

Citation: *R. v. Moss*, 2009 YKTC 29

Date: 20081212
Docket: 08-00168A
08-00168B
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Judge Foisy

REGINA

v.

DAVID JOHN MOSS

Appearances:
Jennifer Grandy
Malcolm Campbell

Counsel for Crown
Counsel for Defence

REASONS FOR JUDGMENT

[1] FOISY T.C.J. (Oral): The accused is charged with possessing a substance, that is to say crack cocaine, for the purpose of trafficking, contrary to s. 5(2) of the *Controlled Drugs and Substances Act*.

[2] As has been mentioned by counsel, I must apply the case of *W.(D.)*, which is a case that has become famous since the Supreme of Canada came out with it some years ago. In other words, if the accused testifies and his evidence is accepted, then, of course, he must be acquitted; if his evidence raises a reasonable doubt, he must be acquitted; and if his evidence is not accepted but on all of the evidence there is a reasonable doubt, he still must be acquitted.

[3] However, in this case the accused testified. I have to say that I was not impressed. He was not a good witness.

[4] The first thing that he did was give us a date for a breach of his conditional release, which in cross-examination showed that he was in breach of his conditions. He immediately attempted to back down from that and try to convince the Court that it was a month earlier: He was not sure of his months anymore; he was not sure what had happened. That evidence is somewhat hard to accept.

[5] It was also his evidence that he did not have any contact with Crompton, who was the other person that was being observed by Constable Walker at the time that this happened. His entire explanation for being near this individual is somewhat hard to believe, but Constable Walker's evidence was clear and without equivocation that he saw the hand-to-hand contact. In light of this, I do not accept the accused's explanation that he stayed at least five feet away from Crompton at the time he was in the area.

[6] His explanation is simply too convenient. It explains how he came to have in his possession a fairly substantial amount of crack cocaine. It explains, conveniently, why he did not have a pipe or any other apparatus to smoke this crack cocaine, and it also conveniently explains the amount of 4.7 grams which he was found with. In other words, with this unbelievable story of finding the stash under a cement pad or a pad of cement, he explains away other factors which would weigh heavily against him.

[7] There was no explanation given by the accused with respect to the possession of a Tylenol container. It was not mentioned by him on the stand. We know there was no Tylenol in it and we have the evidence of the expert, Corporal Monkman, that this type

of container is often used to place the drugs in while they are being carried. The fact that there was no cocaine in it does not alter the situation in this case because, based on the evidence that I have heard, the accused would have had no time to place any cocaine in the container.

[8] The accused said he has been a heavy user for some time; perhaps not an extended period of time, but I find it difficult to accept his evidence that he was a heavy user and that it would not have shown to some extent with respect to his appearance, in his weight and all of the other matters that were described by Constable Monkman. His explanation that he puts on weight easily does not really explain the difference between -- perhaps today he has gained weight lately, I do not know, but the evidence is that today he looks very similar to the time when he was arrested.

[9] All in all, I do not accept the evidence given by the accused, and I find that it does not raise a reasonable doubt in my mind. Taking into account the Crown's evidence and all of the evidence, I am convinced beyond a reasonable doubt that the accused was in possession of crack cocaine for the purpose of trafficking, and I find him guilty.

[10] Are we prepared to deal with sentence today? Unfortunately, I am leaving tomorrow.

[11] MR. CAMPBELL: Is the Court prepared to accept a guilty plea with respect to the 145 as well?

[12] THE COURT: To the 145?

[13] MR. CAMPBELL: With respect to the 145.

[14] THE COURT: I have no problem with that, if the Crown --

[15] MS. GRANDY: No, I'll just -- if I could just read quickly over the facts?

[16] I believe Mr. Moss, through examination-in-chief, indicated on the 20th of June at about 10:30 he was seen in Lizard's Bar. At about quarter to 11:00 he was seen at the bar with a bottle in his hand. He was arrested and taken into custody. So those are substantially the facts that he related.

[17] THE COURT: Yes. On that basis, the plea is accepted.

FOISY T.C.J.