
CANADA / JUDGMENT

R. v. Badr

2017 BCSC 1122

COURT

Supreme Court of British Columbia

DECIDED

30 June 2017

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Badr,

2017 BCSC 1122

Date: 20170630

Docket: X078559

Registry: New Westminster

Regina

v.

Raafat Badr

Before: The Honourable Mr. Justice Leask

Reasons for Judgment

Counsel for the Crown:

J. Whiting

Counsel for the Accused:

J. Stowe

V. Aldosky

Place and Date of Hearing:

New Westminster, B.C.

September 6-8 and

November 7, 2016

Place and Date of Verdict:

Vancouver, B.C.

December 14, 2016

Place and Date of Judgment:

New Westminster, B.C.

June 30, 2017

- [1] The accused was charged with three counts: Production of marijuana; PPT marijuana; and theft of electricity.
- [2] The relevant investigation included a drive-by of the suspect dwelling house in the early hours of February 20, 2013 when one of the investigators noted a pick-up truck in the driveway registered to the accused. A search warrant was executed at the premises that morning by a team of RCMP investigators. When they entered the premises, the house was unoccupied. In the lower level of the house they discovered a sophisticated grow-op with 237 marijuana plants and appropriate equipment and supplies for maintaining the plants. In the upper level, there was evidence that someone lived in the house. A number of documents were seized from the upper level addressed to the accused who later admitted to a police officer that he lived there.
- [3] The Crown witnesses were the investigating officers who conducted the search and an expert. The owner of the home was subpoenaed to testify at the trial but did not appear. The defence called no evidence and the issue for the Court was whether the Crown had proved its case beyond a reasonable doubt on the basis of circumstantial evidence.
- [4] On December 14, 2016, I informed the accused and Crown counsel of my verdict in this case. I found the accused not guilty of all three counts in the indictment with Reasons to follow. These are my Reasons.

EVIDENCE

- [5] The first witness was Corporal Valyear, the exhibit officer. He described the search of 17373 - 100th Avenue, Surrey, British Columbia. He testified that approximately seven members of the search team entered the front door after a steel ram had been used to force it open. Inside the front door were two staircases - one leading up, the other down. The officers first searched for occupants in the upper level and found none. They then turned their attention to the lower level. They proceeded to the basement landing where there were three closed doors. The door to the west was locked and forced open - inside was a marijuana grow room. The search team quickly established there were no occupants in the basement level. The

house had only two levels with a split entry at the main entrance. From the basement landing, the north door - closed but not locked - led into a nutrient room with a door opening into the first grow room that Corporal Valyear had discovered. Subsequent searching revealed two more marijuana grow rooms, a laundry room, and a storage room. The three grow rooms were numbered 1, 2 and 3 in a diagram prepared by Corporal Valyear.

- [6] In Grow Room #1, there were two fans on when Corporal Valyear entered. In that room, he seized 79 flowering marijuana plants, 28-36" tall. The walls and ceiling were lined with white mylar plastic and there was a blue tarpaulin on the floor.
- [7] One week later, Corporal Valyear conducted a "yield test" on three randomly selected marijuana plants seized from Grow Room #1:

Plant #1

46 g. dried bud

Plant #2

67 g. dried bud

Plant #3

55 g. dried bud

- [8] From Grow Room #2, Corporal Valyear seized 22 flowering marijuana plants, 28-36" high. There were also two fans in Grow Room #2; Corporal Valyear couldn't recall if the fans were on or off. The walls were also lined with white mylar and there was a blue tarpaulin on the floor.
- [9] In Grow Room #3, there were five mother plants, 24-36" tall; 25 marijuana plants in a vegetative state, 5-12" tall; and 106 marijuana plants in a vegetative state, 12-18" tall.
- [10] The nutrient room contained equipment and supplies for watering the plants. The laundry room appeared to contain the only laundry facilities in the residence.
- [11] The search of the upper level was conducted by other members of the investigating team but Corporal Valyear attended to seize evidence. In the bedroom designated Bedroom #2 in Corporal Valyear's sketch plan, Sergeant Uzelac discovered two photographs of a male and female (the male being later identified as the accused) and a Canadian passport in the name of the accused. In the same drawer as the passport, there were some ICBC documents, again in the name of the accused. In that bedroom there were T4 slips for 2010 and 2011 in the accused's name and a CRA assessment notice for 2011 in his name. There was also a two page letter from the City of Surrey addressed to the accused and another person at 17360 - 100th Avenue, Surrey. There was also a B.C. Property Assessment Notice addressed to the same two persons at 17360 - 100th Avenue.

- [12] In Bedroom #3, searched by Constable Trenn, a number of other documents were located: Exhibit 15 is a B.C. Hydro statement addressed to the accused at 17373 - 100th Avenue dated December 20, 2012; a violation ticket in the accused's name involving his pick-up truck dated January 11, 2013 and giving a Surrey address other than the grow-op house; and a Telus bill dated February 1, 2013 addressed to the accused at 17373 - 100th Avenue. Also found in Bedroom #3 were two ziplock bags containing green plant-like material that were not sent for analysis. One bag was labelled "TUNA" and the other "KANDI" (the supposed significance of this evidence is that one of the mother plants in grown room No. 3 was labelled "CANDY").
- [13] Constable Valyear's evidence was that the upper floor appeared to be a residence that was lived in - with shoes, clothing and dishes. In his opinion, Bedroom #2 was used as a bedroom and Bedroom #3 was an office or den.
- [14] In cross-examination, Corporal Valyear testified that he couldn't recall whether Grow Room #3 had a lock on the door. He testified that there were three exterior doors to the residence: the front door which the police found locked; a basement entrance to the nutrient room, also locked; and a back door to the upper floor (Corporal Valyear didn't know if it was locked or not). No keys were found in the premises.
- [15] The next Crown witness was Sergeant Uzelac. He testified that there was a bucket of air freshener just inside the front door. There was no odour of marijuana when the team entered the front door. As part of the search for a hydro bypass, he examined the exterior of the residence. At the southeast corner of the residence, he smelled the odour of vegetative marijuana.
- [16] He gave general evidence of the appearance of the grow-op consistent with Corporal Valyear's evidence. As to the upstairs, his evidence was that Bedroom #1 did not appear to be in use; Bedroom #2 appeared lived in. The bed had sheets and a blanket with the colours of the Lebanese flag, the closet held men's clothes. He described finding the documents that Corporal Valyear seized. In the kitchen, he noticed plates, cutlery, used pizza boxes, and dog treats which he associated with the dogs found in the back yard.
- [17] The next Crown witness was Constable Ryzak who testified that he was part of the entry team and assisted with "clearing" both the upper and lower floors. He testified that after the house was "cleared", all interior doors were open. He testified that he smelled a strong odour of marijuana throughout the upper floor.
- [18] The next Crown witness was Sergeant Stover. At the time of the search, he was the Senior NCO of the Surrey Drug Unit. He was the last member to enter the residence when the team broke open the front door. When the officers went to the lower level he remembered Constable Trenn opening an unlocked door. He had no recollection of Corporal Valyear's presence at that time nor of Corporal Valyear kicking in a locked door in the basement. He testified that there was a faint constant odour of vegetative marijuana in the upper floor.

- [19] The next Crown witness was Constable Furoc who did a drive-by surveillance at 3:50 a.m. on the day of the search and observed a green pick-up truck registered to the accused parked in the driveway. He attended at the staging area for the search warrant execution team and learned that Constable Daigle had done another drive-by and the green pick-up was gone.
- [20] At the time the search warrant was executed, he went to the rear of the building to "cover off" the back exits. He observed two pit bulls in the back yard which was enclosed by a chain link fence. He went to inspect the hydro meter and detected an odour of growing marijuana. After other officers had determined there were no occupants and the basement search was under way, he entered the home through the front door, observed men's footwear and women's flip-flops on the floor. He could smell the odour of marijuana and observed a large tub of odour gel near the front door. After looking around upstairs, he went to the lower level; looking for the electrical panel. He cut through the mylar and located the panel. He was unable to locate any bypass at the electric panel and contacted B.C. Hydro to request assistance in searching for a bypass. While in the basement he counted the marijuana plants. His count was consistent with Corporal Valyear's count. He examined the nutrient room and testified that it contained two large 45 gallon nutrient tanks, approximately 1/10 full, a watering wand and a red cart. He assisted in searching and dismantling the grow-op.
- [21] The next Crown witness was Constable Daigle who participated in the search and testified that it "looked like somebody lived" in the upstairs portion of the residence. The lower level contained marijuana plants growing in several different rooms.
- [22] Constable Daigle also interviewed the accused when he came to the Surrey Detachment office voluntarily in response to a message. The relevant portion of the interview was:

Q Are you living at 17373 100th Ave?

A Yes

Q Renting or owning?

A Renting

Q We know that you live there with your girlfriend Lisa?

A Right. Nobody lives with me.

- [23] In cross-examination he said he had maintained surveillance on the house that had been searched from 13:02 to 18:00 and no people or vehicles went to the house.
- [24] The Crown called Inspector Shawna Baker who was qualified as an expert witness on the production and trafficking of marijuana. She testified that the set up in the basement of this house required a lot of time and effort and was obviously a commercial operation. She explained the significance of the equipment and staging of the various grow rooms. Essentially she testified that the growers were creating an artificial environment-blocking out natural light and temperature so that the plants would experience man-made seasons

indoors. She testified that this was a three-stage grow-op. The two mother plants would be used to clone new female plants. That initial "clone" stage would take two weeks; the next "vegetative" stage would take seven weeks; the "breeding" or "harvest" stage would also take seven weeks. From start to finish, the process would take sixteen weeks. She testified that all the plants appeared to be healthy and doing well. Plants would be cloned in the room with the "mother" plants. One of the other rooms consisted of plants in the "vegetative" stage; the other room contained plants ready to be harvested.

- [25] Based on the samples harvested by Constable Daigle, Inspector Baker estimated that the average yield of dried bud per plant would be 56 grams. Taking the total of 239 plants, she estimated that the total yield from the plants in the grow-op would have been 29.25 pounds with a street value, if sold in pounds, of just over \$52,000. She was careful to say that no grow-op operation could or would harvest that way. Under normal circumstances, there would be a harvest every seven weeks as a crop completed the "harvest" stage.
- [26] The next Crown witness was Constable Trenn. She was involved in the search of 17373 - 100th Avenue. She was the photographer and the second officer to enter the premises. She stayed on the landing while other officers checked the upstairs for occupants. In less than five minutes, she and other officers descended to the bottom of the stairs. She was the first officer to open one of the basement doors that was closed but not locked. She took all the photographs and located some of the exhibits including Exhibit #14 - a Vancity Visa bill for the period January 3 - February 4, 2013; Exhibit #15 - a B.C. Hydro bill for service to the searched premises for the period October 19-December 19, 2012; and Exhibit 16 - a violation ticket addressed to the accused at 9973 - 104th Avenue in Surrey.
- [27] At the conclusion of Constable Trenn's evidence, the Crown proposed to call a B.C. Hydro investigator to testify about locating a "bypass" which diverted electricity to power the equipment in the basement without passing through the electricity meter and consequently preventing B.C. Hydro from being aware of the consumption and able to charge the residents for the use thereof.
- [28] Counsel for the defence instead admitted that the B.C. Hydro investigator had located such a bypass that was not detectable by visual observation of the electricity meter.
- [29] The defence elected to call no evidence.

ANALYSIS

- [30] Dealing with the charge of theft of electricity was relatively straightforward. It took an expert to locate the bypass. No consumer reading the hydro bill would see anything abnormal (that's the whole purpose of the bypass). There was no evidence that the accused knew anything about it. I found him not guilty.

- [31] I deal next with the charge of producing marijuana. The Crown's case is circumstantial. The accused rents the house and lives upstairs. The Crown asks me to draw the inference that he must know of the existence of the grow-op in the basement. If he knows about it, the Crown submits that he is probably "looking after" it by feeding and watering the plants and troubleshooting any problems that may arise. Even if he is not carrying out those tasks, the Crown submits that he must be at least an aider and abettor helping to maintain an environment in which the crime can be committed.
- [32] I rejected the Crown's submissions because I had a reasonable doubt based in part on the evidence before me and, in part, on the absence of evidence. Some of the factors which caused me to have a reasonable doubt included:
1. There is an exterior door to the basement grow-op which means a caretaker could look after it without ever entering by the front door.
 2. The Crown presented no evidence that the accused had ever been in the basement; no belongings of his; no fingerprints; nothing whatsoever.
 3. The police evidence was that the upstairs portion of the house was relatively neat and tidy. In the basement, there was a bathroom with fecal material in the toilet. I believe that leads to the reasonable inference that some person other than the accused frequented the basement and used the toilet.
 4. The earliest date that the Crown can associate the accused with these premises is roughly the third week of December 2012. This would be established by possession of the B.C. Hydro bill for electricity consumption up to December 19, 2012. According to the Crown's expert, this grow-op must have been in existence for approximately 16 weeks prior to February 20, 2013. This means it must have been established by November 1, 2012. Judging from the expert's evidence, it would have taken considerable time and energy to prepare the basement to be a grow-op. I heard no evidence on how long that would take but I believe a reasonable inference would be at least two to four weeks or early to mid-October 2012.
 5. The inference that someone else set up the grow-op is strengthened by the fact that the landlord was subpoenaed to give evidence at the trial but did not appear. No explanation of this non-appearance was provided to the Court.
 6. A possible inference is that the landlord had guilty knowledge of the grow-op which predated the accused's presence in the premises. Any truthful evidence that she could have given relating to the situation before the accused started residing at that house would have been of assistance to the accused.
 7. The Crown's argument that simply by living in the upper portion of the house, the accused was aiding and abetting the producer of marijuana in the basement grow-op, I found unconvincing for the reasons given by Madam Justice Adair in *R v. Johnson*, 2016 BCSC 922 at para. 58:

- [58] I also find the evidence does not establish Ms. Johnson knowingly aided the production of marihuana. Essentially, as was noted in *R. v. Deng*, 2009 ABQB 64, and in *Ngo*, the argument by the Crown is Ms. Johnson assisted in the grow operation by living in the house, thereby enabling the grow operation to occur. This argument without more, is simply too tenuous and not sufficient for a conviction. It could potentially apply in a wide range of cases and does not adequately meet the requirement to consider the full factual matrix in coming to a conclusion. The reality is the Crown must prove its case beyond a reasonable doubt.
- [33] I found the accused not guilty of production of marijuana on the basis of my reasonable doubt.
- [34] In some ways, the most difficult charge to deal with was the charge of PPT marijuana. It's obvious that anyone in possession of the plants growing in the basement of this residence would be guilty of PPT. Was the accused in possession? The two key elements to establish possession are knowledge and control. As to control, I found it particularly significant that there was no evidence of his presence in the basement; that the landlord did not appear to give evidence although properly served with a subpoena; and that the dialogue between the accused and Constable Daigle upon which the Crown relies for its proposition that the accused was the sole resident of the entire house and therefore had a "measure of control" over the basement, appeared to me to be ambiguous and directed toward a different topic entirely (did he live there with his girlfriend, or not?).
- [35] As to knowledge, again the Crown is relying on inference based on the officers who smelt the odour of marijuana on the premises and the presence of the bucket of odour suppressing gel at the front door. As to the officers, the police witness I found to be the most reliable was the exhibit man, Corporal Valyear, who was among the first to enter the premises and gave no evidence of detecting the odour of marijuana. Sergeant Uzelac actually testified there was no odour of marijuana when the team entered the front door. The other officers who did testify that they smelt such an odour had generally been downstairs in the grow-op area or searching upstairs after all the doors to the basement area had been opened. I find myself with a reasonable doubt that, with doors to the basement closed, there was any substantial odour of marijuana on the upper floor of the residence. That, in turn, led me to have a reasonable doubt that the accused had knowledge of the grow-op in the basement.
- [36] On the whole of the evidence, I am not satisfied that the Crown established beyond a reasonable doubt anything more than that the accused was present in the upstairs portion of 17373 - 100th Avenue, Surrey, British Columbia. I rely on the well-known Supreme Court of Canada case, *Dunlop and Sylvester v. The Queen*, [1979] 2 S.C.R. 881 at p. 891 for the proposition: "Mere presence at the scene of a crime is not sufficient to ground culpability."
- [37] On the whole of the evidence, I find myself with a reasonable doubt that the Crown has proved beyond a reasonable doubt that the accused was in possession of the marijuana plants in the basement of the house.

[38] That being so, the accused is entitled to be acquitted of the charge of PPT marijuana.

[39] In the end, I found the accused not guilty on all three counts.

"Leask J."

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