



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

Citation: *R. v. Noseworthy*, 2018 NLCA 69

Date: December 3, 2018

Docket Number: 201701H0072

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT

AND:

RODNEY NOSEWORTHY

RESPONDENT

Coram: White, Hoegg and O'Brien JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
General Division 201401G1160
2017 NLTD(G) 125

Appeal Heard: October 15, 2018

Judgment Rendered: December 3, 2018

Reasons for Judgment by: Hoegg J.A.

Concurred in by: White and O'Brien JJ.A.

Counsel for the Appellant: Elaine Reid

Counsel for the Respondent: John Lavers

Hoegg J.A.:

[1] The Crown appeals the acquittal of Rodney Noseworthy on charges of conspiracy to traffic in cocaine and marihuana.

[2] Mr. Noseworthy's charges arose from an investigation concerning the transport of illegal drugs from Quebec to the island of Newfoundland. At trial the evidence comprised a lengthy and detailed agreed statement of facts, a book of photographs, two volumes of transcripts of interceptions, and Mr. Noseworthy's *viva voce* testimony. In short, it established that two Quebec men, Tan Tai Huynh and Alex Prefontaine (also known as Dimitri), arranged for drugs to be transported to St. John's in the gas tanks of vehicles and offloaded at a garage owned and operated by Charles Noftall of St. John's. The drugs were then distributed for injection into the local market.

[3] Mr. Noseworthy trafficked the drugs locally. He acquired his supplies of cocaine and marihuana from Mr. Noftall, with whom he had a long-standing friendship, at the garage. He returned the proceeds from his trafficking to Mr. Prefontaine, which cash proceeds were then couriered or transported by Mr. Huynh to Quebec.

[4] Police began their conspiracy investigation in June of 2012. Mr. Noseworthy first came to their attention in December 2012, having been brought into the operation during the fall of 2012 by Mr. Noftall.

[5] The uncontroverted evidence, agreed to by Mr. Noseworthy, established that he communicated with all three of the men named above, by text, telephone and in person, on matters related to acquiring the drugs from Mr. Noftall at the garage and remitting the sales proceeds to Mr. Prefontaine for return to Quebec. As well, the evidence established that Mr. Noseworthy was a frequent visitor to Mr. Noftall's garage, that Mr. Noseworthy was aware of how the drugs had been brought into St. John's, and that it was those drugs that he agreed to sell and did sell, locally. The evidence also established that Mr. Noseworthy arranged for his friend Keith Walsh to become a trafficker of drugs obtained from Mr. Noftall at his garage, and that Mr. Noseworthy arranged for relocation of Mr. Walsh's stash when Mr. Walsh became nervous about storing his stash at his own home.

[6] In addition to the agreed and uncontroverted evidence referenced above, Mr. Noseworthy gave *viva voce* evidence. He testified that when he initially agreed to traffic the drugs he only knew that Mr. Noftall could supply him with drugs to sell. Mr. Noseworthy's evidence was that he knew three days before

meeting Mr. Prefontaine and Mr. Huynh that drugs were coming into Mr. Noftall's garage for sale. He said that by December 2012, he had met Mr. Prefontaine and Mr. Huynh in Mr. Noftall's garage and knew the nature of their business relationship with Mr. Noftall, and that although he did not know the details of the transport of the drugs initially, he knew those details before his birthday on January 26, 2013. He testified that on his birthday he advised his wife that he:

... was getting away from Tai, Alex and Charlie because what they had on the go was like way above anything that I ever got involved with because by this time, about a week before my birthday I was under the understanding of exactly how, like, how crazy the whole picture of the whole thing was because it took a while, because they didn't just come out and tell me, oh, we're doing this and this much comes every couple of weeks and this does that, I was just told there's stuff here now. There's, this is here, this is available and that's available. Not exactly how much, I never, ever see the whole load. They asked me to help 'em unload the vehicle. I told 'em downright, no, I don't want nothing to do with any of that, I just wants to be the guy, just I'll come to you if I need something or I'll drop something off to you, but once I wrapped my head around what they were actually doing, I then said it to my spouse, on my birthday, ... I did not want to be involved with it. I mentioned it to her and she told me to either ship out of that or ship out of her life ... there was still \$5,000 that I had to collect off one of my friends, and I told him, when I gives you that \$5,000 that's it and I said, and then he contacted Dmitri, 'cause we had \$21,000 there and that's when I met Dmitri, that evening, around 11:30 that evening ... I used to always just go give him money. Any time I wanted any drugs, I would just get it from Charlie. So, Dmitri or Tai never, ever gave me drugs, ever, I always was meeting with them to give them money.

(Transcript, June 13, 2017, at 43-44.)

[7] Despite the agreed evidence and Mr. Noseworthy's admissions in his testimony that he knew the details of the conspiracy and agreed to play a role in it, the Judge found Mr. Noseworthy not guilty of conspiracy. At paragraphs 128-130 of his decision (2017 NLTD(G) 125), the Judge said:

[128] To summarize, Mr. Noseworthy was not present at the formation of the agreement, which would date from at least as early as June 2012. There is no evidence that he participated in, or assisted in the importation of drugs into the Province. There is no evidence of his assisting in sending money out of the Province. There is no evidence of his furthering the formation or continuance of the agreement itself. There is ample evidence that he furthered the object of the agreement.

[129] At the outset I described the elements of the offence of conspiracy. The first element is that the Crown must prove the existence of a conspiracy. I believe there has been evidence presented which shows there was a conspiracy to import product

into the Province and distribute it for profit. The second element is that the conspiracy has an unlawful objective. That object in this case was to traffic in illicit drugs. I believe the Crown has made out this element.

[130] The final element, and the most important where Mr. Noseworthy was concerned, is proving that he was a participant in the conspiracy. Here, in my view, the Crown has failed to persuade me, beyond a reasonable doubt, that he was a party to the agreement. He certainly was involved in trafficking of illegal substances. But that is not the same as conspiracy, and he was not charged with trafficking.

In summary, the Judge concluded that there was a conspiracy which had an unlawful objective, but that Mr. Noseworthy was not a party to the agreement to conspire. As such, the Judge found him not guilty of conspiracy.

ISSUE

[8] The central issue is whether the Judge erred in applying the law of conspiracy to the undisputed evidence against Mr. Noseworthy. Resolution of the issue involves determining whether the Judge misapprehended and/or misapplied the law of conspiracy and also whether he erred in failing to consider evidence material to the crime of conspiracy when he was deciding whether to convict Mr. Noseworthy.

THE LAW

Question of Law

[9] The Crown is entitled to appeal an acquittal on a question of law alone (*Criminal Code*, section 676(1)(a)). In criminal law, the application of a legal standard to a set of facts is a question of law (*R. v. Shepherd*, 2009 SCC 35, [2009] 2 S.C.R. 527 at para. 20; *R. v. Day*, 2014 NLCA 14, 349 Nfld. & P.E.I.R. 1 at paras. 8-16, aff'd 2014 SCC 74, [2014] 3 S.C.R. 614; and *R. v. Al-Amiri*, 2015 NLCA 37, 368 Nfld. & P.E.I.R. 146, at para. 21). The applicable standard of review in this case is therefore correctness.

The Law of Conspiracy

[10] Conspiracy is an agreement between two or more individuals to act together to achieve an unlawful object. In *Papalia v. The Queen*, [1979] 2 S.C.R. 256, 93 D.L.R. (3d) 161 the Supreme Court of Canada explained the offence at 276:

...On a charge of conspiracy, the agreement itself is the gist of the offence: *Paradis v. R.*, [1934] S.C.R. 165 at 168, 61 C.C.C. 184, [1934] 2 D.L.R. 88. The *actus reus* is the fact of agreement: *D.P.O. v. Nock*, [1978] 3 W.L.R. 57 at 66, [1978] 2 All E.R. 654 (H.L.). The agreement reached by the co-conspirators may contemplate a number of acts or offences. Any number of persons may be privy to it. Additional persons may join the ongoing scheme, while others may drop out. So long as there is a continuing, overall, dominant plan, there may be changes in methods of operation, personnel or victims without bringing the conspiracy to an end. The important inquiry is not as to the acts done in pursuance of the agreement, but whether there was, in fact, a common agreement to which the acts are referable and to which all of the alleged offenders were privy. ...

[11] In *United States of America v. Dynar*, [1997] 2 S.C.R. 462, 147 D.L.R. (4th) 399, the Supreme Court of Canada affirmed the law of conspiracy as set out in *Papalia* saying, at paragraph 87, to establish a conspiracy “[t]he Crown is simply required to prove a meeting of the minds with regard to a common design to do something unlawful, specifically the commission of an indictable offence. See section 465(1)(c) of the *Criminal Code*.” In *R. v. Root*, 2008 ONCA 869, 241 C.C.C. (3d) 125 at para. 71, leave to appeal to SCC refused, [2009] S.C.C.A. No. 282, the Ontario Court of Appeal described the elements of conspiracy as follows:

[71] Conspiracy, like attempt, is a crime of intention. Its factual element or *actus reus* is established upon proof of the agreement to commit the predicate offence, for example to possess or launder the proceeds of crime. The factual element in the conspiracy need not correspond with the factual elements of the substantive offence that is the object of the conspiracy. The goal of the agreement, the commission of the substantive offence, is part of the mental element or *mens rea* of the offence of conspiracy. *Dynar* at para. 103. Where the goal of a conspiracy involves the commission of a substantive offence of which knowledge of certain circumstances is an essential element, the mental element is belief. The subjective state of mind of anyone who conspires with others to launder money is the belief that the money has illegitimate origins. *Dynar* at para. 108.

[12] More recently, in *R. v. J.F.*, 2013 SCC 12, [2013] 1 S.C.R. 565, the Supreme Court of Canada discussed the law of conspiracy. The Court explained at paragraphs 52-54 how membership in an existing conspiracy can be proved:

[52] ... where a person, with knowledge of a conspiracy (which by definition includes knowledge of the unlawful object sought to be attained), does (or omits to do) something for the purpose of furthering the unlawful object, with the knowledge and consent of one or more of the existing conspirators, this provides powerful circumstantial evidence from which membership in the conspiracy can be inferred. To

be precise, it would be evidence of an agreement, whether tacit or express, that the unlawful object should be achieved. ...

[53] ... conspiracies are often proved by way of circumstantial evidence. Direct evidence of an agreement tends to be a rarity. However, it is commonplace that membership in a conspiracy may be inferred from evidence of conduct that assists the unlawful object. Justice Rinfret made this basic point in *Paradis v. The King*, [1934] S.C.R. 165, some eight decades ago:

Conspiracy, like all other crimes, may be established by inference from the conduct of the parties. No doubt the agreement between them is the gist of the offence, but only in very rare cases will it be possible to prove it by direct evidence. [p. 168]

[54] Furthermore, it is not necessary that all members of a conspiracy play, or intend to play, equal roles in the ultimate commission of the unlawful object. Indeed, members in a conspiracy need not personally commit, or intend to commit, the offence which each has agreed should be committed: *R. v. Genser* (1986), 39 Man. R. (2d) 203 (C.A.), aff'd [1987] 2 S.C.R. 685. Any degree of assistance in the furtherance of the unlawful object can lead to a finding of membership as long as agreement to a common plan can be inferred and the requisite mental state has been established.

(Emphasis added, footnote removed.)

[13] A few years before *J.F.*, in *R. v. Niemi* (2006), 208 C.C.C. (3d) 119, 209 O.A.C. 71 (ONCA), the Ontario Court of Appeal explained how members of a conspiracy may have different roles and different levels of knowledge and involvement in a given conspiracy. *Niemi* concerned whether the accused, a pilot flying a private plane carrying illegal drugs from Jamaica to Canada, was part of the conspiracy to import the drugs into Canada. The trial judge found that the pilot's partial role was such that he was not a member of the conspiracy. In allowing the Crown's appeal, the Ontario Court of Appeal stated that there is "no requirement that a particular member of a conspiracy be involved in any particular step of the plan or in any planning at all" (paragraph 68). The Court further stated that there is no requirement that a conspirator have contact with "more than one other member" of a conspiracy (paragraph 66), that contact with any co-conspirator be "continuous" (paragraph 67), or that a member of a conspiracy be "an essential component of the criminal scheme" (paragraph 69).

[14] In summary, the law of conspiracy does not require that each conspirator join the conspiracy at the same time (*Papalia* at 276) or that all members of the conspiracy play equal roles (*J.F.* at paragraph 54). A person may become a member of a conspiracy that is already in progress or leave while it continues,

and a person may be a member of a conspiracy even if he or she does not have knowledge of all of the details of the common scheme (*Niemi* at paragraph 68).

[15] As well, while the extent of an individual's role in a conspiracy is a relevant factor in sentencing, it is not relevant to determining membership in a conspiracy (*R. v. Basha* (1979), 23 Nfld. & P.E.I.R. 286, 61 A.P.R. 286 (Nfld. C.A.) at 298-299).

Application of the Law to this Case

[16] In this case the Judge found that Mr. Noseworthy's membership in the conspiracy was not established. With respect, that conclusion cannot be sustained.

[17] The evidence, which was accepted by the Judge, shows that Mr. Noseworthy was fully aware of the plan to bring illegal drugs – cocaine and marihuana – into Newfoundland for the unlawful objective of selling them locally. He agreed to sell and did sell these drugs, which he obtained from Mr. Noftall with full knowledge of where they came from and how they got to Mr. Noftall's garage, and remitted the proceeds of their sales to Messrs. Prefontaine and Huynh for return to Quebec.

[18] Mr. Noseworthy's membership in the conspiracy is established by his knowledge of the conspiracy, and his agreement to join it by agreeing to further its unlawful objective of selling the drugs locally. His selling of the drugs locally, combined with his knowledge of the conspiracy and his agreement to traffic, is "powerful evidence" (*J.F.* at paragraph 52) that he actually was a member of the conspiracy. Moreover, his bringing a friend of his (Mr. Walsh) into the scheme is further evidence of his membership, as is his remittance of monies to Messrs. Prefontaine and Huynh for return to Quebec. Moreover, Mr. Noseworthy's *viva voce* evidence respecting his professed desire to his wife to get out of "what they [Messrs. Huynh, Prefontaine, and Noftall] had on the go" actually confirms that he was "in" the conspiracy.

[19] The fact that Mr. Noseworthy was not an original member of the conspiracy did not prevent him from becoming a member later. Nor does the fact that his role in the conspiracy might be described as a lesser one than the roles of other members. In short, the agreed evidence and his own testimony lead to the inevitable conclusion that Mr. Noseworthy was a member of the conspiracy.

[20] The Supreme Court of Canada in *J.F.* clarified the difference between being a party to a conspiracy and being a member, saying that party liability involves conduct that aids or abets the formation of the agreement. The Court in *J.F.* concluded that the offender was not a party to a conspiracy but in fact a conspirator.

[21] In this case, the Judge focused on the fact that Mr. Noseworthy was not involved in the initial plan to transport drugs to Newfoundland. There is no requirement for a conspirator to have been involved in the early planning to transport the drugs (*Papalia* at 276). Neither is there a requirement that a conspirator's role must be equal to those of other co-conspirators (*J.F.* at paragraph 54). In reaching his conclusion that Mr. Noseworthy was not a member of the conspiracy, the Judge relied on the Supreme Court of Canada decision in *J.F.* respecting party liability for a conspiracy charge. In cases involving party liability, liability only arises when the accused aids or abets an agreement to conspire. Mr. Noseworthy, unlike the offender in *J.F.*, was not charged with being a party to the conspiracy – Mr. Noseworthy was charged with conspiracy. In finding that Mr. Noseworthy was not a member of the conspiracy, the Judge misapprehended the law of conspiracy as set out in *J.F.* and consequently applied the wrong law to the evidence. In so doing, he failed to consider the uncontroverted evidence establishing Mr. Noseworthy's membership in the conspiracy.

[22] In this case the Judge failed to appreciate the difference between being a party to a conspiracy and being a conspirator. He erroneously applied the law respecting being a party to a conspiracy (aiding and abetting a conspiracy) in his analysis of the evidence. The Judge accepted the possible explanation that Mr. Noseworthy was not a party to the initial agreement to conspire and that he simply agreed to traffic the drugs afterward, and on that basis had a reasonable doubt about Mr. Noseworthy's membership in the conspiracy. The Judge's finding that Mr. Noseworthy agreed to participate in the conspiracy by trafficking the drugs is actually a finding that he was a member of the conspiracy.

[23] The Judge's findings that Mr. Noseworthy's knowledge and involvement in the conspiracy were limited (in comparison to his co-conspirators) does not change this point. As this Court stated in *R. v. Parsons*, 2017 NLCA 64, 395 C.R.R. (2d) 41 at para. 36:

[36] ... In fact, the Crown was not required to prove that Mr. Parsons was directly involved in arranging for the package of cocaine to be shipped to this Province. It was

necessary only to prove that he was a participant in the global conspiracy to traffic in cocaine. In a conspiracy of this type, involving activity in two provinces, it could be assumed that each member of the conspiracy would not necessarily know the entire membership. ...

[24] The Judge expressed a concern (at paragraph 124) that to extend liability to Mr. Noseworthy in this case would extend criminal liability to an overly broad group of individuals. While each case must be determined on its own facts, it should be noted that a purchaser of illegal drugs does not become a party to a conspiracy simply by purchasing drugs (*R. v. Greyeyes*, [1997] 2 S.C.R. 825, 148 D.L.R. (4th) 634 at para. 8). It is only when the purchaser has an agreement with the vendor to resell the drugs that the purchaser has entered into a conspiracy to traffic (*Sokoloski v. The Queen*, [1977] 2 S.C.R. 523, 74 D.L.R. (3d) 126).

[25] As stated in *Sokoloski*, the conspiracy lies in the joint agreement of the parties to the illegal purchase and sale to pursue the object of trafficking the illegal drugs. The purchaser's intention to resell the drugs helps to establish the common object. In this case, Mr. Noseworthy, as a purchaser of drugs from Mr. Noftall, agreed to resell the drugs to achieve this common object.

Co-conspirator's Exception to the Hearsay Rule

[26] In view of the agreed, uncontroverted, and substantial evidence supporting Mr. Noseworthy's membership in the conspiracy, it was not necessary for the Judge to rely on the additional evidence which was available to him under the co-conspirators exception to the hearsay rule. Accordingly, it is not necessary for this Court to address the Crown's submission on this issue.

DISPOSITION

[27] The Crown requests that this Court enter verdicts of guilty to the conspiracy charges as authorized by section 686(4)(b) of the *Code*. The Supreme Court of Canada has cautioned that the power of an appellate court to substitute a guilty verdict for an acquittal be exercised in only the clearest of cases (*R. v. Audet*, [1996] 2 S.C.R. 171, 135 D.L.R. (4th) 20 at para. 48).

[28] The authority in section 686(4)(b) to enter a guilty verdict following an appeal of an acquittal has been considered by the Supreme Court of Canada on several occasions. When a trial judge has made, explicitly or implicitly, all the findings necessary to support a guilty verdict – or when the uncontroverted evidence supports a conviction on the charges – an appellate court may enter a

conviction (*R. v. Cassidy*, [1989] 2 S.C.R. 345, 61 D.L.R. (4th) 480, at 354-5; *R. v. Lutoslawski*, 2010 SCC 49, [2010] 3 S.C.R. 60, and *Audet* at paragraph 48). In *Audet*, the Court stated:

[48] While conscious of the fact that this Court's power to enter a verdict of guilty in circumstances such as these must be exercised only in the clearest of cases, I am satisfied that the respondent would have been found guilty but for the trial judge's error in law. Furthermore, to repeat the wording used in *Cassidy*, *supra*, the trial judge made all the findings necessary to support a verdict of guilty. This Court is therefore justified in this case in exercising the discretion conferred on it by s. 686(4) of the *Criminal Code* and entering a verdict of guilty.

[29] More recently, the Supreme Court of Canada upheld a conviction that had been entered by the Ontario Court of Appeal following the appeal of an acquittal in *R. v. Tran*, 2010 SCC 58, [2010] 3 S.C.R. 350, stating at para. 47:

[47] The Court of Appeal properly substituted a conviction for second degree murder and returned the matter to the trial court for sentencing. As Watson J.A. stated: "In light of the law, and of the trial judge's findings of fact, and of the overwhelming evidence, a conviction for murder was unavoidable" (para. 81). I would dismiss the appeal.

[30] In this case, the evidence was agreed to by Mr. Noseworthy or given by him under oath. It is not in dispute. Like in *Audet*, I am satisfied that but for the Judge's misapprehension of conspiracy law and consequent application of the wrong law to the facts, he would have found Mr. Noseworthy guilty of Counts 1 and 2. As well, I note that counsel for Mr. Noseworthy agreed that if this Court were to find error, it would not be necessary to retry the case; rather, the matter could be remitted to the Judge for sentencing. Accordingly, convictions for conspiracy are entered in respect of Mr. Noseworthy on the conspiracy charges respecting cocaine and marihuana, and the matter is remitted to the Judge for sentencing. In light of the Judge's finding that there was "absolutely no evidence that Mr. Noseworthy had anything to do with trafficking" the phenacetin, at issue in Count 3, I would not disturb the acquittal on that charge.

L. R. Hoegg J.A.

I concur: _____
C. W. White J.A.

I concur: _____
F. P. O'Brien J.A.