficking. It is
  13. packaged in a method that is used for resale,
  14. there are paraphernalia of cocaine trafficking
  15. located on the table and in near proximity to the
  16. drugs: a box of baggies on a couch; a digital
  17. scale with what appeared to be cocaine residue on
  18. it; a plate with what appeared to be cocaine
  19. residue on it; there is cash on the table;
  20. multiple cell phones in the residence, including
  21. three that were still in their packaging; and
  22. what appears to be loose crack cocaine on the
  23. table. When viewing the coffee table in the
  24. living room, it is apparent that someone was in
  25. the process of packaging the cocaine for sale.
  26. The Crown conceded that the evidence does
  27. not establish that possession of the marijuana

1. would be for the purpose of trafficking.
2. Corporal Lai, when he testified, said that he
3. would not be able to come to that conclusion.
4. Therefore, the Crown is seeking a conviction for
5. possession of marijuana only.
6. With respect to the cocaine in the upstairs
7. bathroom, the defence argues that the cocaine
8. located there could be for personal use, and that
9. there was no link between this cocaine and the
10. cocaine found in the living room.
11. Corporal Lai testified that he was of the
12. opinion that the cocaine found in the bathroom
13. was possessed for the purposes of trafficking.
14. The packaging of the drugs was in ten pieces, and
15. the weights (the weights of the pieces were
16. between 0.5 to 0.7 grams) suggested to him that
17. the drugs were packaged for trafficking and
18. resale of the drugs.
19. Corporal Lai was also of the opinion that
20. because there were two types of drugs (powder and
21. crack cocaine) in the package, that this was also
22. consistent with trafficking as it was his opinion
23. that a user of cocaine typically has a preference
24. for either powder or crack cocaine, and that a
25. user would typically purchase their preference
26. rather than purchasing both types of cocaine.
27. Corporal Lai testified that the drugs were
    1. about 10 street grams, and the value of the drugs
    2. was up to $1,000, and his opinion was that a user
    3. would not buy that much cocaine for personal use
    4. as it is readily available in Yellowknife.
    5. He also testified that if a user wanted to
    6. buy cocaine in bulk to get a better price, that
    7. they would buy an 8 ball, which would be packaged
    8. differently and typically be in one bag.
    9. I accept Corporal Lai's opinion with respect
    10. to the packaging of the cocaine in the bathroom,
    11. and that it would not be typical for a user of
    12. cocaine to possess cocaine in the manner in which
    13. it was found in the bathroom.
    14. As well, I have considered that the drugs
    15. were located in a house where the accused was an
    16. occupant, and it was apparent that there were
    17. activities associated with drug trafficking
    18. occurring. There was cocaine plainly visible on
    19. the coffee table, and cocaine that was in the
    20. process of being packaged for sale.
    21. There were other indicia of trafficking: the
    22. money on the coffee table; the money in the safe
    23. in the master bedroom; the multiple cell phones;
    24. the cell phone logs of two phones, which had
    25. texts which were indicative of trafficking.
    26. It is accepted that William Castro was a
    27. major supplier of cocaine. The cocaine in a
28. locker and the residence and the cash located in
29. the safe make that clear. If the accused were to
30. buy crack cocaine from William Castro for
31. personal use, he could have gotten either crack
32. cocaine or powder cocaine from him, whatever his
33. preference was, rather than getting a combination
34. of the two.
35. Overall, I am satisfied beyond a reasonable
36. doubt that when considering the packaging of the
37. cocaine, and the evidence as a whole, that the
38. cocaine located in the bathroom upstairs was
39. possessed for the purpose of trafficking.

# Possession of Property Obtained by Crime

1. Turning to the possession of property
2. obtained by crime, count 1 on the Indictment: the
3. Crown must establish beyond a reasonable doubt
4. that the accused was in possession of the money,
5. that the money was the proceeds of crime, and
6. that the accused knew that the money was the
7. proceeds of crime.
8. As I understand it, the Crown is seeking a
9. conviction on this count on the basis of the
10. money which was located in the shoe in the
11. upstairs bedroom, so the $1,000 in cash, and not
12. for the money which was located in the safe or
13. located on the coffee table in the living room.
14. The money in the spare bedroom upstairs was
    1. located in a shoe, along with the accused's
    2. passport, it totalled $1,000, and I am satisfied,
    3. in the circumstances, that the accused was in
    4. possession of the money based on this.
    5. Considering whether the money was the
    6. proceeds of crime, while I am satisfied that the
    7. accused possessed the cocaine for the purpose of
    8. trafficking, I cannot conclude that the money was
    9. the proceeds of crime. While it is likely, or
    10. even probable, that the money was earned by the
    11. accused selling cocaine, it is not the only
    12. reasonable explanation.
    13. The evidence suggests that the accused had
    14. recently come to Yellowknife from Vancouver, and
    15. he was a recent occupant of the residence. It is
    16. a possibility, one that I find that is not
    17. unreasonable, that he brought the cash with him.
    18. There is no direct evidence linking the cash to
    19. the trafficking activities, and the amount is not
    20. so large that it cannot be explained by a person
    21. bringing cash with him when travelling to a new
    22. place.
    23. Therefore, for the reasons stated, I find
    24. the accused guilty of count 3, possession for the
    25. purpose of trafficking of cocaine; and guilty of
    26. the included offence of possession of marijuana
    27. in count 4; not guilty of count 2, possession for
15. the purpose of trafficking of fentanyl; and not
16. guilty of count 1, possession of the proceeds of
17. crime.

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5 **ADJOURNED TO NOVEMBER 14, 2018, AT 11:00 A.M.**

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# 9 CERTIFICATE OF TRANSCRIPT

1. I, the undersigned, hereby certify that the
2. foregoing transcribed pages are a complete and
3. accurate transcript of the digitally recorded
4. proceedings taken herein to the best of my skill and
5. ability.
6. Dated at the City of Sault Ste. Marie, Province
7. of Ontario, this 8th day of October, 2018.
8. Certified Pursuant to Rule 723
9. of the Rules of Court 19



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1. Kerri Francella
2. Court Transcriber

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