

Date: 20121025
Docket: 11/72
Citation: *R. v. Wall*, 2012 NLCA 67

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

BETWEEN:

JAMES DAVID WALL

APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

Coram: Rowe, Barry and Hoegg JJ.A.

Court Appealed From: Provincial Court of Newfoundland and Labrador
Judicial Centre at St. John's

Appeal Heard: October 10, 2012

Judgment Rendered: October 25, 2012

Reasons for Judgment by Rowe J.A.

Concurred in by Barry and Hoegg JJ.A.

Counsel for the Appellant: Averill J. Baker

Counsel for the Respondent: Andrew O. Brown

Rowe J.A.:

INTRODUCTION

[1] James Wall appeals his convictions for possession of marihuana for the purpose of trafficking and for trafficking. A key issue relates to possession of the drugs, as they were removed by the police before the package that had contained them was delivered to Mr. Wall.

FACTS

[2] On October 4, 2010, the Appellant went to a house that had been rented by his cousin, who had recently vacated it. There, he received delivery of a package addressed to “J. Wahl”. The delivery was made by an RCMP officer dressed in a Canada Post uniform. The package had been intercepted by Canada Post and the RCMP; it had contained 7½ pounds of marihuana, which had been removed before the package was delivered.

[3] Shortly after Mr. Wall accepted delivery of the package, the police entered the house. Mr. Wall was alone. The package had been opened. The contents of the package (a bag containing lawn grass) was found on the ground outside a window in the house.

[4] Mr. Wall told the police and later testified that he was in the apartment to do some repairs for his cousin, so that the cousin could receive back his security deposit. (Mr. Wall’s cousin did not testify.) Mr. Wall said he had no knowledge of the package and the 7½ lbs. of marihuana. The landlord testified that he did not know Mr. Wall, had not given him permission to be in the house and that, so far as he was aware, nothing needed to be fixed for return of the security deposit.

[5] In his decision, the Provincial Court judge indicated that he did not believe Mr. Wall’s testimony. Rather, he inferred that Mr. Wall had made an arrangement to receive the drugs and that he accepted the package believing that he was receiving the drugs. For each of the two offences, the judge imposed a 12-month conditional sentence, to be served concurrently.

ISSUES

[6] The Appellant submits that the reasons of the judge are inadequate, that the verdicts are unreasonable and that possession of the drugs has not been made out at law (given that Mr. Wall took receipt of a package containing no marihuana).

ANALYSIS

[7] Upon a careful reading of the reasons of the Provincial Court judge, I see no merit in the Appellant's submission that the reasons were inadequate. As is often the case in the Provincial Court, the reasons were delivered orally and did not follow the more highly structured approach that one tends to see in written reasons. That said, the review of the evidence and the treatment of the legal issues was clear and entirely adequate to provide a basis for appellate review.

[8] As regards the submission that the decision was unreasonable, concerning the conviction for possession for the purposes of trafficking, I see no merit in this. (I will say more below regarding "possession".) There was evidence upon which a trier of fact acting judicially could properly have entered a conviction. The circumstantial evidence was clearly inculpatory. I would note, in particular, two key findings: that Mr. Wall "had no legitimate business being at this particular address"; and it "would be an astronomical coincidence, it would be a coincidence beyond any reasonable or rational belief whatsoever that he could be there and that package was delivered at that particular point in time".

[9] The key issue was the assessment of the credibility of Mr. Wall's testimony. It was open to the Provincial Court judge not to believe Mr. Wall and to find that Mr. Wall's testimony did not raise a reasonable doubt (in the face of the highly inculpatory circumstantial evidence). Such assessments of credibility are to be shown deference by appellate courts. See *R. v. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621 at para. 20 (per Bastarache and Abella JJ.); *F.H. v. MacDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41 at paras. 72-73 (per Rothstein J.); and *Cleary v. Courtney*, 2010 NLCA 46, 299 Nfld. & P.E.I.R. 85 at para. 15 (per Cameron J.A.).

[10] As regards the conviction for trafficking, the Crown conceded that the verdict was unreasonable. I am not certain that the Crown is correct in this. However, in light of the Crown's position, the conviction for trafficking is set aside and an acquittal is entered on that charge.

[11] Regarding “possession” as a necessary element of the offence of possession for the purposes of trafficking, more needs to be said. For reasons best understood by the police, locally the practice appears to be that when a drug shipment is intercepted, all the drugs are removed before the package is delivered. In some other parts of Canada, the practice is to remove almost all of the drugs, but to leave in a small amount, in order to meet the requirement for “possession”.

[12] Mr. Wall never had personal possession of the 7½ lbs. of marihuana. Two other possibilities are constructive possession and joint possession. For constructive possession, two elements are required: the accused must have knowledge and “some measure of control over the item to be possessed”. *R. v. Pham* (2005), 203 C.C.C. (3d) 326 (ONCA) at para. 15, affirmed 2006 SCC 26, [2006] 1 S.C.R. 940. For joint possession, three elements are required: “knowledge, consent and a measure of control on the part of the person deemed to be in possession”, *Pham*, paragraph 16.

[13] In *R. v. Bonassin*, 2008 NLCA 40, 278 Nfld. & P.E.I.R. 45, this Court held, in circumstances that closely parallel those in this case, that knowledge, consent and control could be inferred, thus making out the requirements for joint possession. While the Provincial Court judge did not refer to *Bonassin*, his decision that Mr. Wall had possession of the 7½ lbs. of marihuana is in accord with the law as set out in *Bonassin*.

SENTENCE

[14] Neither the Notice of Appeal nor the Appellant’s Factum referred to an appeal against sentence. However, in the course of argument, in the alternative, counsel for Mr. Wall sought a reduction of his sentence to time served. (Mr. Wall has served 10 months of his 12-month conditional sentence.) The Crown did not take issue with sentence being placed in issue, notwithstanding the lack of proper notice.

[15] Counsel for Mr. Wall argued that with the substitution of an acquittal for the trafficking charge, Mr. Wall’s sentence should be reduced. This argument fails. Mr. Wall was sentenced to 12 months conditional for possession for the purposes of trafficking and 12 months conditional for trafficking. The Provincial Court judge made the sentences concurrent. The sentence for trafficking falls away with the reversal of the conviction for that offence. However, that has no effect on the sentence for possession for the purpose of trafficking.

CONCLUSION

[16] The appeal is allowed in part, in that the conviction for trafficking is set aside and an acquittal is entered for that charge. In other respects, being the conviction for possession for the purposes of trafficking and the sentence for that offence, the appeal is dismissed.

M. H. Rowe J.A.

I Concur: _____

L. D. Barry J.A.

I Concur: _____

L. R. Hoegg J.A.