

CANADA / JUDGMENT

R. v. Bathie

2022 BCSC 1744

COURT

Supreme Court of British Columbia

DECIDED

26 September 2022

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2022 BCSC 1744 R. v. Bathie

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Bathie,

2022 BCSC 1744

Date: 20220926

Docket: 16059

Registry: Powell River

Between:

His Majesty the King

And

David Robert Bathie

Before: The Honourable Justice Branch

Oral Reasons for Judgment

Counsel for His Majesty the King:

J. Langlois-Sadubin

Counsel for David Robert Bathie:

B. S. Lynskey

T. Forss

Place and Date of Trial:

Powell River, B.C.

January 11-13, 2021 and

August 24-25, 2022

Place and Date of Judgment:

Powell River, B.C.

September 26, 2022

Table of Contents

I. INTRODUCTION.. 3

II. THE EVIDENCE.. 3

A. Factual Circumstances. 3

B. Expert Evidence. 8

III. ANALYSIS.. 9

A. Overarching Principles. 9

B. Elements of Possession for the Purpose of Trafficking. 10

C. Evidentiary Issue: Application of the Co-Conspirators' Exception.. 11

Step One: Has the existence of the conspiracy been proven?. 12

Step Two: Determining probable membership based on non-hearsay evidence. 15

Step Three - "In Furtherance". 17

Residual Discretion.. 18

D. Assessment of Guilt 18

Introduction.. 18

Case Law Review.. 19

Application of the Law to the Facts. 22

IV. VERDICT.. 26

I. INTRODUCTION

- [1] The accused is charged with two counts of possession of cocaine, heroin and fentanyl for the purpose of trafficking contrary to s. 5(2) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19 [CDSA].

II. THE EVIDENCE

A. Factual Circumstances

- [2] Prior to the accused's arrest, Corporal Wallie Zakkour of the Powell River RCMP received information about a potential new "Dial-a-Dope" operation working in the local area. He communicated the information received to Corporal Timothy Venselaar on October 13, 2017. A plan was developed for Cpl. Venselaar to communicate via text with a phone number suspected to be associated with the operation. Cpl. Venselaar would arrange for the purchase of "3 pants", or three 0.1-gram packages of heroin. The meeting would take place in a public parking lot at the Catalyst Mill in the historic district of Powell River. Arrangements were made to secure support from two other officers in order to facilitate any required arrests, being Cpl. Todd Woon and Constable Derek Quilley.
- [3] At 13:44 on October 13, 2017, Cpl. Venselaar made the planned text approach. The recipient of the text message (the "Recipient") agreed to the proposed arrangements. The meeting was scheduled to take place about 45 minutes from the time of the text, or at around 14:30. The Recipient mentioned that he was "just getting new tires on [the] car" and that he "got a flat popped tire". The Recipient said he would call when he was five minutes out.
- [4] The Recipient was late. At 14:38 the Recipient texted asking whether they were ready to meet, which Cpl. Venselaar confirmed. Shortly thereafter, Cpl. Venselaar confirmed his location for the Recipient. Cpl. Venselaar received a phone call from the Recipient at about 14:40 in which the Recipient asked for directions. Cpl. Venselaar gave the directions and asked what he should be looking for. The Recipient stated a Ford Fusion. Cpl. Venselaar then overheard another male (the "Associate") yelling at the Recipient's end "What the f*ck, you never tell them the vehicle!"
- [5] Cpl. Venselaar texted the Recipient at 14:50 asking if all was still good, as he was a bit worried by the Associate's outburst. The Recipient said everything was fine. The Recipient texted at 14:55 stating, "OK were coming from joycr [sic] got 2 ppl on the way will be 15 minutes". (Later, the police discovered text messages on the Recipient's phone suggesting the Recipient may have been attending to two other drug transactions during this delay.)
- [6] At 15:13, the Recipient confirmed he was a couple of minutes away. Finally, at 15:14, which was about 45 minutes later than originally planned, the Recipient confirmed he was at the designated location. Cpl. Venselaar said he would come to the Recipient. At 15:15, the Recipient texted to reconfirm the correct location. Cpls. Venselaar and Zakkour then drove up and blocked the Ford Fusion from the front. Constables Woon and Quilley then blocked the Ford Fusion from the rear in their marked police car. From the front, Cpls. Venselaar and Zakkour exited their unmarked vehicle in plain clothes, but with police vests on and weapons drawn.

- [7] There is no dispute that the accused was driving the Ford Fusion, and that an individual named Brendan Shorter was in the passenger seat. Upon seeing the officers, the accused initially tried to reverse the vehicle, but his way was blocked by the police vehicle behind him.
- [8] As he approached the Ford Fusion, Cpl. Venselaar saw the accused put something small into his mouth with his right hand, and then take a drink from something with his left hand. Cpl. Venselaar believed it was a bottle of Vitamin Water. Cpl. Zakkour also observed the accused move his hand to his mouth and then take a sip from a bottle.
- [9] Cpl. Venselaar asked the accused to get out of the vehicle. He pulled the door open and took him out of the vehicle to arrest him. The officers in the trailing police vehicle started to approach. Cpl. Woon was in plainclothes and Cst. Quilley was in a uniform. Cst. Quilley assisted with the arrest and search of the accused. His search uncovered \$2,287.20 in cash, but no drugs, either in the accused's mouth or elsewhere. The accused indicated that the cash came from a transfer from his mother, and that he could provide a receipt for same.
- [10] At the same time, Cpl. Zakkour and Cst. Woon approached the passenger side door and asked Brendan Shorter to exit the vehicle. He eventually did so and was arrested. There was no evidence to confirm whether Mr. Shorter was searched or not.
- [11] The accused was taken to hospital by Cst. Woon and Cst. Quilley. There is no evidence that the accused suffered ill effects from anything swallowed. The accused refused treatment. He was then transported to the Powell River RCMP detachment and subjected to a strip search that did not reveal any drugs.
- [12] Searches of the Ford Fusion at the point of arrest, and then again at the detachment, yielded the following evidence:
- a) a key for Room #11 at the Old Courthouse Inn, located on the same key chain as the vehicle's key;
 - b) a cell phone in the driver side door, later determined to be Brendan Shorter's;
 - c) a second cell phone with a cracked screen, which Cpl. Venselaar testified was found on the driver's seat along with a lighter, a bottle cap, and one pill capsule of brown heroin powder;
 - d) empty plastic packaging, the location of which was left somewhat unclear from the evidence;
 - e) a crack pipe, which Cpl. Venselaar believes was sitting on the centre console, although he acknowledged that he may have moved it to get a clearer photograph;
 - f) \$360 in cash in the centre console;
 - g) an empty bottle of Vitamin Water without a cap, found in the front seat passenger well; and
 - h) a baseball bat in the trunk.

- [13] Cpl. Zakkour and Cst. Woon attended at the suite in the Old Courthouse Inn associated with the key found in the vehicle. The suite was comprised of two adjoining rooms, the first being a yellow room with a bed, a bedside table, a dresser with a TV, and a bathroom. Connected to this first room was a purple room with a bed, an armoire, and a fridge. In order to use the bathroom, the occupant of the purple room would need to pass through the yellow room. There was no armoire in the yellow room, so any clothes that needed to be hung would have to be placed in the armoire in the purple room.
- [14] Later, a search warrant was obtained for the suite. Pursuant to the warrant, Cpl. Zakkour and Cpl. Venselaar found \$240 in cash in the dresser in the yellow room, and \$100 on the floor of the purple room. In the purple room's armoire, the officers found a Harry Rosen suit bag with a smaller bag at the bottom. There were dress clothes inside the suit bag. The smaller bag at the bottom contained the following drugs:
- a) 54 "Red Lips" packages of soft cocaine weighing 27g;
 - b) 87 packages of white rock cocaine weighing 96g;
 - c) 55 orange wrapped packages of cocaine weighing 20g; and
 - d) 228 capsules of a heroin/fentanyl mix weighing 36g.
- [15] Along with other clothing in the armoire, there was \$1,690 in cash found inside a jacket.
- [16] There were two pieces of luggage in the purple room. One of the bags was filled with tools.
- [17] The day following the arrest, the accused and Mr. Shorter were to be released from police custody, and sent home on the ferry. The accused was escorted to the hotel by Sergeant Trevor Busch so that he could retrieve his belongings. Sgt. Busch was with the accused as he collected items from the suite. Sgt. Busch did not have a particularly detailed memory of this process. This was not particularly surprising, given that his role was administrative rather than to gather additional evidence. As a result, his notes made at the time were perfunctory. His notes did not record what belongings each individual took and from where. Sgt. Busch only made more detailed notes more than three years later, at the request of Crown Counsel.
- [18] Sgt. Busch testified that to the best of his recollection, the accused packed up belongings from the purple room. He retrieved certain items from the armoire. He also packed shoes not in the armoire. The accused emptied the one suitcase of its power tools, and put items he collected therein. He also packed the second suitcase, and another small bag.
- [19] Sgt. Busch only recalled in cross-examination that the accused also went to the laundry room to retrieve additional items from a clothes dryer.

- [20] Mr. Shorter was brought into the suite after the accused departed. He did not use any luggage, but put certain items in a black sports or garbage bag. He gathered items from the yellow room. Sgt. Busch did not recall Mr. Shorter taking anything from the purple room but agreed it was possible. He did recall Mr. Shorter going into the purple room. It was possible that his bag was obtained from the purple room.
- [21] Sgt. Busch recalls that certain items were left behind in each room, although he recalls that the armoire was emptied. He did not recall seeing which of the two removed the suit bag from the armoire.
- [22] As part of the investigation, the two phones found in the Ford Fusion were examined and photos taken of the information on various screens. From this examination, it became clear that the phone found in the driver side door was Mr. Shorter's, and that this was the phone with which the Recipient was texting Cpl. Venselaar. Certain texts on this phone aligned with the texts from Cpl. Venselaar. As such, there was no material dispute at trial that Mr. Shorter was the Recipient. Mr. Shorter plead guilty to a trafficking charge, but did not testify at this trial.
- [23] There was also no dispute that the second phone with the cracked screen belonged to the accused, as it contained messages with individuals who appear to be Bathie family members. In particular, the messages include a notice of a \$3,000 bank transfer coming in from Dawn Bathie on October 10. The phone also contained several messages with Mr. Shorter which included discussions about shared interests such as bodybuilding. There were no discussions about drugs in these texts.
- [24] There were certain formal admissions entered into evidence. The most material of these are as follows:
- a) The identity of the accused as one of the individuals arrested in the parking lot was admitted.
 - b) The nature and general location of the drugs seized was admitted.
 - c) The accuracy of various photographs taken by the officers was admitted, including the pictures taken of various screens from the two cell phones.

B. Expert Evidence

- [25] The admissions also provided for the admission of the expert opinion of Constable Paul Jones. Cst. Jones' evidence included information regarding the drugs seized, their street names, the typical prices for same in Powell River, common drug paraphernalia and packaging, and the usual structure of a Dial-A-Dope operation.
- [26] The accused called no evidence.

III. ANALYSIS

A. Overarching Principles

- [27] Justice Kent summarized the fundamental principles applicable to all criminal matters in *R. v. Rochemont*, 2017 BCSC 930:

Reasonable Doubt and the Presumption of Innocence

- [99] It is a fundamental principle of Canadian criminal law that any person charged with an offence is presumed to be innocent until proven guilty and convicted in a court of law. First articulated in the common law, this principle is also prescribed by s. 6(1) of the Criminal Code, and is now enshrined in s. 11(d) of the Canadian Charter of Rights and Freedoms.
- [100] In a criminal case, the obligation is upon the Crown to prove all elements of an offence beyond a reasonable doubt, and only then can a court convict. The burden remains on the Crown throughout. Where a reasonable doubt exists respecting any of the constituent elements of the offence charged, the accused must be acquitted of that offence.
- [101] Reasonable doubt means a doubt that is based upon reason and common sense. Such doubt must be logically connected to the evidence or absence of evidence. It must not be based on sympathy or prejudice. The Crown is not required to prove all elements of an offence to an absolute certainty ... as this would be an impossibly high standard. However, the reasonable doubt standard falls much closer to absolute certainty than to the standard of proof used in civil cases, i.e., the balance of probabilities. Indeed, in a criminal case if the court can only find that the accused probably committed the offence, the accused must be acquitted. See *R. v. Lifchus*, 1997 CanLII 319 (SCC), [1997] 3 S.C.R. 320 and *R. v. Starr*, 2000 SCC 40.
- [102] The difference between these various standards of proof is a critical component of our system of criminal justice. In a case such as the present one, involving unsavoury characters and an exchange of gunfire in public space, the court of public opinion might well be inclined to "convict" based on a combination of poor character, presence at the scene of events, and perceptions of what likely or probably occurred. In criminal matters, however, the law rightly imposes a very high standard of proof before an individual, no matter how unsavoury, can be convicted of an offence under the Criminal Code.

[Emphasis in original.]

- [28] As this case is based in part on circumstantial evidence, the following direction from *R. v. Villaroman*, 2016 SCC 33 is also germane:
- [35] At one time, it was said that in circumstantial cases, "conclusions alternative to the guilt of the accused must be rational conclusions based on inferences drawn from proven facts": see *R. v. McIver*, 1965 CanLII 26 (ON CA), [1965] 2 O.R. 475 (C.A.), at p. 479, aff'd without discussion of this point 1966 CanLII 6 (SCC), [1966] S.C.R. 254. However, that view is no longer accepted. In assessing circumstantial evidence, inferences consistent with innocence do not have to arise from proven facts: *R. v. Khela*, 2009 SCC 4, [2009] 1 S.C.R. 104, at para. 58; see also *R. v. Defaveri*, 2014 BCCA 370, 361 B.C.A.C. 301, at para. 10; *R. v. Bui*, 2014 ONCA

614, 14 C.R. (7th) 149, at para. 28. Requiring proven facts to support explanations other than guilt wrongly puts an obligation on an accused to prove facts and is contrary to the rule that whether there is a reasonable doubt is assessed by considering all of the evidence. The issue with respect to circumstantial evidence is the range of reasonable inferences that can be drawn from it. If there are reasonable inferences other than guilt, the Crown's evidence does not meet the standard of proof beyond a reasonable doubt.

[Emphasis added.]

B. Elements of Possession for the Purpose of Trafficking

[29] In a charge of possession for the purpose of trafficking, the Crown must first prove that the accused had possession of the drugs in question. Section 2(1) of the CDSA incorporates the definition of "possession" from s. 4(3) of the Criminal Code, R.S.C., 1985, c. C-46:

(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.

[30] In order to establish constructive possession under s. 4(3)(a)(ii), the Crown must prove that the accused had both knowledge and control of the drugs in question, and that the two co-existed at some point in time: *R. v. Anderson* (1995), 67 B.C.A.C. 311 (C.A.) at para. 13.

[31] Joint possession under s. 4(3)(b) applies to situations in which more than one person has possession of an item. The person who does not have direct personal possession jointly possesses an item if he or she knows that the other person has custody or possession of it, and either exercises or has the right to exercise control over it. Joint possession also requires proof of knowledge and control, which may be proven either by direct evidence or by circumstantial evidence or a combination of both: *R v. Mackay*, 2018 BCSC 1820 at paras. 75 and 77.

[32] The Crown relies on each of actual, constructive, and joint possession in the present case.

[33] Beyond possession, the Crown must prove that the possession of the drugs was for the purpose of trafficking: *R. v. Liu*, 2011 BCSC 1269 at paras. 17, 30-35; *R. v. Chan* (2003), 66 O.R. (3d) 577 (C.A.) at paras. 27-35; CDSA, s. 2(1). However, this element was not at issue here given the volume of drugs seized.

C. Evidentiary Issue: Application of the Co-Conspirators' Exception

- [34] Before considering the culpability of the accused, it is necessary to address an evidentiary issue. The Crown sought to admit the text messages and phone calls between Cpl. Venselaar and Mr. Shorter was against the accused pursuant to the co-conspirators' exception to the hearsay rule. The operation of this exception was summarized by the Supreme Court of Canada in *R. v. Mapara*, 2005 SCC 23:
- [8] The co-conspirators' exception to the hearsay rule may be stated as follows: "Statements made by a person engaged in an unlawful conspiracy are receivable as admissions as against all those acting in concert if the declarations were made while the conspiracy was ongoing and were made towards the accomplishment of the common object" [citation omitted]. Following *Carter*, co-conspirators' statements will be admissible against the accused only if the trier of fact is satisfied beyond a reasonable doubt that a conspiracy existed and if independent evidence, directly admissible against the accused, establishes on a balance of probabilities that the accused was a member of the conspiracy.
- [26] In addition to these preliminary conditions, the final *Carter* requirement, i.e., only those hearsay statements made in furtherance of the conspiracy can be considered, provides guarantees of reliability in the more immediate circumstances under which the statement is made
- [27] In sum, the conditions of the *Carter* rule provide sufficient circumstantial guarantees of trustworthiness necessary to permit the evidence to be received.
- [35] The application of this exception is not limited to cases involving a conspiracy offence. The exception also applies to cases, such as the present, where the charge is that persons participated in a joint criminal enterprise: *R. v. Tran*, 2014 BCCA 343 at para. 88; *Mackay* at para.107.
- [36] The three-stage test for the operation of the exception is as follows:
- a) The Crown must prove beyond a reasonable doubt that there was a conspiracy or common criminal enterprise. In determining whether such a conspiracy or common enterprise has been proven, the court can look to all the evidence called, including acts and declarations made by alleged co-actors.
 - b) The Crown must then prove on a balance of probabilities that the individual accused was a member of the common enterprise or conspiracy. At this stage the court can only have regard to evidence directly admissible against the particular accused, without reference to the acts or declarations of other members of the conspiracy or common enterprise.
 - c) Finally, it must be established that the act or declaration of the other members was made in furtherance of the conspiracy.

R. v. Smith; R. v. James, 2007 NSCA 19 at paras. 194-197; MacKay at para. 106; R. v. Correia, 2016 BCCA 330 at para. 24.

Step One: Has the existence of the conspiracy been proven?

[37] As noted, the first stage of the test requires a determination of whether, on all the evidence, the alleged conspiracy exists beyond a reasonable doubt. The conspiracy can be proven by direct evidence, but may also be inferred from the declarations and conduct of the parties, and it can be inferred from circumstantial evidence. The necessary agreement may be inferred from a series of isolated acts having little or no value in and of themselves, but when put together in light of all the surrounding circumstances, make the inference so compelling that it does not leave room for any other rational conclusion: Smith, at paras. 189-190.

[38] The scope of the evidence considered at this step has been accepted to mean "all of the evidence". As stated in Mackay:

[108] With respect to the first step outlined in Carter [1982 CarswellNB 13 (S.C.C.)], the hearsay rule is not engaged. In R. v. Correia, 2016 BCCA 330 (B.C. C.A.), the court confirmed that, in determining whether a conspiracy exists, the trier of fact may consider all admissible evidence, including provisionally considering any acts and declarations of unindicted co-conspirators:

[26] In R. v. Tran, 2014 BCCA 343 (B.C. C.A.), Frankel J.A. highlighted that what is at issue at the first stage of the "Carter test" is whether the Crown has proven the existence of a conspiracy on a global basis beyond a reasonable doubt. The question of whether the Crown has proved the existence of an alleged conspiracy is "made on all the evidence, including but not only what alleged conspirators have said and done in furtherance of the common purpose": . This question does not involve deciding whether any particular individual (the accused or an unindicted co-conspirator) was a member of the conspiracy:

[27] In R. v. Puddicombe, 2013 ONCA 506 (Ont. C.A.), leave to appeal ref'd (2014), [2013] S.C.C.A. No. 496 (S.C.C.), Mr. Justice Doherty explained that the phrase "all of the evidence" refers to all of the evidence admissible under the rules of evidence. At para. 111, he stated:

... Evidence that as a matter of logic and human experience makes the existence of the conspiracy more likely is relevant to prove the existence of the conspiracy unless excluded by some specific rule.

[28] Doherty J.A. observed that evidence adduced to prove the existence of an alleged agreement is often not led for the truth of its contents, but as circumstantial evidence of the existence of the agreement. Evidence that is not tendered for the truth of its contents will not engage the hearsay rule and does not need to have been said or done in furtherance of the conspiracy. At para. 112 [of Tran, Frankel J.A.] stated:

[112] Evidence offered to prove the existence of the alleged agreement will not often engage the hearsay rule. Generally, at the step one inquiry, testimony of things said and done by alleged conspirators is tendered not for its truth, but as circumstantial evidence of the existence of the agreement. The admissibility of the evidence depends on whether as a matter of logic and human experience an inference of the existence of the agreement is available from the evidence considered in its totality. Admissibility on the question of the existence of the agreement does not depend on whether the evidence consists of acts and declarations in furtherance of the conspiracy: see David Paciocco & Lee Stuesser, *The Law of Evidence*, 6th ed. (Toronto, Irwin Law, 2011), at pp. 156-58; *R. v. Smith*; *R. v. James*, 2007 NSCA 19, 216 C.C.C. (3d) 490 at paras. 187-91, paras. 235-38.

This step does not involve deciding whether any particular individual (the accused or an unindicted co-conspirator) was a member of the conspiracy: *Tran*, para. 103.

- [39] I find that this first step has been met. There was undoubtedly a plan to sell illegal drugs, as illustrated by the text messages. The fact that there was more than one person involved in a conspiracy to sell these drugs is supported by the phone call, in which the Associate was overheard cautioning the Recipient about how much to say about the vehicle that would be used to attend the drug transaction. It only requires two individuals to create the necessary agreement.
- [40] In terms of the evidence flowing from the hotel suite, the volume of clothes and drugs in the hotel suite and the apparent use of two beds, further buttresses the conclusion that there were multiple individuals involved in the "Dial-a-Dope" scheme.
- [41] Lastly, circumstantial evidence as to the existence of the conspiracy is obtained from the use of the plural "we" pronoun in certain text messages from the Recipient. Although "we" can, in rare situations, be used as a singular pronoun (i.e. on the part of royalty, or by authors seeking to maintain ambiguity over the number of individuals to which reference is being made), I find that the circumstances here do not support an inference that the term was being so employed. Further, I do not see any evidence that the Recipient was using the plural "we" to try to impress the officers by implying a larger group organization. As such, the use of "we" in the text messages is further evidence of a conspiracy.
- [42] Based on all of this evidence, it is beyond a reasonable doubt that a conspiracy did exist.

Step Two: Determining probable membership based on non-hearsay evidence

- [43] At stage two, the trier of fact determines whether there is sufficient admissible non-hearsay evidence to establish that the accused is a member of the common enterprise.
- [44] The burden of proof at this stage is only on a balance of probabilities. This is an evidentiary test only, not a test of the guilt of the accused.
- [45] In *Tran*, the court described the exercise at the second stage as follows:

- [116] A probable-membership determination requires a contextual assessment of the "direct evidence" against the person whose participation is being considered. To do otherwise would place a trier of fact in the position of having to evaluate an accused's or unindicted co-conspirator's own acts and declarations in isolation, detached from the surrounding events. Whether it is more likely than not that someone participated in joint criminal activity can only be properly determined by considering what that person said and did against the backdrop of what the other alleged participants were doing at the relevant times. However, at this stage of the analysis acts and statements of other alleged participants which are hearsay cannot be accepted for their truth.
- [46] I find that there is sufficient evidence to conclude that the accused was a member of the conspiracy on a balance of probabilities in light of the following evidence:
- a) The accused arrived at the scene of the planned illegal drug transaction with the Recipient, Mr. Shorter.
 - b) The accused was in control of the vehicle used to deliver the drugs.
 - c) The accused put the car in reverse in an apparent effort to escape away from the approaching officers.
 - d) The accused was using a key to drive the vehicle that was on a key chain with the key to the hotel suite in which the bulk of the drugs were found.
 - e) The accused was seen putting something to his mouth and then taking a drink when approached by the officers. Although the officers did not see precisely what was put in his mouth, this suspicious activity supports an inference that the accused was disposing of an illicit substance. This evidence is even more compelling given that a pill was found underneath where the accused was sitting that matched pills found in the hotel suite.
 - f) A crack pipe was found in the vehicle.
 - g) The accused was found with a large sum of money on his person; and
 - h) The accused had clothing in a hotel suite shared with Mr. Shorter. Given that one guest had to go through the other's room to use the washroom, and that the other guest had to go through the first guest's room to use the armoire to hang any clothes, one can reasonably infer that the people had a close relationship.
- [47] Note, again, that it is not proper to use the hearsay statements sought to be admitted under the co-conspirators' exception as part of this stage of the analysis.
- [48] There is admittedly evidence (or an absence of evidence) that lessens the weight of the above factors:
- a) There is no evidence that the vehicle was owned or rented by the accused.

- b) The Recipient's cell phone was found in the driver's side door, suggesting that someone else may have been the usual driver.
- c) In terms of the decision to reverse the vehicle, it is possible that the accused simply panicked when faced with armed individuals, particularly as those officers were in plainclothes, save for police vests;
- d) None of the officers were able to confirm that the accused actually put drugs in his mouth;
- e) The accused was not found with any drugs on his person;
- f) Although the crack pipe was found in the vehicle, it may have been moved from a location not previously visible to the accused;
- g) There is no evidence that the accused ever had or took control of the suit bag in which the drugs in the hotel suite were found;
- h) The drugs were not in plain view in the suite, but rather were hidden in a box inside a suit bag in an armoire, creating the possibility that the accused was unaware of their presence;
- i) There is another possible explanation for the large sum of money on the accused's person, being that it was the remainder of the \$3,000 transfer he received from Dawn Bathie; and
- j) The text messages between the accused and Mr. Shorter did not contain any discussion of drug transactions.

[49] This latter evidence (and its effect on any ultimate finding of guilt), is reviewed in greater detail below. But for present purposes, I do not find that the mitigating evidence cumulatively weighs sufficiently heavily against the evidence of participation reviewed above, so as to undermine the Court's conclusion that this second stage of this test is also met on its lower balance of probabilities standard.

Step Three - "In Furtherance"

- [50] The proposed hearsay exception does not apply to all acts and declarations of co-conspirators. It only applies to statements made in furtherance of the conspiracy.
- [51] I find that the texts and phone call were clearly in furtherance of the conspiracy. They were for the purpose of arranging the relevant drug transaction. The statement by the Associate during the phone call was clearly intended to minimize the prospects of identification or capture, which is in furtherance of a successful joint enterprise.

Residual Discretion

- [52] In *Mapara*, the Supreme Court describes that, even if the elements above are met, there may be "rare" or "exceptional" cases where the requirements of necessity and reliability are still not present, such that the exception should not apply:

- [34] This leaves for consideration the argument that even if the co-conspirators' exception to the hearsay rule satisfies the need for indicia of necessity and reliability, this is one of those rare cases where evidence falling within a valid exception to the hearsay rule should nevertheless not be admitted because the required indicia of necessity and reliability are lacking in the particular circumstances of the case. The same considerations that lead to the conclusion that the co-conspirators' exception to the hearsay rule satisfies the requirements for indicia of necessity and reliability are applicable here. Necessity is established, in the absence of direct evidence from the co-accused declarants. Indicia of reliability are found in the requirements of the Carter rule for a conspiracy proved beyond a reasonable doubt, membership of the accused in it on a balance of probability, and the rule that only statements made in furtherance of the conspiracy are admitted. It therefore becomes difficult to conclude that evidence falling under the Carter rule would lack the indicia of reliability and necessity required for the admission of hearsay evidence on the principled approach. In all but the most exceptional cases the argument is spent at the point where an exception to the hearsay rule is found to comply with the principled approach to the hearsay rule.
- [53] The defence did not expressly rely on this residual discretion to exclude the evidence if otherwise admissible, and I do not find that it should apply to the present case in any event. There is nothing unique about this fact pattern that disrupts the reliability and necessity that flows naturally from the application of the usual test. In particular, although some of the time stamps on Mr. Shorter's phone do not appear to align with the timeline, this may be explained by the fact that the phone did not have a SIM card. Furthermore, any time stamp problem does not disrupt the reliability of the key conversation, being that with Cpl. Venselaar. I find that there is sufficient reliability and necessity to justify simply applying the exception.

D. Assessment of Guilt

Introduction

- [54] That brings us to the core assessment as to whether guilt has been established. Although there is a great deal of overlap between the evidence considered to assess the admissibility of the hearsay evidence and the evidence relevant to an assessment of guilt, the lens through which such evidence is examined is obviously different. Most notably, the legal test now becomes whether the Crown has established all the elements of the offence beyond a reasonable doubt, rather than on a balance of probabilities.

Case Law Review

- [55] I begin by reviewing certain cases where courts were faced with similar situations. I find that these cases are helpful in placing the present fact pattern into context, and in identifying relevant evidentiary markers.

[56] I begin with a review of a series of similar cases where the accused was found not guilty:

- a) R. v. Iturriaga, 1993 CanLII 2517 (B.C.C.A.): The accused was driving, but did not own the vehicle in which drugs were found. There was a passenger in the vehicle. The majority of the drugs were found under the passenger's seat. The accused was nervous when the police approached, but the court found that "it is common for people to be nervous when pulled over by the police" (para. 9).
- b) R. v. Anderson, 1995 CanLII 1338 (B.C.C.A.): The vehicle in which the drugs were found was not owned by the accused, but by his brother. There was also a passenger in the vehicle. This was the first time the accused had been observed leaving the house that had been the subject of a 14-month undercover investigation. The court concluded that another rational conclusion from the evidence was that the brother had placed the drugs in the vehicle without the accused's knowledge.
- c) R. v. Harper, 2019 BCSC 1460: Again, there was a passenger in the vehicle with the accused. The accused was nervous when the police approached, but he had been prohibited from driving. Drugs were found under the driver's seat. The accused was not the owner of the vehicle or the license plate on the vehicle. Someone else's cell phone was found by the driver's side seat. The court held that it was possible to derive reasonable scenarios that fell short of the inferences required to support guilt.

[57] Next, I review certain cases where the accused was found guilty:

- a) R. v. Gosselin, 2002 BCSC 1484: The accused was the owner and driver of the subject vehicle. His wife was a passenger. Three one-pound bags of marijuana were found in the trunk. The bags were substantial in size and would have been in plain view when the trunk was open. The court noted that the accused had been driving the car for a considerable distance and thus, "his control over the vehicle was not momentary". These circumstances were sufficient to establish possession.
- b) R. v. Olson, 2004 BCSC 377: The accused was the registered owner of a vehicle in which the drugs were found. The police found a gym bag located behind the passenger seat containing three zip-lock bags holding 711 grams of marijuana. The court found the bag would have been visible to the driver and, as such, possession was established.
- c) R. v. Russell, 2011 BCCA 277: The accused was driving. There was a passenger. The vehicle was rented jointly by the accused and the passenger. Drugs were found in a sealed pouch in plain view, tucked between the right-hand side of the driver's seat and the centre console. The accused was found in possession of \$3,400 in cash in denominations consistent with drug trafficking. The court found that the passenger would not reasonably have allowed her own drugs to be so close to the accused. The more logical inference was that they were the accused's drugs. The Court of Appeal upheld the conviction, stating:

- [14] It was not solely the proximity of the drugs to the accused that founded the conviction. Rather it was the combination of the other circumstances, including the money and the car rental contract, which the trial judge explicitly mentioned, that persuaded the trial judge that the only reasonable conclusion was that the appellant knew of, and had control over, the drugs.
- d) R. v. Ahmadzai, 2012 BCCA 215: The accused was the driver and owner of the vehicle. There was one passenger. The accused had added the passenger as a registered owner only 12 days prior to the offence. Upon a search of the vehicle, the following items were discovered: (1) a bag behind the driver's seat containing zip-lock bags of marijuana with a total street value of about \$5,000, (2) a digital scale in the seat pocket attached to the rear of the driver's seat, (3) a pouch containing two throwing stars under the floor mat of the front passenger's seat, and (4) brass knuckles between the driver's seat and the console. The throwing stars and brass knuckles were not visible. The trial judge convicted the driver and acquitted the passenger. On appeal, the court confirmed the accused's conviction:
- [35] I agree with the Crown that the competing "possibility" advanced by the appellant requires an untenable interpretation of the evidence whereby the appellant would have been completely ignorant of contraband in a vehicle he had owned for nearly two years, and that he was driving at the time of the alleged offence. I would add to this description the observation that the marihuana, the weigh scale and the weapons were stashed in various places throughout the car, making a lack of knowledge on the part of the appellant even more improbable.
- e) R. v. Howell, 2014 BCSC 2290: The police found \$1,530 in cash on the accused's person and methamphetamine in a fanny pack located between the front seats inside a car owned and being driven by the accused. Baggies and a digital scale were found on the passenger side floor of the vehicle, along with further methamphetamine. The total value of the drugs was in the range of \$10,000 to \$12,000. There was a passenger in the vehicle. The court found that a strong piece of evidence suggesting that it was the accused who was in possession of the drugs was that the passenger was content to walk away from the car when he went into a shop, leaving the accused in control of the vehicle.
- f) R. v. Khosravi, 2018 BCSC 2163: There was \$5,000 worth of drugs located inside a bag in the trunk of the vehicle. The accused owned the vehicle and was found alone in it. There were vials in the back seat that matched vials in the trunk found with the drugs. The vials in the back seat were in plain view. There was also a butterfly knife found in the bag in the trunk, along with men's clothing, cologne and a shaving kit.
- g) R. v. White, 2018 BCSC 2391: The accused was on trial for six counts: three counts of possession of controlled substances for the purpose of trafficking; possession of the drug GHB; and two firearms counts. H was the driver of the vehicle, the owner D was the front seat passenger, and the accused was in the back seat. The cocaine associated with Count 1 was in a backpack in the back seat of the car. Fentanyl supporting Count 2 was also found in

the backpack, as well as in a container on the floor on the front passenger side of the car, and on the accused's person. A mixture of heroin/fentanyl/MDMA (Count 4) was also found in the backpack. The GHB associated with Count 3 was found in a hotel room. A loaded semi-automatic handgun was in the pocket of the left rear door, which was the basis for Counts 5 and 6. The accused was found guilty on Count 2 insofar as it related to the fentanyl on his own person. He was also found guilty on Count 3, and on the two firearms counts. The accused had on his person \$2,510 in cash and rubber bands. The court found the existence of unexplained cash particularly cogent in terms of supporting a finding of guilt in relation to the fentanyl on his person. In relation to the drugs in the backpack however, there was no evidence that the accused had knowledge of the drugs being there, or that he had control of them.

Application of the Law to the Facts

- [58] Given Mr. Shorter's guilty plea and the fact that the phone being messaged by the officer was Mr. Shorter's, there is little doubt that Mr. Shorter is properly treated as having been in possession of the illegal drugs in the vehicle and the hotel suite. The question is whether the accused should also be found to have been in possession.
- [59] The evidence in favour of such a conclusion is largely the same as that reviewed above in the application of the co-conspirators' exception, but now also buttressed with the evidence supporting guilt arising from the messages on Mr. Shorter's cell phone and the phone call.
- [60] On the other side of the ledger is the exculpatory evidence reviewed above in the context of the application of the exception, as well as further evidence flowing from the text messages.
- [61] The key evidence in this case is as follows:
- a) There is no evidence that the accused owned or rented the vehicle: Anderson, Olson, Russell, Howell, Ahmadzai, Khosravi, Harper.
 - b) There is no evidence as to how long the accused had been driving the vehicle: Gosselin.
 - c) There was another passenger in the vehicle, and another individual staying in the hotel room: Harper.
 - d) There was no evidence of Mr. Shorter ever leaving the accused alone with any of the drugs: Russell, Howell.
 - e) There is no evidence that Mr. Shorter was searched, leaving open the possibility that the other two pills ordered by Cpl. Venselaar (beyond the pill found on the driver's seat) may have been on Mr. Shorter's person. The admission of the text messages allows the court to consider the effect of the car trouble reported therein. The fact that Mr. Shorter arrived 45 minutes late to the scheduled transaction further supports the inference that the Recipient had car trouble. This evidence of car trouble creates a reasonable prospect that the accused only ended up in the driver's seat specifically, or in the car generally, as a result of a repair

process, or as part of an effort by Mr. Shorter to secure alternate transportation. This possibility that the driver's seat was usually Mr. Shorter's is further supported by the fact that the phone in the driver's side door was Mr. Shorter's: Harper at paras. 29, 34. Further, this supports a reasonable prospect that the third pill may have fallen onto the driver's seat from Mr. Shorter's person rather than from the accused's person.

- f) There is evidence of a possible explanation for the cash on the accused's person, being the receipt of the Interac transfer from a family member: White, Russell.
 - g) The drugs in the hotel room were concealed, and so it cannot be said that the accused would have necessarily been aware of the presence of the drugs because they were in plain view: Iturriaga, para. 9; Olsen, Russell, Khosravi, White.
- [62] The mere fact that drugs are found in a vehicle driven by the accused does not raise an irrefutable inference that the accused is in possession of that drug: Ahmadzai at para. 37. Indeed, such a presumption was treated as an error of law in *R. v. Lincoln*, 2012 ONCA 542 at paras. 2-3. To put the point more directly, a person may drive a drug dealer's car without being a drug dealer.
- [63] The decision in *Villaroman* allows the court to consider whether there are reasonable alternate scenarios even without proven facts. I find that there are reasonable alternative scenarios under which the accused would not have had possession of the drugs. To wit:
- a) The accused could have been driving the vehicle only because Mr. Shorter had trouble with a vehicle over which Mr. Shorter otherwise had control. For example, the accused could have ended up in the driver's seat after Mr. Shorter left this position in order to change a tire. As noted above, the fact that Mr. Shorter may have been in the drivers' position shortly before the planned transaction is supported by the fact that the phone with which Mr. Shorter was communicating with police was found in the driver's side door.
 - b) This potential for a change in seating provides a reasonable alternate explanation for the one pill being on the driver's seat. The accused may have not noticed the pill being there if and when he took over temporary control of the vehicle as part of any repair process.
 - c) Alternatively, the accused could only have been driving the vehicle because Mr. Shorter asked for a lift as a result of Mr. Shorter's car troubles.
 - d) There is no evidence that the accused ever had or took control of the suit bag in which the drugs in the hotel were found. Given that the only armoire was in the purple room, it would have been necessary for Mr. Shorter to any suit bag containing the drugs in that armoire.
 - e) The drugs were not in plain view in the hotel room, creating the prospect that the accused may have been unaware of them.

- [64] I conclude that these alternative scenarios flow logically from the available evidence, and do not require the court to speculate. As such, assessing the evidence as a whole, I am left with a reasonable doubt on the question of possession.
- [65] As was the case in Harper, I find myself once again in a position akin to Justice Kent's in R. v. Bhatti, 2018 BCSC 1657, where he concluded:
- [42] If this were a civil case to be determined on the balance of probabilities, I would very likely conclude that on the evening of March 15, 2016 Mr. Bhatti was indeed in possession of drugs for the purpose of trafficking
- [43] But the standard of proof in this case is not the balance of probabilities -- it is proof beyond a reasonable doubt. While I am inclined to disbelieve much of Mr. Bhatti's evidence, I am left in reasonable doubt by it
- [44] I may be inclined to conclude it was more likely than not that Mr. Bhatti possessed the drugs for the purpose of trafficking, but it is indeed reasonably possible for the facts of this case to be equally consistent with simple possession as Mr. Bhatti claims. In such circumstances, an acquittal is mandatory.
- [66] Like Bhatti, this is a case that turns on the burden of proof. Although I was able to find, on a balance of probabilities, that the accused was a member of a conspiracy for purposes of the application of the co-conspirators' exception, I am unable to make a finding that he was in possession of illegal drugs for the purposes of a finding of guilt on the much higher reasonable doubt standard. Although there was certainly some overlap between the two assessments, they apply different tests for different purposes. In short, the additional evidence secured by the application of the exception was not enough to overcome the heightened burden of proof and indeed, to some extent, the additional evidence supports a not guilty finding by adding an air of reality to the suggestion that there was car trouble that could have resulted in people not being in their usual positions within the vehicle.

IV. VERDICT

- [67] Mr. Bathie, please stand. Based on my review of the evidence as a whole in this case, I am not satisfied beyond a reasonable doubt that the only rational inference is one of guilt. I find you not guilty on both counts.

"The Honourable Mr. Justice Branch"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/22/17/2022BCSC1744.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-bathie-2022>

Prepared on 29 October 2026 · Esheria