

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R. v. [REDACTED]*,
2014 BCCA 245

Date: 20140624
Docket: CA041176; CA041179

Docket: CA041176

Between:

Regina

Respondent

And

[REDACTED]

Appellant

- and -

Docket: CA041179

Between:

Regina

Respondent

And

[REDACTED]

Appellant

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Lowry
The Honourable Mr. Justice Willcock

On appeal from: An order of the Provincial Court of British Columbia,
dated April 15, 2013 (*R. v. [REDACTED]*, Victoria Docket 158808-4-C).

Counsel for the Appellant,
[REDACTED]

M. F. Allen

Counsel for the Appellant,
[REDACTED]

R. L. Neary

Counsel for the Respondent:

G. Parson

Place and Date of Hearing:

Victoria, British Columbia
June 12, 2014

Place and Date of Judgment:

Vancouver, British Columbia
June 24, 2014

Written Reasons by:

The Honourable Mr. Justice Lowry

Concurred in by:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Willcock

Summary: Appeal allowed: appellants acquitted. Appeals by the accused from convictions for possession of unlicensed firearms and related offences following a police search of an apartment. The firearms were found in a closet in a backpack in plain view. The appellants alone were present when the search warrant was executed. The case against them was entirely circumstantial. The trial judge found the appellants had been living in the apartment as a couple for six days before the search was conducted. Until the appellants moved in, the apartment had been leased jointly by Champagne and Ewing. The trial judge found that both appellants had control of the backpack and its contents by virtue of it being in their apartment and in plain view. She rejected the contention that the backpack might have belonged to someone other than the appellants as having no basis in the evidence such that it was irrational and speculative, concluding the only rational inference was the backpack belonged to the appellants and that they were aware of the contents.

HELD: Appeals allowed.

The appellants were acquitted. The judge based her conclusion that the appellants had knowledge of the contents of the backpack on the assumption that both Champagne and Ewing had moved out and removed their belongings before the appellants moved in, when the evidence established that only Champagne had done so. There was no evidence Ewing moved out. There was no evidence as to what became of her belongings. The evidence did not establish that the backpack belonged to the appellants. While the appellants might have had control of the backpack, as they would have had control over any of the contents of the apartment, it could not be said they would necessarily have searched the backpack or otherwise known of its contents.

Reasons for Judgment of the Honourable Mr. Justice Lowry:

[1] The appellants, [REDACTED] and [REDACTED] were convicted in the Provincial Court of possession of unlicensed firearms and related offences on an eight-count indictment following a police search of an apartment in Victoria. They alone were present when the search warrant was executed. A lever-action rifle, two sawed-off shotguns and ammunition were found in a backpack lying in a closet. The case against them is entirely circumstantial. They appeal, contending in the main the verdicts are unreasonable: the evidence does not establish, beyond a reasonable doubt, they both had knowledge and control of the contents of the backpack.

The Findings of Fact

[2] At the trial, the Crown called the police officers involved in the search and two other witnesses: a former tenant in the apartment, Amber Champagne who was friends with the appellants, and the resident manager of the building. The judge did not accept all of Champagne's evidence; she was found to have been to some extent evasive and the judge rejected her evidence where it conflicted with that of the manager. The defence called no evidence.

[3] On the judge's review of the evidence she accepted, and the admissions made, she found the appellants had been living in the apartment as a couple for six days before the search was conducted. It was a one-bedroom apartment that, until the appellants moved in, had been leased jointly by Champagne and another woman, Shanda Ewing, who lived there with each paying half of the rent. Champagne, who had lived in the apartment for approximately six months and to whom the furnishings belonged, moved out two weeks before the appellants moved in and went to live in Nanaimo, leaving her furnishings behind and putting her belongings in a locker. She provided the appellants with a key. They assumed her obligations under the lease with the appellant [REDACTED] paying their share of the rent for the first month when they moved in.

[4] Ewing had been living in the apartment for a month and a half before Champagne moved out. Her share of the rent was paid by a government agency. A number of people regularly went into and out of the apartment, at least during the time the two women were living there. The manager last saw Ewing around the building about four or five days after Champagne had moved out. The judge said the manager heard Ewing had been arrested and Ewing “contacted her afterwards regarding her stuff”, but the manager was not asked what, if anything, “happened regarding Ms. Ewing’s belongings in the apartment”.

[5] The closet in which the backpack was lying when the search was undertaken was adjacent to the entrance door. Many articles of clothing and the other contents of the closet protruded such as to prevent the bifold doors from being closed. The backpack was large – “half in and half out of the closet” – with nothing on top of it, in plain view of anyone entering the apartment. When the backpack was stood up and opened, on top were two leather jackets and an RCMP forage cap. The two shotguns were underneath individually wrapped in cloth and taped. The tape on one had been loosened. The ammunition consisted of four shotgun shells that were also wrapped and taped and one shell that was not. The backpack also contained a body armour vest, a tactical camouflage vest with an untested laser eyesight in one of the pockets, and other items. The evidence showed the backpack also contained a lever-action rifle in two pieces and two replica guns.

[6] The firearms were functioning. The two shotguns were prohibited weapons. Neither appellant was licensed to possess a firearm. Indeed, both appellants were at the time prohibited from possessing any firearms or ammunition.

The Judgment

[7] The judge stated the issue as follows:

[38] I found that both accused were living in the apartment at the time of the search and had been living there since November the 2nd, for a total of six days. The backpack was located in that apartment in plain view. I am satisfied, beyond a reasonable doubt, that both accused had control of the

backpack and its contents by virtue of it being in their apartment and in plain view.

[39] The same reasoning does not apply to knowledge. That is, although the backpack was in plain view, the contents were not. I must therefore consider all of the circumstantial evidence in this case to determine if the Crown has proven either or both accused knew what was in the backpack.

[8] The judge then reviewed the legal principles that govern the verdict in a circumstantial case, referencing *R. v. To* (1992), 16 B.C.A.C. 223. She specifically recognized that, in order to convict, guilt must be the only rational and reasonable inference to be drawn from the evidence. She also recognized that any inferences inconsistent with guilt must be rational and drawn from the proven facts. She summarized the submissions advanced by the Crown and the defence. She rejected the contention that the backpack may have belonged to someone other than the appellants as having no basis in the evidence such that it was irrational and speculative concluding:

[53] The inference that someone else left the backpack in the apartment is also not a rational one. It is not based on any evidence and amounts to speculation. There is no evidence that there were people coming and going from the suite after Ms. Ewing moved out, and Ms. Larkin did not see Ms. Ewing after approximately October the 19th.

[54] I find that the only rational inference is the backpack belonged to Mr. [REDACTED] and Ms. [REDACTED], and that they were aware of the contents.

The Appeal

[9] The appellant [REDACTED] contends that, on the facts she found, the judge's conclusion that the backpack belonged to the appellants was not open to her given that their tenancy in the apartment was shared with a woman who began living there two months before they moved in. This is said to be so because of the absence of any sound evidentiary basis upon which Ewing could be found to have moved out and taken her belongings with her before the search was undertaken.

[10] Both appellants contend the judge failed to consider, and could not on the evidence have concluded, whether only one of them knew of the contents of the backpack. They say the evidence does not support a finding that knowledge of the

contents was shared by both of them such that knowledge attributed to one, without a determination of which one, means that neither can be found guilty of the offence.

[11] The Crown maintains the judge's findings and conclusion that both appellants had control and knowledge of the contents of the backpack are supported by the evidence she accepted.

Discussion

[12] It is for this Court to determine whether on the whole of the evidence the judge's verdicts could reasonably have been rendered by a properly instructed jury, acting judicially: whether on re-examining, and to some extent reweighing and considering the effect of the evidence, the judge's conclusion that both appellants had, beyond a reasonable doubt, not only control of the backpack but knowledge of its contents can be upheld: *R. v. Yebes* (1987), 36 C.C.C. (3d) 417 at 430 (S.C.C.). In my respectful view it cannot.

[13] It is important to recognize that, while Champagne did disavow any knowledge of the backpack, there is no evidence as to when it was placed in the closet in the apartment where it was when the search was conducted. It could have been where it was for some time before the appellants moved in or it could have been taken to the apartment and put in the closet at any time during the six days the appellants lived there before the police arrived with their search warrant.

[14] It appears to me the judge based her conclusion that the appellants had knowledge of the contents of the backpack on the assumption that both Champagne and Ewing had moved out and removed their belongings before the appellants moved in, when the evidence establishes that only Champagne had done so. Indeed, as quoted (para. 53), the judge stated Ewing had moved out but counsel are agreed she misstated herself intending to have said there was no evidence of people coming and going from the apartment after Champagne moved out. There is no evidence Ewing moved out: her rent had been paid for the first month the appellants were living in the apartment and the manager, whose evidence the judge

accepted, testified Ewing had not returned her key. As the judge said, there is no evidence as to what became of her belongings.

[15] The judge attached significance to the manager having last seen Ewing around the building four or five days after Champagne had moved out. But the manager had also not seen the appellant [REDACTED] for a week after he paid the rent. The fact that Ewing had not been seen by the manager for some days does not establish she had moved out of the apartment much less taken her belongings.

[16] The judge noted the manager said she had heard Ewing had been arrested and had contacted her about her belongings afterwards. But if what appears to be hearsay were to have any probative value, which I doubt, it would be inconsistent with Ewing having moved out and taken her belongings before the police searched the apartment.

[17] The Crown attaches importance to text messages between the appellants and Champagne when, after she moved out, she offered to let them have their “own” apartment, and a text message the appellant [REDACTED] sent to someone two days after he paid half of the rent asking for money to “pay the rest of the rent”. But while the expectation may have been that the appellants would at some point have the apartment to themselves, the messages are inconsistent with Ewing’s share of the rent for the first month the appellants were to have lived in the apartment having been paid and they certainly do not establish she had moved out.

[18] I do not consider the evidence establishes the backpack belonged to the appellants as the judge concluded. There is, on the evidence, no reason it could not have belonged to Ewing. While the appellants may have had control of the backpack, as they would have had control over any of the contents of the apartment, it cannot be said they would necessarily have searched the backpack or otherwise known of its contents. That, the evidence does not prove beyond a reasonable doubt. A properly instructed jury, acting judiciously, could not conclude that it does such that the judge’s verdicts cannot be upheld.

[19] For the purposes of the appellant [REDACTED] appeal, her counsel does accept it was reasonable for the judge to have concluded that one or the other of the appellants brought the backpack into the apartment or at the very least to have been aware of its contents if it was brought there by some third party. The focus of the submission is on the judge not having addressed whether both can be said to have had knowledge of the contents. Given that in my view the verdicts cannot be upheld in any event, it is not necessary that I consider whether, in the circumstances of the case, the judge was required to address the appellants' knowledge of the contents of the backpack individually. What counsel accepts was reasonable for the judge to have concluded is not necessary for the submission made and has not in any way disadvantaged the Crown in arguing the appeal.

Disposition

[20] It follows that I would set aside the guilty verdicts and enter acquittals in respect of each of the counts of the indictment.

"The Honourable Mr. Justice Lowry"

I agree:

"The Honourable Madam Justice Newbury"

I agree:

"The Honourable Mr. Justice Willcock"