# R. v. Angel Anne Martel, 2015 NWTTC 04

# Date: 2015 03 10

# File: T2-CR-2014-000339

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## **IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES**

 **BETWEEN:**

## **Her Majesty the Queen**

**- and -**

**ANGEL ANNE MARTEL**

**REASONS FOR DECISION**

**of the**

**HONOURABLE JUDGE GARTH MALAKOE**

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| Heard at: |  | Hay River and Yellowknife, Northwest Territories |
|  |  |  |
| Date of Decision: |  | March 10, 2015 |
|  |  |  |
| Date of Trial: |  | November 9, 2014 and February 25, 2015 |
|  |  |  |
| Counsel for the Crown: |  | Kindra Lakusta |
|  |  |  |
| Counsel for the Accused: |  | Peter Harte |

 [Section 5(2) of the *Controlled Drugs and Substances Act*]

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1. INTRODUCTION
	* 1. Angel Martel is charged with possessing cocaine for the purpose of trafficking.
		2. On April 24, 2014, six members of the Hay River RCMP executed a search warrant on a trailer at 24-61 Woodland Drive in Hay River, Northwest Territories. The RCMP were looking for evidence of drug trafficking. Angel Martel was one of four occupants in the trailer. Ms. Martel was in the living room. About 5’ to 7’ away from her was a brown purse. Inside the brown purse were 5 small packages of cocaine with a total combined weight of 1.7 grams. There was also $900 Canadian consisting of $20 bills inside the purse.
		3. The brown purse contained a green wallet containing identification belonging to Angel Martel.
2. THE CROWN AND DEFENCE POSITIONS
	* 1. There are no issues with respect to the date and place of the events; nor the identity of the accused; nor that the substance found in Ms. Martel’s purse was cocaine. The Crown submits that the brown purse belonged to Angel Martel and she was in possession of the cocaine that was inside the purse. The Crown called an expert witness who opined that the cocaine was possessed for the purpose of trafficking.
		2. Counsel for Angel Martel submits that as a result of the testimony of one of the officers, the Court should have a doubt as to whether the purse and the cocaine belonged to the accused. In any case, counsel for the accused submits that there are flaws in the expert’s report and testimony and that the Crown has not proven beyond a reasonable doubt that the cocaine was possessed for the purpose of trafficking.
		3. With respect to possession, the Crown suggests that there is nothing to displace the obvious inference, i.e., a purse with a wallet containing Angel Martel’s identification located near Angel Martel belongs to Angel Martel and that she has knowledge of and control over the contents.
3. ISSUES
	* 1. In analysing whether or not possession has been proved and whether the cocaine was possessed for the purposes of trafficking, there are two issues which are important:
			1. The effect of the inconsistencies in the testimony of Cst. Steve Beck; and
			2. The factual assumptions in the expert report.
	1. The Inconsistencies in the Testimony of Cst. Steve Beck
		1. The defence argument against possession involves the testimony of Special Cst. Steve Beck. To put this testimony in context, it is necessary to understand how the search was carried out. First, the RCMP officers went into the trailer, arrested the occupants and removed them. Then, the exhibit custodian, Cst. Newcombe, photographed the inside of the trailer, before the searching and seizing of items.
		2. Next the officers performed a search. When an item to be seized was located, the officer who found the item called for Cst. Newcombe. Cst. Newcombe would photograph the item and then take custody of the item.
		3. Cst. Steve Beck located the brown purse. Cst. Newcombe took a photograph of the purse and of Cst. Beck’s hand with Ms. Martel’s identification from the wallet. Cst. Newcombe took custody of the purse containing the wallet and the cocaine. Cst. Newcombe described the cocaine seized as five baggies each containing a rock of crack cocaine.
		4. Cst. Steve Beck kept notes of his activities. In his notes, he wrote that at 21:21, he located the purse. He also wrote that in the purse were 5 baggies, each containing a rock of crack cocaine and 5 baggies, each containing powder cocaine. Cst. Beck also wrote this in his General Report. The following is an excerpt from his testimony in both examination-in-chief and cross-examination:

A. . . . The next item I have seized here is at 21:21. There was a bundle of several crack rocks, as well as a bundle of soft, which is just how I was referencing the two different types of cocaine found, . . .

 . . .

Q. The reference to a bundle of soft cocaine containing several baggies, the soft cocaine is cocaine powder as opposed to crack cocaine?

A. Yes.

* + 1. Cst. Newcombe denies that any powdered cocaine was seized in the trailer. He specifically denies that there was powdered cocaine in the brown purse.
		2. Defence submits that it is highly unlikely that a trained police officer who was making notes as events were occurring such as Cst. Beck claims he was doing, would make an error wherein he invented the presence of five baggies of powdered cocaine. In my view, this is a valid observation.
		3. Cst. Beck testified as to the importance of making accurate notes. He also testified that he saw the baggies of “hard”, meaning crack cocaine and baggies of “soft”, meaning powder cocaine. I am baffled by the testimony of Cst. Beck. In the context of the way the search was conducted and the photographs and testimony of Cst. Newcombe, I can only conclude that Cst. Beck is incorrect. This is an unfortunate finding given the importance which the judiciary places on the testimony of officers who are making contemporaneous notes.
		4. Defence would have the Court take the error in Cst. Beck’s testimony and consider the possibility that the purse and the wallet were not located where Cst Newcombe and Cst. Beck say they were located, i.e., in the close proximity to Angel Martel. I accept that I am not able to rely on the testimony of Cst. Beck in this regard given my finding of his inaccuracy, but I am satisfied that based on the testimony of Cst. Newcombe and the photographs, the purse, cash, wallet and cocaine were found in the configuration indicated.
		5. Based on the evidence, I am satisfied that the only reasonable inference is that Ms. Martel had knowledge of and control over the cocaine found in her purse and in so doing, I am mindful of the Alberta Court of Appeal’s comments at paragraphs 22 and 23 of *R. v. Clouden*, 2012 ABCA 175:

 22. In our view the trial judge carefully analyzed the evidence in light of the applicable legal authorities. At para. 34 he stated:

In order to convict, I must be satisfied beyond a reasonable doubt that the only reasonable inference to be drawn from the proven facts is that the Accused had knowledge of and control over the cocaine: *R. v. Griffin*, 2009 SCC 28, [2009] 2 S.C.R. 42.

23. Furthermore, we agree with the comments made in *R. v. Heiberg,* 2011 ABQB 211 which were quoted with approval by the trial judge below at para. 44 of his decision:

It was incumbent on the Crown to prove this [knowledge, intent and control] beyond a reasonable doubt and there is no obligation on Mr. Heiberg to testify or lead evidence. However, without any other evidence, I am left with no evidentiary basis for an innocent explanation for the established facts nor does a rational explanation come to mind. Mere speculation is insufficient to create a reasonable doubt . . .

* + 1. The only reasonable conclusion, based on the facts before the Court, is that the purse and its contents were in the possession of Angel Martel.
	1. The Factual Assumptions in the Expert Report
		1. Cpl. Eric Rashid Irani was qualified as an expert to give opinion evidence in relation to packaging, pricing, street jargon, distribution methods, consumption and usage habits and personal use versus trafficking of crack cocaine.
		2. Cpl. Irani concluded that the cocaine located in Ms. Martel’s purse was for the purpose of trafficking. The reasons for this included the following factors:
			1. The quantity of cocaine (1.7 grams) although Cpl. Irani’s report uses 2.9 grams;
			2. The packaging of the cocaine (individually wrapped);
			3. That the cocaine was in the form of crack cocaine;
			4. The cash ($900) and the denomination ($20 bills);
			5. The presence in the trailer of the following items: scales, stash can (an ordinary looking object such as a pop can used to conceal drugs), and police scanner;
			6. Lack of drug paraphernalia in the trailer or in the purse;
			7. The presence in the trailer of multiple cell phones; firearms and ammunition.
		3. The cross-examination of the expert was thorough and lengthy. Cst. Irani admitted to have taken large portions of his report out of a text without attributing the material to the author of the text. I did not find this admission to detract from the conclusions of the report given that it only affected general comments about cocaine and cocaine usage. The extracts from the text book were correct as stated; they were just copied without giving credit.
		4. In my view, the value of the expert’s testimony diminished because of an apparent tenaciousness to the conclusion even when some of the underlying facts forming the basis of the conclusion had been disproven. This manifested itself in a number of ways – the most obvious being Cst. Irani’s refusal to answer certain questions directly. For example, “there is no evidence of the purity of the cocaine?” or “there are purely innocuous uses for telephones, aren’t there?”
		5. The opinion refers to 10 individual packages of cocaine being seized. In fact, there were only 8 packages. The opinion refers to a total of 2.9 grams of cocaine individually packaged in plastic known as “spitters’. In fact, the amount found in Ms. Martel’s purse was 1.7 grams.
		6. Exhibit 10 in the trial consisted of four of the five baggies of cocaine found in Ms. Martel’s purse. The fifth had been sent for testing, resulting in a certificate of analysis indicating “Cocaine (benzoylmethylecgonine)” Cpl. Irani was asked to examine the exhibit and he described it as powdered cocaine. In fact, his testimony was as follows:

The Court: Can you tell me is there a difference between cocaine and crack cocaine? And if so, what are you looking at?

The Witness: Okay. What I’m seeing here, it looks and feels the texture and the colour looks like powder cocaine off a chunk of a brick of cocaine. Crack cocaine, it’s a little bit different in look, texture, and whatnot. It’s a harder, smokeable form of cocaine that’s manufactured to smoke. And it sometimes has a yellower tinge versus a very white with a powder cocaine. [emphasis added]

* + 1. Later on, in cross-examination, Cpl. Irani resiled from this position a bit but confirmed that his opinion was based on there being crack cocaine in Ms. Martel’s purse:

Q Before you look at it, maybe help me with this: Is your evidence that it looks like crack cocaine or that it looks like powdered cocaine?

A It looks like powder cocaine the way it comes off the brick, but it could be crack cocaine depending on how it’s manufactured, how it’s done up in a homemade lab to make it into the crack form.

Q Okay. Because your opinion is based on the proposition that we’re dealing with crack cocaine, right?

A That’s right. That was in the purse. [emphasis added]

* + 1. This description by Cpl. Irani is of the cocaine that was purported to be found in the purse of Angel Martel. In the face of the testimony of Cst. Beck and Cst. Newcombe, Cpl. Irani’s description of it as “powder cocaine” causes some difficulty. Cst. Newcombe stated that these were crack rocks; Cst. Beck said there were both crack rocks and powder cocaine; and Cpl. Irani testified that it appeared to be powder cocaine.
		2. The law is clear that in order for a Court to give weight to an expert opinion, the factual basis for the expert opinion must be proven beyond a reasonable doubt. In the context of expert evidence regarding blood alcohol concentrations, the Supreme Court of Canada stated the following at paragraph 58 of *R. v. Gibson* (2008), 230 C.C.C. (3d) 97:

. . . Even admissible expert evidence cannot be given any weight without a proper factual foundation: as this Court stated in *R. v. Abbey*, [1982] 2 S.C.R. 24, “the facts upon which the opinion is based must be found to exist” (*per* Dickson J., at p. 46).

* + 1. The Alberta Court of Appeal in *R. v. Porquez*, [1991] A.J. No. 103 (C.A.), leave to appeal to S.C.C. refused 127 A.R. 393, stated that it could not accept an expert opinion where the amount of the cocaine was equivocal yet the expert used a specific weight, 7 grams.
		2. Cpl. Irani testified that his expert opinion was based on the fact that crack cocaine was found in Angel Martel’s purse. As indicated above, this fact is in doubt, as is the weight that he used. The reason that the question of powder versus crack cocaine is important can be seen in the considerations which Cpl. Irani used in his opinion.
		3. Cpl. Irani testified that the lack of a crack pipe in Ms. Martel’s purse or in the house was an indication that the cocaine was for trafficking. This was because, in his view, someone who was addicted to crack cocaine would always have a pipe close by. In addition, someone who was addicted to crack cocaine would purchase small amounts at a time because they normally would not have funds to buy anything more than a small quantity. Cpl. Irani contrasted this with the user of powder cocaine, who would be more likely to use it recreationally. There would not be a pipe to smoke it and this type of user would not be cash strapped.
		4. In coming to the conclusion that the 2.9 grams of cocaine (although Ms. Martel only possessed 1.7 grams) was for the purpose of trafficking, Cpl. Irani looked at some of the other “global” factors such as the scanner, firearms, cell phones, stash can and scales. The evidence in the trial indicated that the trailer was the residence of Travis Guild, who occupied one of the bedrooms. There was some evidence that Angel Martel was a girl friend of Travis Guild, who was one of the four occupants when the police arrived. Another occupant was Rachel Martel, the mother of Angel Martel. Rachel Martel pleaded guilty to possession of 0.5 grams of crack cocaine which one of the officers saw her throwing toward her daughter on April 24, 2014.
		5. The evidentiary importance of these global items is diminished given the presence of three other occupants in the house. As Cpl. Irani reluctantly agreed, there are innocuous uses for cell phones. The same can be said for scanners, firearms and stash cans. The inferential value of these items as indicia of drug trafficking is considerably less if there is no evidence that establishes that Angel Martel was someone who was not simply at the trailer to visit or perhaps, to buy cocaine.
1. CONCLUSION
	* 1. The Crown has not established that Angel Martel possessed the 1.7 grams of cocaine for the purpose of trafficking. I find her not guilty of the charge under section 5(2) of the *Controlled Drugs and Substances Act* and guilty of the lesser and included offence of simple possession of cocaine under section 4(3) of the *Controlled Drugs and Substances Act*.
		2. I direct that Exhibits 10, 11 and 12, being the cocaine, the transmittal envelope and the scanner be returned to the RCMP for safekeeping until the end of the appeal period; at which point, they should be forfeited and destroyed.

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|  |  | Garth MalakoeT.C.J. |
| Dated at Yellowknife, Northwest Territories, this 10th day of March, 2015. |  |  |

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