
CANADA / JUDGMENT

R. v. Alec

2020 BCSC 1027

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Supreme Court of British Columbia

DECIDED

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2020 BCSC 1027 R. v. Alec

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Alec,

2020 BCSC 1027

Date: 20200630

Docket: 72354-2

Registry: Prince George

Regina

v.

Myles Hunter Alec

Before: The Honourable Madam Justice Devlin

Oral Reasons for Judgment

Counsel for the Crown:

R.D. Withall

Counsel for the Accused Myles Hunter Alec:

A.J. Lagemaat

Place and Date of Hearing:

Prince George, B.C.

June 29, 30, 2020

Place and Date of Judgment:

Prince George, B.C.

June 30, 2020

- [1] THE COURT: This decision was delivered in the form of Oral Reasons. The Reasons have since been edited for publication.

Introduction

- [2] The accused, Myles Hunter Alec, is charged on Indictment 72354-2 with seven counts related to the possession of a firearm and prohibited device and/or ammunition and four counts of breach of a firearms prohibition orders.
- [3] The charges arise out of a traffic stop which occurred on April 25, 2019 in Prince George, B.C. Mr. Alec was a passenger in a vehicle driven by Melissa Christensen. At the commencement of the trial the Crown directed a stay of proceedings on all charges against Ms. Christensen.
- [4] Following a voir dire, I determined that the actions of the police officers did not violate Mr. Alec's ss. 8, 9 or 10 Charter rights. Counsel agreed that the evidence on the voir dire should be applied to the trial proper. The Crown called no further evidence and closed its case. Mr. Alec testified on his own behalf at trial. Following the close of the defence case, I granted the Crown leave to call rebuttal evidence in response to Mr. Alec's evidence regarding his arrival in Prince George.

Position of the Parties

- [5] The Crown's position is that Mr. Alec was in constructive possession of the firearm and ammunition which was located inside a case located in a vehicle. The Crown submits Mr. Alec's statement to Cst. Mahaffey - "he made me take the gun" - establishes beyond a reasonable doubt that Mr. Alec knew the firearm was in the vehicle and that he took control over it. The Crown urges me to reject Mr. Alec's version of events, particularly his testimony that he told Cst. Mahaffey: "she said he made her take the gun". The Crown submits the evidence called on rebuttal demonstrates that none of Mr. Alec's testimony should be accepted. The Crown has referred to a number of cases dealing with possession which I have read and considered. Reliance upon other cases is helpful for their principles, but not the outcome.
- [6] The defence submits the Crown has not proven beyond a reasonable doubt that Mr. Alec had either knowledge or control of the firearm in the vehicle. The evidence demonstrating Mr. Alec was not credible regarding his travel to Prince George does not serve to fortify the circumstantial evidence the Crown relies on to establish Mr. Alec was in constructive possession of the firearm.
- [7] The main issue at trial is whether Mr. Alec knew the firearm was inside the vehicle.

Circumstances of the Offence

- [8] On April 25, 2019 Sgt. Davidson of the Prince George RCMP stopped a grey Nissan Sedan ("the vehicle") due to a report of expired insurance. During the brief exchange with the driver and Mr. Alec the police officer noticed what appeared to him to be a soft padded long barrel gun case on floor in the back seat of the car. Sgt. Davidson asked the occupants of the vehicle what was in the case. The driver, Ms. Christensen turned away and did not respond and Mr. Alec told Sgt. Davidson the case was not his and he could not search the car. On the voir dire, I determined that based on the information the police officer had at the time he seized the case out of concern for officer safety.
- [9] Sgt. Davidson unzipped the case and located a SKS type rifle with digital camouflage. There were two magazines - one containing 10-rounds and the other containing 16-rounds of ammunition taped together. Further examination of the firearm by Cst. Peel determined there was a round that had been loaded into the firearm.
- [10] As a result of the seizure of the firearm, Mr. Alec and the driver were arrested. Cst. Mahaffey arrested Mr. Alec, placed him in the backseat of his police vehicle, and got into the driver's seat. A closed security barrier made of Plexiglas separated Mr. Alec from Cst. Mahaffey. As Cst. Mahaffey was advising Mr. Alec of his Charter rights by reading from his police issued Charter card Mr. Alec was also talking. Cst. Mahaffey testified that after he advised Mr. Alec of the reasons for his arrest in accordance with s. 10(a), Mr. Alec stated "no man I don't" and then continued to say "he made me take the gun" and then "I should just shut up and not say anything". Cst. Mahaffey testified he was quite certain Mr. Alec said "he" and not "she" in reference to the gun. In cross-examination Cst. Mahaffey testified he made notes of this exchange while he was dealing with Mr. Alec.

The Evidence of the Accused, Myles Alec

- [11] Mr. Alec testified that he had arrived in Prince George on April 25, 2019 on the Northern Health Connections bus from Burns Lake to attend a doctor's appointment the next day. He said the bus left Burns Lake at 7:15 am and dropped him off in Prince George at the University Hospital at Northern B.C. ("UHNBC") about 11:30 am. He was picked up at the bus stop by Ms. Christensen who he explained was a friend of his brother's girlfriend. He had brought a backpack with him which he placed in front of him in the passenger seat of Ms. Christensen's car. He testified in chief that Ms. Christensen had a few stops to make before she took him to check into his hotel. In cross-examination he admitted the purpose of Ms. Christensen's stop was to obtain some crack for him.
- [12] Mr. Alec testified that approximately twenty minutes after he entered into Ms. Christensen's car they were pulled over for a traffic stop. Mr. Alec said that Ms. Christensen told him that there was a firearm in the car after Sgt. Davidson had first approached the car. Mr. Alec said as Sgt. Davidson walked back towards their car Melissa said "her boyfriend, Chris, made her take the gun". He says that was the moment he became aware that there was a firearm in the

vehicle. Mr. Alec testified that when Sgt. Davidson asked what was in the bag he recalls saying 'I'm not too sure, it's not mine' and that he told Sgt. Davidson 'I'm pretty sure if you don't have consent from the driver or probable cause you can't search the vehicle and contents in it'. While there is some discrepancy between Sgt. Davidson's and Mr. Alec's evidence with respect to what was said, the substance is the same.

- [13] Mr. Alec testified that he was placed in the back seat of a police vehicle by Cst. Mahaffey. He said there was a safety barricade made of Plexiglas between the front and back seat which made the sound "really muffled" to the point that "you have to yell in order to hear clearly". Mr. Alec said as Cst. Mahaffey was reading him his Charter rights he was talking at the same time. Mr. Alec explained he told Cst. Mahaffey "fuck man this is stupid, I don't know why I'm being arrested. She said he made her take the gun" and then he said "Oh, I'd better just shut up".
- [14] Mr. Alec was extensively cross-examined about his exchange with Cst. Mahaffey. When it was suggested to him that he was not exactly sure what he said Mr. Alec maintained "I'm pretty sure I said, Fuck man, that is stupid. She said he made her take the gun" and "I shouldn't be in jail". Mr. Alec explained he and Cst. Mahaffey were talking over each other and it was "kind of heated and stuff".

Crown's Rebuttal Evidence

- [15] As stated earlier, following the close of the defence case I permitted the Crown to call rebuttal evidence. Fiona MacPherson, the head of the Northern Health Connections bus program testified that Northern Health Connections did not operate a bus from Burns Lake to Prince George on April 25, 2019 and the schedule of bus routes operated by Northern Health Connections between March 2019 to March 2020 was marked as Exhibit 14. Ms. MacPherson also testified that the only record of a bus ticket issued for the client named Myles Alec was for a trip on August 29, 2019 from Prince George to Abbotsford and the client was a no show. Ms. MacPherson's evidence was not challenged. I accept her evidence that there was no bus from Burns Lake to Prince George on April 25, 2019 as suggested by Mr. Alec. I find Mr. Alec was not truthful when he testified about his arrival in Prince George at 11:30 am on April 25, 2019.
- [16] Nick Straughan has been an employee of the BC Sheriff Service since August 2014. He testified that while off-duty he was in the Bon Voyage Plaza area and observed a person he knew to be Mr. Alec and another individual drive into the Esso station located in the plaza. Mr. Straughan testified he had an unobstructed view of Mr. Alec and the other male. Based on what he observed Mr. Straughan contacted the RCMP to report his observations. While he could not recall the date he stated that this was the only occasion he had called the RCMP about Mr. Alec. Mr. Straughan explained he had dealt with Mr. Alec in his capacity as a Sheriff and was 100% certain the person he saw that day was Mr. Alec. However, I note that Mr. Straughan did not identify the accused as the person he knew as Myles Alec.

- [17] Cst. Flewelling testified that on April 24, 2019 he responded to a dispatch of a complaint received at 17:34 hours on April 24, 2019 from an off duty Sheriff Nick Straughan regarding Mr. Alec in the area of the Bon Voyage Plaza. Cst. Flewelling attended the area sometime later but did not locate Mr. Alec.

The Governing Legal Principles

Assessment of Credibility

- [18] Because Mr. Alec testified, I must instruct myself in accordance with the principles set out in *R. v. W.(D.)*, [1991] 1 S.C.R. 742 [W.(D)]. In doing so, I am guided by the comments of MacKenzie J.A. in *R. v. Kaplan*, 2019 BCCA 356 at paras. 59-60:

- [59] The "rule in W.(D.)", the "W.(D.) instruction", or simply "W.(D.)", comes from W.(D.) at 757-58 in which Justice Cory made it clear that "[i]n a case where credibility is important, the trial judge must instruct the jury that the rule of reasonable doubt applies to that issue." He suggested the following instruction:

First, if you believe the evidence of the accused, obviously you must acquit.

Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

Since then, W.(D.) has become a staple of the criminal law repertoire for instructing juries, and to the framework judges follow in their self-instruction in cases where credibility is important. Needless to say, W.(D.) has generated significant jurisprudence since 1991.

- [60] The purpose served by W.(D.) is to remind the trier of fact that reaching a verdict is not simply a question of choosing between the Crown's and the accused's evidence. The question is whether, based on the totality of the evidence, the trier of fact is left with a reasonable doubt as to the guilt of the accused. Judges are not required to repeat the formula set out in W.(D.) to demonstrate they relied on the appropriate legal principles when assessing the accused's credibility: *R. v. Boucher*, 2005 SCC 72 at para. 59, per Justice Charron, dissenting (but not on this point).

- [19] The standard of proof must not be reduced to a choice between the complainant and the accused. (see *R. v. B.G.S.*, 2010 SKCA 24 at para. 9).

- [20] I am mindful that Mr. Alec is presumed innocent unless and until the Crown meets its burden of proof. The Crown is required to prove the guilt of the accused beyond a reasonable doubt.

[21] I have had the opportunity to observe Mr. Alec as he testified and I have carefully reviewed all of his evidence. Applying the W.(D.) analysis, there are some aspects of Mr. Alec's testimony I do accept, particularly his evidence of the exchange between himself and Sgt. Davidson when he approached the vehicle and asked about the bag. As I said earlier, while there are some discrepancies in the evidence, they are minor. There are other aspects that I do not accept. Given the evidence of Ms. MacPherson that there was no Northern Health bus running from Burns Lake to Prince George on April 25, 2019 I do not believe Mr. Alec's testimony about his travel to Prince George on April 25, 2019. I also considered the evidence of Mr. Straughan and Cst. Flewelling regarding observations of Mr. Alec on April 24, 2019. However, I note that neither Mr. Straughan nor Cst. Flewelling actually identified the accused as the person they knew to be Myles Alec. Critical to the Crown's case is a finding that Mr. Alec told Cst. Mahaffey "he made me take the gun". I will discuss this exchange and the impact of my findings during my analysis of the evidence.

[22] I will now canvass the legal principles that I must apply to my analysis of the evidence.

The Law of Possession

[23] Possession is defined in the Criminal Code s. 4(3) as follows:

4(3) For the purposes of this Act,

- (a) a person has anything in possession when he has it in his personal possession or knowingly
 - (i) has it in the actual possession or custody of another person, or
 - (ii) has it in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or of another person; and
- (b) where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them.

[24] The Crown relies on s. 4(3)(b) to establish that Mr. Alec had constructive possession over the firearm and ammunition. In *R. v. Ahmadzai*, 2012 BCCA 215 [Ahmadzai], MacKenzie J.A. sets out what is required to prove constructive possession under s. 4(3) at para. 26:

[26] Proof of manual handling of a prohibited item or substance is not required to prove constructive or joint possession under s. 4(3). Rather, to prove constructive possession, the Crown must prove beyond a reasonable doubt that the accused had knowledge of the nature of the prohibited item or substance and some measure of control over it. In *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253, Fish J. for the majority said:

[17] Constructive possession is established where the accused did not have physical custody of the object in question, but did have it "in the actual possession or custody of another person" or "in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or of another person" (Criminal Code, s. 4(3)(a)). Constructive possession

is thus complete where the accused: (1) has knowledge of the character of the object, (2) knowingly puts or keeps the object in a particular place, whether or not that place belongs to him, and (3) intends to have the object in the particular place for his "use or benefit" or that of another person.

Circumstantial Evidence

- [25] The Crown acknowledges that without Mr. Alec's statement "he made me take the gun", it must rely on the circumstantial evidence to establish constructive possession.
- [26] The Supreme Court of Canada in *R. v. Villaroman*, 2016 SCC 33 [Villaroman], set out the correct approach the trier of fact must take when assessing circumstantial evidence. In Villaroman, the Court clarified that inferences that may be consistent with innocence do not have to arise from proven facts: at para. 35. The trier of fact should consider other plausible theories or reasonable possibilities. However, as the Court cautions, such theories or possibilities "must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation" at para. 37. In other words, as stated by the Court at para. 42:

that trier of fact should not act on alternative interpretations of the circumstances that it considers to be unreasonable; and that alternative inferences must be reasonable, not just possible.

- [27] Villaroman makes it clear that only those "reasonable possibilities" or "plausible theories" moored in logic and experience, "applied to the evidence or the absence of evidence, not on speculation" that are inconsistent with guilt, are eligible for consideration (at para. 37).
- [28] In *R. v. Dingwall*, 2017 BCSC 1457, Abrioux J. (as he then was) sets out a summary of the principles that apply when considering circumstantial evidence at para. 9:
- (a) in some cases, in the absence of a credible explanation, an inference of knowledge may properly be drawn from the circumstantial evidence: *R. v. To*, [1992] B.C.J. No. 1700 (B.C.C.A) [To], cited with approval in *R. v. Vu*, 2002 BCCA 659 at para. 25 [Vu];
 - (b) where an alternative inference is asserted, there needs to be some evidence to support it: *Vu* at para. 26;
 - (c) the trial judge is entitled to apply ordinary human experience and common sense in his/her assessment of the evidence. He/she should not apply speculative reasoning: *R. v. Bi*, 2011 BCCA 10, at paras. 15-16; and
 - (d) as far as competing inferences from circumstantial evidence that might be open to a trial judge are concerned, he/she is not expected to:

treat real life cases as a completely intellectual exercise where no conclusion can be reached if there is the slightest competing possibility. The criminal law requires a very high degree of proof, especially for inferences consistent with guilt, but it does not demand certainty:

To at para. 41, McEachern C.J.B.C., cited with approval in *R v. Ngo*, 2009 BCCA 301 [Ngo] at para. 55.

[29] In Ahmadzai, MacKenzie J.A. reminds us that a trial judge is required to assess the body of circumstantial evidence in its totality and not to consider it piecemeal. (see paras. 34-35).

[30] With these legal principles in mind, I turn to my analysis of the evidence.

Analysis

What was the exchange between Mr. Alec and Cst. Mahaffey?

[31] The Crown submits Mr. Alec's testimony is not worthy of belief and I should not accept any of his evidence because he has proven to have deliberately concocted his testimony to detract from the overwhelming evidence of his guilt.

[32] I agree with the Crown that there are many aspects of Mr. Alec's testimony that I simply cannot believe. As stated earlier, I have found that Mr. Alec concocted his evidence about travelling from Burns Lake to Prince George on the morning of April 25, 2019 in an effort to distance himself from the vehicle and the duration of time he spent inside the vehicle which contained the firearm. However, the fact that I do not accept some aspects of Mr. Alec's testimony, does not require me to reject all of his evidence. (see *R. v. J.H.S.*, 2008 SCC 30)

[33] Turning back to a consideration of the statement Mr. Alec made inside Cst. Mahaffey's police vehicle. Cst. Mahaffey testified that Mr. Alec was speaking to him as he was trying to read from his Charter card and make notes of what was said in reply. I have no doubt that Cst. Mahaffey believed that he heard Mr. Alec say "he made me take the gun". Indeed, when asked by the Crown if Mr. Alec said he and not she, Cst. Mahaffey stated he was quite certain Mr. Alec said he.

[34] On the other hand, Mr. Alec testified that he told Cst. Mahaffey "she said that he made her take the gun". He explained that he and Cst. Mahaffey were speaking over each other which aligns with Cst. Mahaffey's evidence. Mr. Alec also testified the sounds were "muffled" because of the security barrier in place between them. Mr. Alec was extensively cross-examined on this statement. The Crown points out there were some small differences in Mr. Alec's description of what he said. At one point Mr. Alec said "she said that he made her take the gun" and then a few moments later he stated "she said he made her take the gun". The Crown concedes this variation is not determinative of the issue.

- [35] The Crown urges me to reject every aspect of Mr. Alec's testimony because it was a complete fabrication crafted to deceive the Court. The Crown submits it would be an error to accept Mr. Alec's testimony that Ms. Christensen told him that "he made her take the gun" and that he relayed that information to Cst. Mahaffey but reject Mr. Alec's testimony about his travel to Prince George. However, as stated earlier the law is clear that I may accept some, none or all of Mr. Alec's evidence.
- [36] The circumstances under which this exchange took place is an important consideration in my analysis. It was inside a police vehicle with a Plexiglas barrier separating Mr. Alec in the back seat from Cst. Mahaffey in the front. According to Mr. Alec the sound was muffled and both Cst. Mahaffey and Mr. Alec testified they were talking over each other at times. Cst. Mahaffey had just arrested Mr. Alec for unauthorized possession of a firearm and was focused on ensuring he read Mr. Alec his Charter warning and making a note of his responses. Mr. Alec described the situation as "kind of heated and stuff" because he was upset with having just been arrested.
- [37] Given the dynamics of the situation, it is difficult to ascertain what exactly was said in the exchange between Cst. Mahaffey and Mr. Alec. As I said, I accept that Cst. Mahaffey believed he heard Mr. Alec state "he made me take the gun" however it is equally plausible that Mr. Alec stated "she said he made her take the gun" and Cst. Mahaffey did not hear the entire statement because of the conditions under which the statement was made. As counsel for Mr. Alec stated in his submissions the exchange was not a linear conversation between two people where they politely took turns speaking.
- [38] As I have stated, I have no doubt that Mr. Alec fabricated some aspects of his evidence. However, having considered the exchange with Cst. Mahaffey inside the police vehicle in the proper context I do not have the requisite clarity to determine which version of the statement is correct. However, this does not end the matter. I must continue with my analysis and ask myself whether, on the whole of the evidence, the Crown has proven the necessary elements beyond a reasonable doubt.

Does the circumstantial evidence establish that Mr. Alec had constructive possession of the firearm?

- [39] The Crown acknowledges without Mr. Alec's statement "he made me take the gun" proving constructive possession on the circumstantial evidence in this case is a challenge.
- [40] I will briefly review the evidence. The firearm was located in a soft sided case located on the floor of the back seat of a vehicle in which Mr. Alec was a front seat passenger. The firearm was concealed inside the case. Mr. Alec was not the registered owner of the vehicle nor is there any evidence establishing he had any prior connection to the vehicle. There is no forensic evidence such as Mr. Alec's fingerprints or DNA on the soft sided case or its contents including the firearm. There is no evidence to establish when Mr. Alec entered the vehicle or when the case was placed inside the vehicle aside from the testimony from Mr. Alec on this point, which as described above, I rejected as not being credible. Mr. Alec was

present inside the vehicle when it was stopped and challenged Sgt. Davidson's authority to search the vehicle but that cannot be considered as anything other than an individual questioning the actions of the police. It does not serve to establish knowledge of the contents of the case.

[41] Apart from Mr. Alec's statement to Cst. Mahaffey in the police vehicle there is no direct evidence that Mr. Alec had knowledge and control of the firearm inside the case. As indicated above, I was unable to reach a conclusion as to what was said. What is left is a body of circumstantial evidence which in my view is insufficient to prove beyond a reasonable doubt that Mr. Alec had knowledge and control of the firearm. As contemplated in Villaroman, there are other plausible theories and other reasonable possibilities which are inconsistent with guilt. Applying logic and experience to the evidence I find there are other inferences apart from the guilt of the accused that may arise from the circumstances of this case.

[42] I find the following observation by Bouck J. in R. v. Amado, [1996] B.C.J. No. 1943 (S.C.) at para. 33 applicable to the circumstances before me:

Not everyone who drives or rides in a car containing concealed illegal objects necessarily knows the nature of those objects. If there is to be a conviction for possession of such objects based upon the knowledge of the occupants of the car, the evidence relating to their knowledge must rise above mere suspicion.

[43] Having considered the body of circumstantial evidence in its totality I find that the Crown has not established beyond a reasonable doubt that Mr. Alec had the requisite knowledge and control with respect to the contents of the bag.

[44] Accordingly, I find Mr. Alec not guilty on all counts.

[45] Thank you counsel. We may adjourn.

"Devlin J."

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