
CANADA / JUDGMENT

R. v. Bhatti

2018 BCSC 1657

COURT

Supreme Court of British Columbia

DECIDED

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2018 BCSC 1657 R. v. Bhatti

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Bhatti,

2018 BCSC 1657

Date: 20181016

Docket: 44085

Registry: Prince George

Regina

v.

Manjeet Singh Bhatti

Before: The Honourable Mr. Justice Kent

Oral Reasons for Judgment

Counsel for the Crown:

C.E. Lee Onman

Counsel for the Accused:

Anthony H. Zipp

Place and Dates of Trial:

Prince George, B.C.

September 5-7, 2018

Place and Date of Sentencing:

Prince George, B.C.

October 16, 2018

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INTRODUCTION

- [1] On a two-count Indictment Mr. Manjeet Singh Bhatti stands charged that, contrary to s. 5(2) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19 (CDSA), on or about the 15th day of March 2016, at or near the City of Prince George, in the Province of British Columbia, he did:
1. unlawfully possess a controlled substance, to wit: methamphetamine (N_x-dimethylbenzeneethanamine) for the purposes of trafficking; and
 2. unlawfully possess a controlled substance, to wit: heroin (diacetylmorphine) and fentanyl (N-(1-phenethyl-4-piperidyl) propionanilide) for the purposes of trafficking.
- [2] Mr. Bhatti pleaded not guilty to the charges and the matter proceeded to a three-day trial in Prince George on September 5-7, 2018.
- [3] The Crown called the evidence of three witnesses from the RCMP. Csts. Plant and Jacobowski testified to the arrest and search of Mr. Bhatti on March 15, 2016 and the handling/examination of the substances found in his possession at that time. Cst. Morris provided expert opinion testimony respecting matters related to the illegal drug trade including the indicia of trafficking.
- [4] At the conclusion of the Crown's case, Mr. Bhatti elected to testify on his own behalf. As a result, there is little or no controversy respecting the basic facts of the case. On behalf of Mr. Bhatti counsel conceded that, at a minimum, Mr. Bhatti is guilty of the included offences of "simple" possession of the controlled substances contrary to s. 4(1) of the CDSA. The real dispute between the parties is whether the Crown has proved beyond a reasonable doubt that Mr. Bhatti possessed those substances for the purposes of trafficking within the meaning of s. 5(2) of the CDSA.

- [5] For the reasons that follow, I find that the Crown has not proved beyond a reasonable doubt the charges of possession for the purpose of trafficking contrary to s. 5(2) of the CDSA, however, I find Mr. Bhatti guilty of the included offences of "simple" possession of the controlled substances contrary to s. 4(1) of the CDSA.

BACKGROUND FACTS

- [6] Mr. Bhatti is currently 43 years old. He has been addicted to hard drugs such as heroin and crystal methamphetamine for over 20 years. During that period, he has been in trouble with the law on many occasions.
- [7] On January 30, 2016 Mr. Bhatti was arrested and charged with assault contrary to s. 266 of the Criminal Code, R.S.C. 1985, c. C-46. He was released on an undertaking. Three conditions of that undertaking included that he:
1. would have no contact directly or indirectly with Ms. Sara Plamondon;
 2. was prohibited from possessing any knives; and
 3. was to abstain from the consumption or possession of any controlled substances under the CDSA.
- [8] On March 15, 2016 the RCMP received information that, contrary to the conditions of the undertaking, Mr. Bhatti was in the company of Ms. Plamondon at the College Heights Motel in Prince George. Csts. Plant and Jacobowski each responded to that location in their respective police vehicles. Mr. Bhatti was leaving the motel premises driving his black Cavalier motor vehicle. Ms. Plamondon was in the passenger seat of that vehicle. Mr. Bhatti was arrested for breach of his undertaking.
- [9] Mr. Bhatti was searched as was his vehicle. Photographs were taken of the vehicle and its contents. No drugs were discovered at first instance, however, among other things, the vehicle contained two knives and drug paraphernalia including a "cooking spoon", a lighter, a digital scale, a syringe on the floor, and syringe wrappers. A cellphone was also found.
- [10] A further search was conducted of Mr. Bhatti at the RCMP detachment. A baggie of heroin was found in his back pocket. A black vinyl bag containing a baggie of heroin and a baggie of crystal methamphetamine was found inside his pants. The sum of \$1,750 in cash was also found on his person. The cash comprised four \$100 bills, 12 \$50 bills, 37 \$20 bills and one \$10 bill, all in crisp, pristine condition and folded in the middle.
- [11] The baggie containing the crystal methamphetamine weighed 8.26 grams. The two baggies containing heroin and fentanyl weighed 4.34 grams and 2.35 grams respectively.

- [12] Samples were taken from each of the bags and sent to Health Canada for analysis. Examination confirmed, and Certificates of Analyst were issued certifying, that the substances in question were methamphetamine and heroin/fentanyl. The substances on the electronic weigh scale were examined and certified to be cocaine, methamphetamine, and cannabinoids.
- [13] The police officers did not examine either the electronic scale or the cellphone found in Mr. Bhatti's car to see if they were working. No other electronic devices were found on Mr. Bhatti's person or in his vehicle. The data on the cellphone was neither accessed nor retrieved for examination.

MR. BHATTI'S TESTIMONY

- [14] Mr. Bhatti testified that the drugs found in his possession on March 15, 2016 were for his personal use and were not for the purpose of trafficking. He says he has been a heroin addict for over 20 years and that he uses a combination of heroin and crystal methamphetamine to "balance" and "counteract" each other to prevent an overdose. Heroin is a "downer" whereas methamphetamine is an "upper" and mixing the two together "levels it out", so he says. This, of course, is his explanation for having two different types of drugs in his possession at the time of his arrest.
- [15] Mr. Bhatti testified that in March 2016 his habit was to consume 1 to 1.5 grams of heroin a day, which he mixed with methamphetamine on a 1:2 ratio. One gram is 10 "points" and usually will be consumed by way of 10 separate "shots" (injections) throughout the day.
- [16] Mr. Bhatti testified that the \$1,750 found on him at the time of his arrest had been given to him by his mother the day before. He says that his parents were "sick of me going to jail for crimes to support my habit" and that they would often help him out with money for that purpose. He does not have a bank account and the money was in crisp and pristine because his mother had withdrawn it from her bank in that condition.
- [17] Mr. Bhatti says that he was not formally employed and had no job in March 2016 because of his drug habit. His parents own three rental properties in Prince George and he "worked" for them collecting rent (usually cash), doing maintenance, and dealing with tenants.
- [18] Mr. Bhatti does not file tax returns. He says he received disability income from social assistance in the amount of \$1,275 a month and supplemented this by the money provided to him by his parents and also by buying and selling vehicles and vehicle parts from time to time. On cross-examination, he stated that his estimated annual income "all in" totalled "\$20-\$25,000-ish".

- [19] Mr. Bhatti says he buys his drugs in quantity from a trafficker each month. In 2016, he paid \$1,800 to \$2,400 for an ounce of heroin, which would last a little over a month, depending on how much he consumed a day. He also bought his methamphetamine by the ounce or half ounce at a cost of \$450 to \$600 in 2016. He says he had regular, consistent suppliers who tended to give him "better deals" than what an unknown customer would pay on the streets.
- [20] Mr. Bhatti testified that he did indeed own the electronic scale that was found in his vehicle, however it was no longer working and the last time he had used it was in the previous year. He says that even though he buys his drugs from acquaintances whom he has mostly known for a long time, "I always weigh(ed) to be on the safe side" to ensure he is not being cheated.
- [21] Mr. Bhatti testified that the cellphone found in his car was broken and he did not have a working cellphone on him at the time of his arrest. He testified that the syringe packages found in his vehicle were for his personal use, although the syringe and open syringe package found in the car at the time of his arrest had just been used by his girlfriend, Ms. Plamondon, shortly before the police stopped the vehicle.
- [22] Mr. Bhatti testified that he had stayed with his girlfriend at the College Heights Motel the previous night at which time they had gotten into a fight and he was locked out. He got another room for himself that night but the room did not have an operable lock on the door. It was for this reason, he says, that he had his stash of drugs and cash on his person at the time that he and Ms. Plamondon left the motel to drive to Walmart.
- [23] Mr. Bhatti's testimony was not effectively challenged on cross-examination - indeed, he was not challenged at all on several key parts of his testimony which thus stands uncontradicted. Rather, the cross-examination was mostly focused on his annual income and the cost of the drugs he claimed to consume on a monthly basis. In final argument, Crown counsel relied heavily on an inference to establish possession for the purpose of trafficking; the cost of Mr. Bhatti's habit, according to the quantities and prices to which he testified, approximated some \$60,000 - \$70,000 per annum, three times more than the amount Mr. Bhatti claimed to receive as an annual income. This "huge difference" was, Crown counsel claimed, entirely consistent with Mr. Bhatti supplementing his income as a drug trafficker.
- [24] It should be noted that neither the inference nor the proposition was directly put to Mr. Bhatti during his cross-examination. It is arguable that this breached the rule in *Browne v. Dunn* (1893) 6 R. 87 (H.L.), however no objection was made in that regard by the defence.

THE EXPERT EVIDENCE OF CST. MORRIS

- [25] Cst. Morris has not had any previous involvement with Mr. Bhatti and was not part of the investigation team in this particular case. His only involvement in the file has been to provide expert evidence on the drug trade in Prince George and the indicia of drug trafficking activity.

[26] Cst. Morris has personally handled many cases involving individuals with long-term drug addiction. He estimates this includes some 50-60 individuals with a habit of 10 years or more, and over a dozen with more than 20 years in that regard.

[27] Cst. Morris confirmed that there are no "hard and fast rules" respecting the consumption habits of drug users. Each user is different as is each "individual situation". He is personally aware of more than a dozen people who consume 1 gram or more of heroin a day and at least one who consumes 3.5 grams a day.

[28] Cst. Morris testified that drug traffickers are commonly drug users as well. Drug addiction is expensive and traditional employment is difficult for drug addicts. Selling drugs to raise money to support their habit is commonplace for people with addiction issues.

[29] Pricing in the drug trade depends upon the quantum of the drugs being purchased. As the bulk increases, the price drops. "Therein lies the profit for drug dealers" who buy in bulk and then sell the product "by point".

[30] Cst. Morris testified that common paraphernalia most drug users have in their possession includes:

- pipes;
- straws
- cook spoons;
- cotton balls;
- syringes;
- steel wool; and
- personal containers for drugs (and also for needles).

[31] Common indicia consistent with drug trafficking as opposed to simply drug consumption include:

- multiple meetings of short duration (i.e., transactions);
- quantities and varieties of drugs in a person's possession beyond what a simpler user would usually have;
- larger than normal quantities of cash (\$500 would be a large amount for an average person);
- multiple operational cellphones;
- digital scales (for weighing/apportioning product);
- a variety of clean, unused packaging for delivering product to customers (e.g., baggies); and
- "score sheets" documenting transactions and debts.

[32] The extent of paraphernalia present will often vary depending on whether the trafficking is occurring on the street, in a car (dial-a-dope), or in a house. The presence and combination of paraphernalia will usually increase as the expectation of privacy increases.

[33] In Mr. Bhatti's case, without objection by the defence, Cst. Morris expressed the opinion that the following indicia supported a conclusion of possession for the purposes of trafficking:

- the amount of drugs;
- the large sum of cash;
- the denominations of the cash - predominantly \$20 bills, which are the "bread and butter" of trafficking;
- the presence of a digital scale (users usually "eyeball" the amount and do not weigh out); and
- multiple substances on the surface of the scale (common because a variety of drugs is required for different customers).

[34] On cross-examination, Cst. Morris confirmed that he did not know whether the scale and cellphone found in Mr. Bhatti's possession was actually operational. He also confirmed that no packaging or score sheet was found at the scene.

[35] Cst. Morris was asked to consider the following scenario:

- an individual with a 20-year drug habit;
- daily usage of 2 grams (combination of heroin and methamphetamine);
- the heroin and methamphetamine are mixed;
- no working cellphone;
- no working scale;
- no score sheet;
- no packaging;
- \$1,700 cash; and
- the same quantity of drugs found on Mr. Bhatti.

He was challenged that this scenario was consistent with simple possession just as much as trafficking. After initially resisting that conclusion, Cst. Morris ultimately stated that it could be consistent with simple possession. On re-direct, he stated that simple possession "is possible" but in his opinion, it is "more indicative of trafficking".

APPLICABLE LAW

[36] In *R. v. Rochemont*, 2017 BCSC 930, I summarized certain fundamental legal principles applicable to criminal trials:

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] 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 criminal matters ... 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.

Evidence, Inferences and Credibility

...

- [104] The trial court is also entitled to draw inferences. An inference is a deduction of fact which is logically and reasonably drawn from other facts established in the case. It must not be speculation. The boundary separating permissible inferences from impermissible speculation can sometimes be difficult to draw, particularly in connection with circumstantial evidence.
- [105] Insofar as inferences and the standard of proof in criminal cases is concerned, if there are reasonable inferences other than guilt that can be drawn from the facts, the Crown's evidence does not meet the "proof beyond reasonable doubt" standard. Gaps in evidence can also result in inferences other than guilt. But all such inferences must be reasonable based on the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense: *R. v. Villaroman*, 2016 SCC 33.

[106] The assessment of a witness's oral testimony necessarily entails an assessment of credibility. The role of the court is not usually reduced to simply choosing between two or more versions of events. It is not an "all or nothing process". In determining facts, i.e., making findings as to what actually occurred in any given case, the court is free to reject some aspects of a witness's evidence and accept others and, indeed, to assign different weight to different parts of a witness's evidence.

[107] Accepting all or part of the testimony of any witness involves an assessment of credibility (truthfulness/honesty) and reliability (accuracy) of both the witness and the evidence. That in turn involves consideration of many different factors including:

- internal consistency of the witness's account of events;
- consistency with other evidence afforded by witnesses, documents or physical evidence;
- whether the evidence is reliably corroborated or contradicted by other evidence;
- the witness's ability/opportunity to observe the events in question and to reliably recall/communicate same;
- the demeanour of the witness and whether the questions are answered in a frank and forthright fashion without evasion, speculation or exaggeration;
- whether the witness has any interest in the trial outcome or has any motive to fabricate;
- whether (based on properly admissible evidence) the witness has "poor character for truthfulness"; and
- the inherent plausibility of the evidence and its consistency with the probabilities affecting the case as a whole.

[37] Mr. Bhatti gave evidence in this case and accordingly it is necessary for the court to consider the instruction and framework that was established in *R. v. W.D.*, [1991] 1 S.C.R. 742 at para. 28:

- 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.

[38] Sometimes a further component is added to this framework. In *R. v. C.W.H.*, [1991] B.C.J. 2753 (C.A.), Wood J.A. said:

24 I would add one more instruction in such cases, which logically ought to be second in the order, namely: If, after a careful consideration of all of the evidence, you are unable to decide whom to believe, you must acquit.

[39] It is important, within the context of the foregoing framework, to recognize that mere disbelief of the accused's evidence does not satisfy the burden on the Crown. To equate disbelief of an accused's evidence with proof of that accused's guilt is impermissible.

ANALYSIS, FINDINGS and CONCLUSIONS

[40] Mr. Bhatti admitted that he owned the drugs found in his possession. He says, however, that they were for his personal use only and not for the purpose of trafficking. The only issue in dispute in this case is therefore whether the Crown has proved beyond a reasonable doubt that Mr. Bhatti had possession of the drugs for the purpose of trafficking.

[41] It must be noted, as Cst. Morris testified, that drug traffickers are frequently also drug users and that it is not uncommon for the latter to traffic drugs in order to support their habit. The Crown argues that this is precisely the scenario that exists in the present case.

[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. His version of events is not reliably corroborated in any way and some of it is inherently implausible. The inference that the Crown asks me to draw based on the discrepancy between Mr. Bhatti's income and the amount of money required to support his habit, is sensible and persuasive.

[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. It is possible that the amount of drugs in his possession could have been for his personal use, particularly if he was using methamphetamine to "level out" the downer effects of the heroin. Personal use paraphernalia was present in his vehicle. His explanation for the presence of cash in pristine quality, while not corroborated, was not refuted. So too with his evidence about the inoperable condition of both the cellphone and the scale. Other common indicia of trafficking were not present i.e., more than one operable cellphone, score sheet(s), and unused packaging for customer's product. Nor was Mr. Bhatti observed engaging in suspicious short meetings with third persons, i.e. interactions consistent with a series of drug transactions.

[44] All of these factors combine to raise reasonable doubt. Like Cst. Morris, 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.

[45] Mr. Bhatti, please stand up.

- [46] On Count 1 of the Indictment that on March 15, 2016 you unlawfully possessed the controlled substance of methamphetamine for the purpose of trafficking contrary to s. 5(2) of the CDSA, I find you "not guilty". However, I find you guilty of the included offence of simple possession of that controlled substance contrary to s. 4(1) of the CDSA.
- [47] On Count 2 of the Indictment that on March 15, 2016 you unlawfully possessed the controlled substances of heroin and fentanyl for the purposes of trafficking, contrary to s. 5(2) of the CDSA, I find you "not guilty". However, I find you guilty of the included offence of simple possession of that controlled substance contrary to s. 4(1) of the CDSA.

"KENT J."

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