

Citation: *R. v.* [REDACTED], 2015 ONCJ 266

ONTARIO COURT OF JUSTICE

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

[REDACTED]

Before Justice H. Borenstein
Heard on April 15, 2015
Reasons for Judgment released on May 12, 2015

Mr. Nisker for the Crown
Mr. Stastny for the accused [REDACTED]

BORENSTEIN J.:

1. The accused Mr. [REDACTED] is charged with trafficking in a substance held out to be cocaine and possession of proceeds of crime. He is alleged to have sold a substance to an undercover officer and received police buy money. The substance did not test as cocaine.
2. The evidence is straightforward and un-contradicted. No defence was called.
3. Detective Constable Scott Brown was acting in an undercover capacity posing as a drug purchaser. He had acted in that capacity some 35 to 40 times previously. During most of those occasions, he bought mostly crack and powder cocaine however, on five or six of those occasions, he bought heroin. Most of his buys are done through what he called "dial ups", that is, where he is given a phone number for a dealer and essentially makes a cold call to the dealer
4. Constable Brown had received information that a male in the Jane and Finch area using the phone number [647-832-5132](tel:647-832-5132) was dealing cocaine.

5. Constable Brown called that number on three different days. On each of those dates, he made several calls where he spoke to a male to arrange a meeting to purchase drugs. He would then meet the male later that same date where Brown purchased what he believed to be cocaine. On April 20th, the date of the last purchase, the accused was arrested after engaging in a transaction with the Constable Brown. Constable Brown could not say for certain that the accused was the same male he had dealt with on the earlier occasions though he believed he was. One further point; Constable Brown recorded all of the conversations he had on a particular day (i.e. phone and face to face) only after each transaction was completed. Accordingly, he fairly conceded that his notes did not record the telephone conversations *verbatim*.
6. Turning to the first deal on January 20th, 2014. The evidence in relation to this transaction was led as context as Mr. ██████████ not charged with that transaction.
7. Brown called that phone number. A male answered. Brown said: “hey buddy what’s up” the male replied: “Nothing you”. Brown said he was working and asked the male if he was “around tonight”. The male said yes but he was going out soon and asked Brown “when”. Brown said “in about an hour” and the male said “okay”. Brown said he had had to get coffee at Jane and Finch and asked whether the Esso station was good for him. The male said ok and told Brown to call him when he got there. The male said: “what do you need”. Brown replied that he has \$80. The male said he usually does more but Brown replied that was all he had. The male said “I will do you up – I will fix you up”. Brown said: “ok thanks man I will call you”.
8. Brown testified that, when he told the male he only had \$80.00, what he meant was that he only had \$80.00 to buy cocaine though neither he nor the male mentioned cocaine. Brown testified that, in his experience, some dealers might say “soft” when referring to powder cocaine, “hard” when referring to crack or “green” when referring to marijuana. He testified that he had the “sense” that the seller knew he was referring to cocaine and the seller never asked any questions.
9. Officer Brown and his back up team attended the area of the Esso station. Brown called the number telling the male that he was there. The male asked “how much again” and Brown replied: “all I got is \$80”. The male said “ok-I’ll fix you up” and told Brown to drive to 50 Driftwood. Brown pulled into the driveway of 50 Driftwood and called the number again saying he was out front. The male said he would be right there. Brown then received a further call from that same number and was told to come to the back of the building. Brown drove to the back of the building. He saw a black male, approximately 6 feet tall, standing by a rear door that was being held open. Brown then received another call. When he answered his phone, the caller hung up. He saw

another black male, shorter than the first, look at his phone and then walk over to Brown. That male walked to the driver's side of Brown's car. Brown said "hey buddy". The male say "hey" and dropped a white plastic tear containing what Brown believed to be cocaine. Brown had seen cocaine packaged like that before. When he purchased heroin, it was usually packed in paper, not plastic. Brown gave the male the \$80 of police buy money. Brown said "thanks buddy" and the male replied "yeah". Brown said he would call again. The male said it was cold and ran back to the apartment door which was being held open by the first male. Brown left and gave the successful signal purchase to his team. No arrests were made at that time. He turned the plastic bag or tear over to his team. He could not see through the plastic but testified that it felt like cocaine.

10. On February 27, 2014, DC Brown called that same number. When the male answered, Brown said: "hey buddy" the male said: "who's this". Brown said: "the construction guy". The male said "oh ok". Brown asked if he was "around tonight". The male asked "when" and Brown said he will see when he gets a break and will call when on his way. He said he had \$100 this time. The male said ok. Brown advised his team.
11. Brown testified that, by \$100, he was referring to \$100 worth of powder cocaine because that was when he got the first time.
12. Brown drove to the Jane and Finch area. At 10:12 p.m., he called the number. When the male answered, Brown said "hey buddy, I'm just leaving the job site now" - same place around back?" The male said "yea" and to call when he arrived. Brown arrived at Driftwood at 10:29 p.m., he saw that he missed a call from that same phone number. He saw a black male, about 5 foot 10 – come over to his car. Brown say "hey buddy" – the male said "hey" and dropped a grey plastic tear containing what Brown believed to be powder cocaine into his hand. Brown gave him \$100 of police buy money. The male tapped his fist to Brown's fist and said "respect". Brown left and gave the buy signal. No arrests were made. Brown handed over the plastic to his team.
13. Turning to the offence date of April 30th; Brown called the number at 8:42 p.m. When the male answered, Brown said: "hey buddy you around tonight" saying he was the "construction guy – just got back into town". The male replied "oh yeah, ok". Brown asked "are you going to be around". The male said "yeah when"? Brown said as soon as he could get a break. The male said he was out right now. Brown replied that he had had a car and could go anywhere he needed to go. The male directed Brown to a plaza at Jane and Sheppard telling him to call when he arrives. Brown agreed and said he had \$100. Brown explained that, in this conversation, he was asking for \$100 worth of cocaine believing the person knew who he was.

14. At 9:27 p.m., Brown called saying he was 10 minutes away. The male directed Brown to the visitors' parking lot at 2020 Sheppard. Brown said "ok buddy – I've got to be quick". The male said – "yeah – I'll come out".
15. Brown pulled into the parking lot. At 9:41 p.m. He called again and the same male answered. Brown said he was there and described his car. The male said he would be right out. At 9:48 p.m., Brown called again and told the male he had to get going. The male said: "see a red car in the back". Brown did and the male told him to come to the red car. Brown did and the red car pulled up next to Brown facing the opposite direction. Both drivers opened their windows. He testified that he did not recognize the male from prior deals but thought it was the same male. Brown said "hey buddy – I can barely reach". The male said "don't worry - here" and reached over out with a grey plastic tear which Brown took and then gave the male \$100 of police buy money. Brown testified that the package "felt right" meaning it felt like powder cocaine and was of the correct weight although he did not examine the substance. The male fist bumped Brown and said "respect". Brown said "thanks buddy – see you later". Brown gave his team the signal. The accused was arrested.
16. It was agreed by counsel that the substance sold to Brown on April 20th did not test as cocaine. There is no evidence about whether the earlier substances tested as cocaine.
17. In cross examination, Brown confirmed that he believed that the phone number he was given was that of someone selling cocaine. He bought crack and powder cocaine as well as heroin previously. Although he never bought crystal meth or ketamine, he has made them in a police college laboratory and those substances are also powdery substances which feel and look about the same as cocaine and are packaged about the same. He was not sure if he would be able to tell the difference by looking at it. It was also suggested to him that, had he had information that the seller was selling heroin, the conversation would have been essentially the same: meaning, "are you around" and providing a dollar figure. Although Officer Brown was somewhat equivocal in his response, on balance, he agreed it would be more or less the same, perhaps with more, perhaps with less said, it all depended in the information he had received in advance. On the occasions that he bought heroin, it was packaged in paper, not plastic although on one occasion, it was packaged exactly the same way in plastic. He agreed there were other white powdery substances sold such as speed, heroin, methamphetamine.
18. He agreed that neither he nor the male on the phone ever discussed cocaine or the nature of the substance to be sold either directly or indirectly using street language either before or during the transaction or on any subsequent transactions. He was under the belief that the male was a seller of co-

caine and had been so advised prior to making the calls. He believed all his calls were in reference to cocaine.

19. By agreed statement of fact, the exhibits officer, P.C. Johnson, who was described as an experienced drug officer though not being tendered as an expert, received the substance in issue on the first and third transactions. He believed the powdery substance was cocaine and submitted it to Health Canada as such even though it ultimately tested negative.
20. No defence was called.
21. There is no question that the accused, on April 20th, sold D.C. Brown an item that purported to be a drug and that he received the proceeds of the transaction, namely; the police buy money. D.C. Brown was a credible and careful witness.
22. Counsel agree that, as particularized, the crown must prove beyond a reasonable doubt that the accused held out the substance in question to D.C. Brown to be cocaine as opposed to some other drug. That is an essential element of the offence. The issue is not what the officer believed. It is what the accused represented or held the substance out to be. That could be proved by direct or circumstantial evidence.
23. In this case, neither the accused nor Officer Brown at any time ever referred to the substance as cocaine in any fashion whatsoever, be it directly or indirectly such as by any street vernacular. D.C. Brown had received information that the male with that phone number was a cocaine dealer. He believed he was talking to a seller of cocaine and believed he was discussing cocaine and receiving cocaine. However, on his evidence, methamphetamine is packaged and looks and feels similar. Heroin could as well as well as other narcotics.
24. To conclude beyond a reasonable doubt that the accused **held this substance out** to be cocaine would be based primarily on Brown's belief he was speaking to a cocaine dealer, as opposed to anything the accused said or even did. On that approach, if Brown believed the accused was a methamphetamine or speed dealer, I would be asked to similarly conclude beyond a reasonable doubt that the accused held out the substance as methamphetamine or speed. That is the frailty of the Crown's argument. The Crown submits that Officer Johnson's belief that this was cocaine buttresses the case to the necessary standard or proof but Officer Johnson was part of the same team participating in the investigation of a suspected cocaine dealer. The evidence of Officer Johnson suffers from the same frailty. While the substance may appear to be cocaine, it also, on the evidence, would appear to be the same as other narcotics. Given that there was nothing said or done by the accused,

or Brown that specifically references cocaine, at any time, and given that other narcotics appear similar and have been packaged similarly, I am not satisfied beyond a reasonable doubt that the accused held out the substance to be cocaine. While it is likely that both the accused and Brown knew they were speaking of cocaine, it is also possible he was holding it out as Methamphetamine or any other similar substance. In the end, he was not selling Brown an authentic product. He will be found not guilty of the trafficking count.

25. With respect to the possession of proceeds count, I am satisfied beyond a reasonable doubt that the accused held out the substance to be a narcotic – be it cocaine, methamphetamine, speed, or heroin. Of that there is no doubt. While I have a doubt about whether the Crown proved that the accused held it out as cocaine, he held it out as a narcotic. As the defence concedes, trafficking in any substance held out as a narcotic is an indictable offence. He received proceeds in relation to the transaction. He will be found guilty of the proceeds count and not guilty of the trafficking count.

Released: May 12, 2015

Signed: Justice H. Borenstein