

R. v. Savoury, [2008] O.J. No. 2896

Ontario Judgments

Ontario Superior Court of Justice

A. Karakatsanis J.

Heard: February 25, 2008.

Judgment: March 6, 2008.

Court File No.: M 81/07

[2008] O.J. No. 2896

Between Her Majesty the Queen, and Travis Savoury

(20 paras.)

Case Summary

Criminal law — Preliminary inquiry — Committal for trial or discharge — Review of committal order — Crown application seeking to quash the preliminary hearing judge's order discharging the accused on drug and firearm related charges dismissed — It was open to the judge to find the evidence of a key and of papers in one bedroom was insufficient to reasonably support the inference that the accused had knowledge of the drugs and firearms hidden in the rest of the home in the circumstances of this case, even in light of some evidence that Savoury was himself a drug dealer — The court was not persuaded the judge erred in her determination.

Crown application for an order in the nature of certiorari quashing the preliminary hearing judge's order discharging the accused on drug and firearm related charges, and seeking an order committing him for trial. The judge had found that although he had a key and let himself in to the house, and an inference could be drawn as to knowledge from occupancy, including access and control, where an individual's personal papers were found, and had committed him on the possession charge relating to drugs found in that room. However, with respect to items found elsewhere in the house, she found there was insufficient evidence to establish an inference of knowledge. The Crown argued the preliminary hearing judge exceeded her jurisdiction by failing to give effect to inferences of possession of the drugs and firearms in the whole house which were available to the crown on the evidence and by improperly weighing the evidence. The Crown submitted that having found he was an occupant or had a key to access the house and having found that there was evidence he was a drug dealer, it was also a reasonable inference that he resided in the home, that he was involved in a joint enterprise of drug dealing and would have had knowledge of the drugs in the laundry room and in the kitchen cupboards and the firearms in the living room and master bedroom.

HELD: Application dismissed.

In a careful and thorough decision, the preliminary hearing judge considered both the correct test and the whole of the evidence in reaching her position. The court was not persuaded that she erred in her determination. In any event, it was obvious from her reasons that she fulfilled the statutory mandate by considering the whole of the evidence in determining that in her opinion no sufficient case was made out to commit him for trial on those charges. It was open to the preliminary hearing judge to find the evidence of a key and of papers in one bedroom was insufficient to reasonably support the inference that he had knowledge of the drugs and firearms hidden in the rest of the home in the circumstances of this case, even in light of some evidence that he was himself a drug dealer. To find that he lived there or that he was in a joint illegal enterprise with the owner of the house or that he had knowledge of the hidden drugs and firearms would require a speculative leap from the inference of his

access and occupancy and his personal possession of drugs for drug dealing.

Statutes, Regulations and Rules Cited

Controlled Drugs and Substances Act,

Criminal Code, s. 548(1)

Counsel

C. Mullaly, for the Crown/responding party.

S. Reid, for the defence/moving party.

REASONS FOR DECISION

A. KARAKATSANIS J.

1 The Crown seeks an order in the nature of *certiorari* quashing the order of the preliminary hearing judge discharging the accused Savoury on drug and firearm related charges and seeks an order committing him for trial on all charges except counts 5 and 6 of the firearm charges.

2 Both Savoury and Williamson were charged with drug and firearm offences following a search of a home on August 31, 2006.

Evidence at the Preliminary Hearing

3 Police had observed Travis Savoury driving a silver Mercedes that stopped on the driveway of 45 Durness Ave on August 31 at 8:02 p.m. He left the car, with what appeared to be keys in his hand, and he appeared to open the front door with a key. The female passenger followed him. They both left after about 4 minutes.

4 The car was back in the driveway just before 9:00 p.m. At 9:00 p.m. police executed a search warrant and arrested Savoury while he was still in his vehicle on the driveway. Savoury had 5.63 grams of cocaine wrapped in clear plastic in his pocket and \$845 cash. Police searched a bedroom on the second floor and found 13.41 grams of powder cocaine in a shoebox as well as a shoebox near the television containing documents in the name of Travis Savoury. The bedroom had a bed and the closet contained men's clothing. A digital scale was found hidden in the closet.

5 A small amount, 4.24 grams, of crack cocaine was found in the laundry room of the house along with personal papers in the name of Williamson. A larger amount of 56.93 grams of cocaine and two scales were found in kitchen cupboards; a cellular phone bill in Williamson's name was also found in the kitchen.

6 A firearm was found wrapped in a white cloth hidden in a vase in the living room and another firearm and ammunition that would fit both firearms were found hidden in a black safe, in a suitcase in the closet of the master bedroom. The master bedroom contained papers in the name of Williamson, including an agreement of purchase and sale and mortgage papers that named Williamson and a Gordon Francis as the owners of the home. Documents in Williamson's name were also found in the garage.

7 An expert witness testified that the amount of cocaine found on Savoury indicated a street dealer for purposes of limited financial reward. The drugs found inside the house, with a street value of about \$10,000, indicated a higher end street trafficker and the expert officer would not have been surprised to find guns involved in order to protect the profits.

The preliminary hearing judge's decision

8 The respondent Savoury was committed for trial in relation to the drugs and money found on him at the time of his arrest and in relation to the drugs found in the bedroom containing his personal papers. He was discharged for the charges relating to drugs found in the laundry room and kitchen; for the firearm found in the living room vase; and for the firearm and ammunition found hidden in a suitcase in the closet of the master bedroom. He was discharged on counts 2, 4, and 6 of the information under the *Controlled Drugs and Substances Act* and all counts relating to the firearms under the *Criminal Code*. Williamson was committed for trial on most of the charges before the court.

9 The preliminary hearing judge found that Savoury had a key and let himself into the house. She found "that an inference could be drawn as to knowledge from occupancy, including access and control, where an individual's personal papers were found. I have no difficulty in finding that based on the *Sheppard* test, Mr. Savoury ought to be committed on the possession charge relating to the drugs found in that room." With respect to the items found elsewhere in the house, she found insufficient evidence to establish an inference of knowledge: "there is no evidence that he was a regular visitor or that he resided there. No surveillance evidence was called to establish that Mr. Savoury frequented that house even though he had a key".

The Crown position

10 The Crown takes the position that the preliminary hearing judge exceeded her jurisdiction by failing to give effect to inferences of possession of the drugs and firearms in the whole house which were available to the crown on the evidence and by improperly weighing the evidence.

11 The Crown submits that having found Savoury was an occupant or had a key to access the house and having found that there was evidence he was a drug dealer, it was also a reasonable inference that he resided in the home, that he was involved in a joint enterprise of drug dealing and would have had knowledge of the drugs in the laundry room and in the kitchen cupboards and the firearms in the living room and master bedroom.

The test for committal and review

12 Subsection 548(1) of the *Criminal Code* requires the preliminary inquiry judge to order the accused to stand trial, "if in his opinion there is sufficient evidence" and to discharge the accused, "if in his opinion on the whole of the evidence no sufficient case is made out." The test for committal is not in issue - whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty: *United States of America v. Sheppard*, [1977] 2 S.C.R. 1067. Under this test, the preliminary inquiry judge must commit the accused to trial in any case in which there is admissible evidence which could, if it were believed, result in a conviction.

13 The preliminary inquiry judge may not assess the credibility of witnesses or weigh the evidence for competing inferences in determining whether there is sufficient evidence for committal. In a circumstantial case, the test is

whether the evidence, if believed, could reasonably support an inference of guilt. The judge does not draw factual inferences or assess credibility. The weighing of the evidence is limited to an assessment of whether the evidence is reasonably capable of supporting the inferences the Crown asks the jury to draw: *R. v. Arcuri* (2001), 157 C.C.C. (3rd) 21 (S.C.C.) at paras. 20-23, 30.

14 A preliminary hearing judge commits jurisdictional error where she weighs competing inference or chooses among them. Where more than one inference can be drawn from the evidence, only the inferences that favour the Crown are to be considered. However, the inference relied upon by the judge to commit the accused must be both reasonable and based upon the evidence. It cannot be based upon speculation, however reasonable. In *R. v. Alexander*, [2006] O.J. No. 3173 (S.C.J.), Ducharme J. articulates that the boundary which separates permissible inference from impermissible speculation in relation to circumstantial evidence is often a very difficult one to locate.

15 In *R. v. Deschamplain* (2004), 196 C.C.C. (3rd) 1 at para. 23, the Supreme Court of Canada cautioned that in engaging in the limited weighing function, a preliminary hearing justice is required to consider the whole of the evidence':

[I]t is not a jurisdictional error for the preliminary inquiry judge, after considering the whole of the evidence and where there is an absence of direct evidence on each essential element of the offence, to erroneously conclude that the totality of the evidence (direct and circumstantial) is insufficient to meet the test for committal and to consequently discharge the accused under s. 548(1)(b) ... In that situation, it would be improper for a reviewing court to intervene merely because the prelim inquiry judge's conclusion on sufficiency differs from that which the reviewing court would have reached

Analysis

16 In this case the defence submits that there was no evidence to connect the respondent to the drugs and firearms found elsewhere in the house. There was no evidence that he was a permanent occupant or frequented the house. The papers found in the second bedroom indicated another address as Savoury's residence. Williamson was the owner of the house and only his personal papers were found outside the second bedroom and throughout the house. The drugs and firearms were hidden from plain view. The drugs were in a tin on the top shelf of kitchen cupboards; one firearm was wrapped in a cloth and hidden in a vase containing bamboo; another firearm was wrapped in a sock that was wrapped in a hat that was in a safe that was in a suitcase in the corner of the closet of the master bedroom.

17 In careful and thorough reasons, the preliminary hearing judge found that with respect to the drugs and firearms found elsewhere in the house that were not in plain view, there was insufficient evidence to reasonably infer that Savoury had knowledge of them. She said there was no evidence that he was a regular visitor or that he resided there.

18 It seems to me that it was open to the preliminary hearing judge to find the evidence of a key and of papers in one bedroom was insufficient to reasonably support the inference that Savoury had knowledge of the drugs and firearms hidden in the rest of the home in the circumstances of this case, even in light of some evidence that Savoury was himself a drug dealer. To find that he lived there or that he was in a joint illegal enterprise with the owner of the house or that he had knowledge of the hidden drugs and firearms would, in my view, require a speculative leap from the inference of Savoury's access and occupancy and his personal possession of drugs for drug dealing. In essence, the Crown submitted that it was a glaring inconsistency to find occupancy but not to find residency on these facts. In *R. v. Grey*, [1996] O.J. No. 1106 (C.A.) the Court of Appeal found that whether or not knowledge can be inferred from occupancy depends on the facts of each case. In that case, while the accused regularly stayed overnight at his girlfriend's apartment, the court found there were insufficient facts to establish possession of drugs found in the apartment; there was no other evidence connecting the accused to the drugs, other persons frequented the apartment and the appellant was not a permanent occupant.

19 In a careful and thorough decision, the preliminary hearing judge considered both the correct test and the whole of the evidence in reaching her position. I am not persuaded that she erred in her determination. In any event, it is obvious from her reasons that she fulfilled the statutory mandate by considering the whole of the evidence in determining that in her opinion no sufficient case was made out to commit Savoury for trial on those charges.

20 The application is dismissed.

A. KARAKATSANIS J.

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