

CANADA / JUDGMENT

R. v. Cashman

2024 BCCA 317

COURT

British Columbia Court of Appeal

DECIDED

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2024 BCCA 317 R. v. Cashman

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Cashman,

2024 BCCA 317

Date: 20240909

Docket: CA48701

Between:

Rex

Respondent

And

Scott William Cashman

Appellant

Before:

The Honourable Chief Justice Marchand

The Honourable Justice Griffin

The Honourable Justice Horsman

On appeal from: An order of the Supreme Court of British Columbia,

dated May 30, 2022 (R. v. Cashman, 2022 BCSC 892,

New Westminster Docket X083326).

Counsel for the Appellant:

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Counsel for the Respondent:

J.N. Walker

M. Wheeler

Place and Date of Hearing:

Vancouver, British Columbia

May 1, 2024

Place and Date of Judgment:

Vancouver, British Columbia

September 9, 2024

Written Reasons by:

The Honourable Chief Justice Marchand

Concurred in by:

The Honourable Justice Griffin

The Honourable Justice Horsman

Summary:

The appellant was convicted of seven counts of possession of controlled substances for the purposes of trafficking. The appellant lived on the lower floor while a co-accused lived on the upper floor of a residence in Mission. During a warranted search, the police found controlled substances worth approximately \$850,000, over \$100,000 in cash, drug trafficking paraphernalia and firearms on the upper floor. The police found no drugs, cash, drug trafficking paraphernalia or firearms on the lower floor. No direct evidence tied the appellant to any of the drug trafficking items or firearms on the upper floor. The Crown case against the appellant was entirely circumstantial. The appellant advances three grounds of appeal. First, he contends the judge erred in law by admitting and relying on police expert opinion evidence regarding who would have knowledge of and access to a location where controlled substances are present for the purpose of trafficking. Second, he argues the judge materially misapprehended the evidence in three respects, resulting in a miscarriage of justice. Third, he asserts the verdict is unreasonable. Held: Appeal dismissed.

The judge inaccurately summarized the police expert opinion evidence about access and trust. However, the opinion actually given was logically relevant, legally relevant, necessary and admissible. Although isolated passages in the judge's reasons for judgment appeared to show she

misapprehended certain evidence, in two cases the appellant did not establish an actual misapprehension. Further, the appellant did not establish that any of the alleged misapprehensions was material. Finally, the judge's findings were open to her. The verdict was not unreasonable.

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Reasons for Judgment of the Honourable Chief Justice Marchand:

Introduction

- [1] On May 30, 2022, in reasons indexed at 2022 BCSC 892 [RFJ], the trial judge convicted Scott William Cashman of seven counts of possession of controlled substances for the purposes of trafficking, contrary to s. 5(2) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19 [CDSA]. The controlled substances were found in a two-storey residence shared by Mr. Cashman and his co-accused, Christopher Leigh Harmes, on Columbia Street in Mission.
- [2] Mr. Cashman lived on the lower floor while Mr. Harmes lived on the upper floor of the Columbia Street residence. The two floors were open to one another but each had its own kitchen, bedrooms, living space, bathroom(s) and laundry.
- [3] During a July 16, 2020 warranted search, the police found controlled substances worth approximately \$850,000, over \$100,000 in cash, drug trafficking paraphernalia and firearms on the upper floor, mostly in Mr. Harmes' bedroom. The police found no drugs, cash, drug trafficking paraphernalia or firearms on the lower floor. No direct evidence tied Mr. Cashman to any of the drug trafficking items or firearms on the upper floor. The Crown case against Mr. Cashman was entirely circumstantial. Mr. Cashman did not testify at trial.
- [4] Mr. Cashman appeals his convictions. He advances three grounds of appeal. First, he contends the judge erred in law by admitting and relying on the expert opinion evidence of Sergeant Rettie regarding who would have knowledge of and access to a location where controlled substances are present for the purpose of trafficking. Second, he argues the judge materially misapprehended the evidence in three respects, resulting in a miscarriage of justice. Third, he asserts the verdict is unreasonable.
- [5] For the reasons that follow, I would dismiss the appeal.

Reasons for Judgment of the Trial Judge

Introduction

- [6] The judge began her reasons by providing a brief overview of the circumstances and the position of the parties. She noted the parties had filed three sets of admissions of fact, including an admission that the controlled substances located at the Columbia Street residence were inconsistent with personal use and were possessed for the purpose of trafficking. The only issue was whether Mr. Cashman had knowledge of and control over--and thus possession of--the controlled substances located on the upper floor of the residence.

Summary of the Evidence

- [7] The judge next summarized the evidence. She noted she would incorporate the parties' admissions and indicate her findings of fact.

Surveillance Evidence

- [8] Between April and July 2020, members of the Ridge Meadows RCMP conducted surveillance on Mr. Harmes, Mr. Cashman, the Columbia Street residence and a residence on Garden Street in Maple Ridge. The surveillance revealed various people attending the rear of the Garden Street residence in a pattern the judge found to be consistent with efforts to conceal illicit activity taking place there. The police subsequently recovered further controlled substances at the Garden Street residence. The surveillance also established a connection between Mr. Cashman, Mr. Harmes and both residences: RFJ at paras. 10-11, 48.
- [9] Of note, on April 1, 2020, Mr. Cashman arrived at the Garden Street residence in his truck at 10:36 a.m. He walked from his truck to the rear of the residence carrying a duffel bag. About 40 minutes later, he walked back to his truck from the rear of the residence carrying the same bag. At approximately noon, he drove his truck from the Garden Street residence to the Columbia Street residence where he entered the residence, again carrying the same bag: RFJ at para 11.
- [10] Also of note, on April 30, 2020, at 2:50 p.m., Mr. Cashman and Mr. Harmes were seen leaving the Columbia Street residence together in Mr. Harmes' truck. At 3:29 p.m., the truck was seen entering a manufactured home park on the Lougheed Highway. At 4:00 p.m., Mr. Cashman and Mr. Harmes were seen walking back to the truck. Mr. Cashman was carrying a bag which he placed in the truck. At 4:14 p.m., the truck arrived at the Garden Street residence and backed into the driveway. Soon after, a male arrived and entered by the front door. Mr. Harmes was observed inside: RFJ at para. 14.
- [11] Later, at 5:32 p.m., another male arrived at the Garden Street residence carrying a duffel bag and walked towards the rear of the residence. At 6:22 p.m. Mr. Harmes was seen with a known associate outside the Garden Street residence. Mr. Harmes returned into the Garden Street residence alone. At 6:51 p.m., Mr. Cashman and Mr. Harmes got into Mr. Harmes' truck and left the Garden Street residence, with Mr. Cashman driving. At 7:19 p.m. the truck was observed back at the Columbia Street residence: RFJ at para. 14.
- [12] The judge reviewed many other observations made during the surveillance of Mr. Cashman and Mr. Harmes, but the details are not germane to the appeal: see RFJ at paras. 10-21.

The Search of the Columbia Street and Garden Street Residences

- [13] On July 16, 2020, the police executed search warrants at the Columbia and Garden Street residences. They recorded a "pre-search video" of the Columbia Street residence, which was entered as an exhibit at trial.

- [14] The front door to the Columbia Street residence had a keypad lock. All areas of the residence were accessible from the front entrance. There was no physical separation between the two floors, and no internal doors were locked when the police executed the warrant. The judge found there was no evidence that any of the inside doors had functioning locks. Surveillance cameras were located on the corner of the deck and outside the front door: RFJ at para. 24.
- [15] The lower floor of the Columbia Street residence consisted of two bedrooms (including Mr. Cashman's), a kitchen, a bathroom, a living room, and an entrance to the garage. A monitor for the property's CCTV camera system was located in Mr. Cashman's bedroom. The police also located a hard drive bolted to the wall inside Mr. Cashman's bedroom closet. The hard drive was connected to the TV and monitor in the bedroom. No controlled substances or paraphernalia were located on the lower floor of the residence: RFJ at paras. 25-26.
- [16] When the police arrived, Mr. Harmes attempted to exit the Columbia Street residence through his upstairs bedroom window. The police directed him to put down a duffel bag he was carrying and remain in place. The subsequent search of Mr. Harmes' bedroom and en suite bathroom located very significant amounts of controlled substances, drug trafficking paraphernalia, two firearms (one restricted and one prohibited), multiple firearm magazines and many rounds of ammunition. A significant quantity of the controlled substances was found in the duffel bag Mr. Harmes had attempted to exit with: RFJ at paras. 27-34.
- [17] The police located further controlled substances and drug trafficking supplies and paraphernalia in the upstairs "open-concept" kitchen in close proximity to Mr. Harmes' bedroom: RFJ at para. 35. The judge described the appearance of the kitchen as follows:
- [35] On the stove top, there was a Magic Bullet blender containing a blue mixture of fentanyl, caffeine, and etizolam; a glass Pyrex measuring cup containing a mixture of fentanyl and caffeine; and a plastic container of blue food colouring. In the refrigerator-freezer, there was a 3.78 litre jug of methyl hydrate, and located behind it was a clear plastic bag containing 600 grams of methamphetamine, which was wet. I find this was the area where the bulk fentanyl was prepared for distribution, by mixing it in the blender and adding the blue food colouring. This was all in plain view in the open-concept kitchen.
- [18] In the closet of another bedroom on the upper floor the police found a shoe box containing, among other things, \$102,725 in Canadian currency and a London Drugs receipt dated June 17, 2020 in the name of Mr. Cashman: RFJ at para. 37.
- [19] In total, the police found the following quantities of controlled substances in Mr. Harmes' duffel bag and on the upper floor of the Columbia Street residence: 3.5 kilograms of fentanyl; 1.636 kilograms of methamphetamine; 284 grams of cocaine; 509 grams of ketamine; 844 codeine pills; 558 hydromorphone pills; and 40 morphine pills: RFJ at para. 39.

- [20] The police found additional controlled substances and \$6,993 in Canadian currency at the Garden Street residence. During their search of the Garden Street residence, the RCMP also found a note posted on the interior of the front door stating "Use back door not this one": RFJ at paras. 40-41

Expert Evidence

- [21] Sgt. Rettie was qualified as an expert in the use of, price, packaging, and distribution of controlled substances, as well as the structure and hierarchy of drug distribution networks. The judge stated she accepted his evidence and relied on it to make factual findings: RFJ at para. 42.
- [22] Sgt. Rettie testified the value and quantity of drugs at the Columbia Street and Garden Street residences were consistent with different purposes. In his view, the Columbia Street residence was likely used to store, and the Garden Street residence to distribute, wholesale quantities of controlled substances. Wholesale drug traffickers often use multiple sites to reduce the risk of detection by the police or rival groups. Concealing and ensuring the security of these sites is essential to the success of such operations: RFJ at paras. 43-48.
- [23] The judge found the fact those attending the Garden Street residence entered through the rear entrance was consistent with their efforts to conceal an illicit operation at that location. She further found the firearms and security system at the Columbia Street residence were security measures put in place to protect the valuable commodities being stored there. At the same time, she noted "Sgt. Rettie acknowledged that real time monitoring of a security system was more effective than recording. He also acknowledged that a surveillance system that only records could be incriminating and, in his opinion, ill-advised in the context of illegal activity": RFJ at para. 48.
- [24] Sgt. Rettie testified that drug trafficking is a "cash business", with the cash being stored with those at higher levels within the organization. Large amounts of cash are hard to deposit in a bank without attracting attention. The judge found this explained why \$102,725 was found in the upstairs bedroom of the Columbia Street residence: RFJ at para. 49.
- [25] The judge also stated, based on the expert evidence, that "[t]rust is critical to the success of a drug trafficking operation. Accordingly, only those trusted persons in the organization would have knowledge and access to the locations": RFJ at para. 50 (emphasis added).

Legal principles

- [26] The judge began by considering the legal principles applicable to the charges and evidence before her: RFJ at paras. 51-62. Mr. Cashman does not take issue with the judge's statement of these principles.

[27] In brief, s. 2(1) of the CDSA adopts the definition of possession set out in s. 4(3) of the Criminal Code, R.S.C., 1985, c. C-46 [Code]. The Crown relied on s. 4(3)(b) to establish Mr. Cashman had constructive or joint possession over the controlled substances seized from the Columbia Street residence. To prove constructive possession, the Crown was required to prove beyond a reasonable doubt Mr. Cashman had knowledge of the nature of the prohibited item or substance and some measure of control over it: RFJ at paras. 52-53, citing *R. v. Ahmadzai*, 2012 BCCA 215 at para. 26.

[28] The judge then reviewed a number of additional leading authorities concerning constructive possession, including *R. v. Choudhury*, 2021 ONCA 560. In that case, the Ontario Court of Appeal allowed Mr. Choudhury's appeal against convictions for numerous drug trafficking and firearms offences. Justice Jamal (as he then was), writing for the Court, summarized the relevant legal principles as follows:

- Constructive possession is established when an accused does not have physical custody of an object but knowingly has it in the actual possession or custody of another person or has it in any place for their own or another's use or benefit: Criminal Code, s. 4(3)(a); *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253, at para. 17; and *R. v. Lights*, 2020 ONCA 128, 149 O.R. (3d) 273, at para. 47.
- Knowledge and control are essential elements of constructive possession, which is established when the Crown proves beyond a reasonable doubt that the accused: (i) has knowledge of the character of the object said to be possessed; (ii) knowingly puts or keeps the object in a particular place, whether or not the place belongs to or is occupied by the accused; and (iii) intends to have the object in the place for the use or benefit of the accused or another person: *Morelli*, at paras. 15, 17; *Lights*, at paras. 44, 47.
- Tenancy or occupancy of a place where an object is found does not create a presumption of possession: *Lights*, at para. 50; *R. v. Watson*, 2011 ONCA 437, at para. 13; *R. v. Lincoln*, 2012 ONCA 542, at paras. 2-3; and *R. v. Bertucci* (2002), 2002 CanLII 41779 (ON CA), 169 C.C.C. (3d) 453 (Ont. C.A.), at para. 18.
- When the Crown relies largely or wholly on circumstantial evidence to establish constructive possession, a conviction can be sustained only if the accused's knowledge and control of the impugned objects is the only reasonable inference on the facts. The trier of fact must determine whether any other proposed way of looking at the case as a whole is reasonable enough to raise a doubt about the accused's guilt, when assessed logically and in light of human experience and common sense: see *R. v. Villaroman*, 2016 SCC 33, [2016] 1 S.C.R. 1000, at paras. 55-56; *Lights*, at para. 39; and *R. v. Stennett*, 2021 ONCA 258, at paras. 60-61.

[RFJ at paras. 54-58, citing *Choudhury* at para. 19]

[29] The judge noted the Crown's case was entirely circumstantial and that an inference of guilt drawn from circumstantial evidence can be made where it is the only reasonable inference available on that evidence: RFJ at paras. 59-61, citing *R. v. Villaroman*, 2016 SCC 33; *Choudhury*; and *R. v. Gibson*, 2021 ONCA 530 at paras. 77-78.

Analysis

- [30] Mr. Cashman submitted there was no evidence to establish he had knowledge of or control over the controlled substances located on the upper floor of the Columbia Street residence. He submitted the evidence established he lived on the lower floor and there was no basis upon which the judge could infer he ever attended the upper floor: RFJ at para. 64.
- [31] The judge agreed with Mr. Cashman that "tenancy or occupancy of a place where an object is found does not create a presumption of possession": Choudhury at para. 19. However, the judge distinguished Mr. Cashman's circumstances from those in Choudhury. The case against Mr. Choudhury consisted of his possession of a key to a lockbox that contained controlled substances. The lockbox was located within a locked room but the lockbox was not itself locked. Mr. Choudhury's appeal was allowed on the basis others could have placed the contraband within the lockbox without his knowledge. In contrast, in this case, the judge found there was a substantial body of evidence to establish Mr. Cashman had possession of the drugs at issue, beyond the mere fact he was residing at the Columbia Street residence: RFJ at paras. 65-66.
- [32] The judge noted the front door entry provided unrestricted access to both levels of the residence. Contrary to defence submissions, she found there was no evidence to suggest any of the interior doors had functioning locks. She also noted the receipt in Mr. Cashman's name that was found inside the shoe box in the upstairs bedroom where the police located the backpack full of cash. She found nothing prevented Mr. Cashman and Mr. Harmes from entering one another's bedrooms: RFJ at para. 67.
- [33] The judge emphasized the monitor and hard drive for the residence's security system were inside Mr. Cashman's bedroom. The judge stated Sgt. Rettie explained security is critical to those engaged in a drug trafficking operation. The judge found this is precisely why the residence had firearms near the controlled substances as well as a security system: RFJ at para. 67.
- [34] The judge noted there was no evidence regarding how the security cameras operated (live monitoring or recording). She found this lack of evidence did not detract from the significance of the security system being located in Mr. Cashman's bedroom. If Mr. Cashman were completely detached from the drug trafficking operation, then it would defy logic and common sense for the security system's monitor to be located in his bedroom: RFJ at para. 68.
- [35] The judge reviewed the circumstances in *R. v. Dipnarine*, 2014 ABCA 328 in some detail and related them to the facts of Mr. Cashman's case. In *Dipnarine*, large quantities of controlled substances were found in plain view in locations that were accessible to both accused. In particular, in the middle of a large unfinished room in the basement was a table on which there were several baggies of drugs containing soft cocaine or crack cocaine, as well as empty baggies, a digital scale, a pan with cocaine residue and scissors and a knife.

- [36] At para. 11, the Alberta Court of Appeal remarked "[n]othing in the photos [of the basement] suggests that anything else was happening in that location other than cutting the drugs into packages. No adult with a modicum of discernment or life experience would fail to realize immediately on seeing it what the condition of that location indicated". At para. 21, the Court further stated "to infer, without evidence, that the basement was somehow out of any range of consent or control by the appellant has no reality". In this case, in the judge's view, the same could be said regarding Mr. Cashman's suggestion he had no access to, or knowledge of, what was occurring on the upper floor of the Columbia Street residence: RFJ at para. 70.
- [37] The judge next underscored the importance of trust to those engaged in a drug trafficking operation. She inferred from the fact the drugs and drug trafficking paraphernalia were in plain view throughout the upper floor of the Columbia Street residence that "Mr. Harmes was, at the very least, confident that Mr. Cashman would not interfere with his illicit operation." And, "[a]pplying logic and common sense", she concluded "it [was] inconceivable that Mr. Harmes would expose his valuable illicit drug operation to someone outside his trusted group of associates, especially someone residing within his own residence": RFJ at para. 71.
- [38] The judge explained her finding was supported by the surveillance evidence showing Mr. Cashman and Mr. Harmes engaged with each other outside of the Columbia Street residence. In particular, the two had together attended both the location where the drugs were stored (the Columbia Street residence) and where they were distributed (the Garden Street residence) in circumstances the judge found it was reasonable to infer related to drug trafficking activity: RFJ at para. 72.
- [39] Mr. Cashman asserted he had no knowledge of the drugs at the Columbia Street residence and posited what he characterized as a reasonable alternative explanation for his attendance at the Garden Street residence, namely that he was working in the garage at the rear of the property. After considering the totality of the circumstances, the judge rejected Mr. Cashman's posited explanation:
- [73] I refer back to the expert's opinion regarding the need for those engaged in an ongoing drug trafficking operation to minimize the risk of their activity being compromised. Given the necessity to avoid detection, it would be a remarkable coincidence if Mr. Cashman lived in a residence with someone engaged in a drug trafficking operation and also used a workshop inside a garage on the property of a residence used as a distribution site by the same drug operation. These circumstances, viewed logically and in light of human experience, are not capable of supporting that alternative theory. It is implausible that Mr. Harmes - who kept two firearms to protect himself from threats to his operation - would permit his drug operation to be exposed by permitting Mr. Cashman to not only live in the Columbia Street Residence where the drugs were mixed and stored, but also attend the Garden Street Residence where the drugs were distributed. Like the Columbia Street Residence operation, the drug operation at the Garden Street Residence was careful to avoid detection - the note

posted to the interior of the front door that stated "Use back door not this one" is one example of such a precaution. I am not prepared to accept that Mr. Cashman's presence at the Garden Street Residence was a mere coincidence, as to do so would be plainly inconsistent with common sense.

- [40] The judge acknowledged there was no evidence as to when or how long the controlled substances were present at the Columbia Street residence. However, the blender and various other items used to mix and dye fentanyl were in plain view in the upstairs kitchen and were accessible to anyone in the residence. The judge found the drug operation was not concealed in any way from Mr. Cashman: RFJ at para. 75.
- [41] Having considered the cumulative effect of all of the evidence, the judge concluded the only reasonable inference was Mr. Cashman had knowledge the drugs were located in the Columbia Street residence and a degree of control over them. The judge therefore found Mr. Cashman guilty of possession of controlled substances for the purposes of trafficking: RFJ at paras. 77-79.

On Appeal

Issue One: Did the judge err in her treatment of the expert evidence tendered by Sgt. Rettie?

Mr. Cashman's Position

- [42] As noted above, Sgt. Rettie was qualified as an expert "in the use of, price, packaging, and distribution of controlled substances, as well as the structure and hierarchy of drug distribution networks": RFJ at para. 42. The vast majority of his evidence was not controversial and is not at issue on appeal.
- [43] Mr. Cashman contends the judge erred in admitting and relying on Sgt. Rettie's opinion that, in his experience, any person allowed access to locations where large quantities of drugs and large amounts of cash are stored "would be trusted persons within the [drug trafficking] organization" (the "impugned opinion").
- [44] Mr. Cashman argues the impugned opinion "went to the heart of the ultimate issue" and "necessitated a finding of possession". He maintains the opinion was neither legally relevant nor helpful.
- [45] Relying on *R. v. Sekhon*, 2014 SCC 15, *R. v. Burnett*, 2018 ONCA 790, and *R. v. Liu*, 2020 BCCA 235, Mr. Cashman says Sgt. Rettie's experience from other cases that only co-participant drug traffickers are permitted access to locations where drugs and money are stored had no bearing on whether he, Mr. Cashman himself, knew about the presence of drugs at the Columbia Street residence or had the ability to exercise control over them.

- [46] Mr. Cashman further says the judge was perfectly able to draw her own inferences concerning Mr. Cashman's state of knowledge and ability to exercise control over the drugs without Sgt. Rettie's opinion. Quoting Justice Doherty in *R. v. Abbey*, 2017 ONCA 624 at para. 94, Mr. Cashman maintains the impugned opinion carried "zero" probative value.
- [47] Finally, Mr. Cashman argues the judge's "wholehearted" acceptance of the impugned opinion effectively reversed the burden of proof by "unfairly cast[ing] the probabilities very much in the Crown's favour not on the basis of the evidence, but on the basis of Sgt. Rettie's opinion derived from other cases." Once the judge accepted the impugned opinion, Mr. Cashman submits alternative inferences apart from guilt were rendered "completely unreasonable" or, as the judge put it, "inconceivable": RFJ at para. 71.

The Authorities

- [48] I agree with Mr. Cashman that expert opinion evidence must always be handled with care. While often a key element in the search for truth, expert opinion evidence can also pose special dangers. One significant risk "is that the trier of fact will inappropriately defer to the expert's opinion rather than evaluate it": *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 at para. 17. Another is that expert evidence of questionable value will not be worth the time and expense associated with its admission: *R. v. D.D.*, 2000 SCC 43 at para. 56.
- [49] Over time, the requirements for the admissibility of expert opinion evidence have been clarified and tightened: *White Burgess* at para. 16. Today, the test for admissibility has two stages. In *White Burgess*, the Court explained:
- [23] At the first step, the proponent of the evidence must establish the threshold requirements of admissibility. These are the four Mohan factors (relevance, necessity, absence of an exclusionary rule and a properly qualified expert) ... Relevance at this threshold stage refers to logical relevance. Evidence that does not meet these threshold requirements should be excluded. Note that I would retain necessity as a threshold requirement.
- [24] At the second discretionary gatekeeping step, the judge balances the potential risks and benefits of admitting the evidence in order to decide whether the potential benefits justify the risks. The required balancing exercise has been described in various ways. In *Mohan*, Sopinka J. spoke of the "reliability versus effect factor" (p. 21), while in *J.-L.J., Binnie J.* spoke about "relevance, reliability and necessity" being "measured against the counterweights of consumption of time, prejudice and confusion": para. 47. Doherty J.A. summed it up well in *Abbey*, stating that the "trial judge must decide whether expert evidence that meets the preconditions to admissibility is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from the admission of the expert evidence": para. 76.

[Citations omitted; emphasis added.]

- [50] I also agree with Mr. Cashman that the admissibility of the impugned opinion is governed by Sekhon, Burnett and Liu. However, I disagree with Mr. Cashman that these authorities support the exclusion of the impugned opinion. To the contrary, looking at Sgt. Rettie's opinion as a whole (rather than merely an isolated part of it), they support its admission. Before explaining why I take that view, I will review Sekhon, Burnett and Liu.
- [51] In Sekhon, Mr. Sekhon was convicted of importation and possession of controlled substances for the purposes of trafficking. Border officers found and seized 50 kg of cocaine hidden in a concealed compartment in a pickup truck he attempted to drive from the United States into Canada: Sekhon at paras. 5-16. Like here, the case against Mr. Sekhon was circumstantial. The only issue at trial was whether he knew of the cocaine in the truck.
- [52] In addition to evidence about the circumstances of Mr. Sekhon's arrest and the discovery of a significant quantity of cocaine, the Crown adduced expert evidence from a police officer, Sergeant Arsenault. Sgt. Arsenault valued the seized cocaine between \$1,500,000 and \$1,750,000 at the wholesale level. He explained it takes time to recruit couriers and first-time couriers are not usually trusted with such large shipments. He also testified that, in his many years of experience, he had never encountered a "blind courier", meaning a courier who was unaware of their illicit cargo: Sekhon at paras. 18-20.
- [53] The trial judge rejected Mr. Sekhon's testimony that an acquaintance had asked him to drive the truck and that he had no knowledge of the cocaine. The trial judge found he knew about the cocaine based on:
- its amount and value;
 - Sgt. Arsenault's testimony, specifically including his testimony that, in his vast experience, he had never encountered a "blind courier";
 - evidence that Mr. Sekhon had detached the fob that controlled access to the secret compartment from his key chain before handing the keys to the border officer; and
 - additional items of circumstantial evidence that pointed towards Mr. Sekhon's guilty knowledge: Sekhon at para. 68.
- [54] On appeal to the Supreme Court of Canada, Mr. Sekhon argued the trial judge should not have admitted or relied on the expert evidence of Sgt. Arsenault relating to his extensive experience with blind couriers. The Court agreed with Mr. Sekhon that the impugned aspect of Sgt. Arsenault's opinion was inadmissible. However, a majority of the Court dismissed Mr. Sekhon's appeal on the basis of the curative proviso; even without the inadmissible opinion, the case against Mr. Sekhon was "overwhelming": Sekhon at para. 54.
- [55] Regarding the admissibility of Sgt. Arsenault's opinion, both the majority and the dissent reasoned the fact Sgt. Arsenault had never personally encountered a blind courier was neither legally relevant nor necessary to the issue facing the trial judge--namely, whether Mr. Sekhon knew about the cocaine: Sekhon at paras. 49, 80.

- [56] As the majority explained: "a fundamental tenet of our criminal justice system is that the guilt of an accused cannot be determined by reference to the guilt of other, unrelated accused persons": Sekhon at para. 49. In other words, Sgt. Arsenault's testimony was of no probative value in determining whether Mr. Sekhon knew about the cocaine. Further, Sgt. Arsenault's evidence was not necessary because determining whether Mr. Sekhon knew about the cocaine was not beyond the knowledge and experience of the judge. Finally, admission of this type of anecdotal evidence would effectively reverse the burden of proof. An accused in Mr. Sekhon's position would be required to somehow prove that, regardless of a particular expert's past experience, their situation was different: Sekhon at paras. 49-50.
- [57] In Burnett, Ms. Burnett was arrested at Toronto Pearson International Airport on her return from a vacation in Panama. Border officers referred Ms. Burnett and her three travelling companions for secondary screening where 1.5 kilograms of cocaine was found in secret compartments in each of the travellers' two suitcases. At trial, Ms. Burnett and a co-accused both testified they had no idea drugs were in their suitcases: Burnett at paras. 1-5.
- [58] The jury rejected Ms. Burnett's testimony and convicted her of importing cocaine. On appeal to the Ontario Court of Appeal, Ms. Burnett argued the trial judge erred by: (1) permitting a police expert witness, Corporal Connelly, to give anecdotal evidence that, in his experience, drug couriers know they are involved in illegal activity; and (2) failing to instruct the jury not to rely on the impugned evidence in its deliberations: Burnett at paras. 5-6, 31.
- [59] Relying primarily on Sekhon, the Court allowed Ms. Burnett's appeal. In the course of his reasons for the Court, Justice Watt acknowledged Cpl. Connelly's evidence was not as categorical as the evidence given by Sgt. Arsenault in Sekhon. In particular, in cross-examination, Cpl. Connelly accepted the possibility that Ms. Burnett and one or more of her travelling companions had been "unwitting dupes". Cpl. Connelly then added that, with the quantities of controlled substances involved, "there is a measure of trust and knowledge that's placed within [couriers]": Burnett at paras. 37, 74.
- [60] Justice Watt noted much of Cpl. Connelly's testimony paralleled unobjectionable testimony given by Sgt. Arsenault in Sekhon, including general opinion evidence about the trust relationship between principals and couriers involved in high-value shipments of contraband. Justice Watt held:
- [71] Much of Cpl. Connolly's testimony was to the same effect as those portions of the evidence of Sgt. Arsenault in Sekhon that the Supreme Court of Canada found unobjectionable. This evidence was about:
- I. chains of distribution;
 - II. the value of the drugs imported;
 - III. the recruitment of couriers;
 - IV. the relationship between couriers and other participants in the distribution chain; and

V. the trust relationship between the principals and couriers involved in the movement of high-value shipments.

This evidence, as in Sekhon, was of a general nature. Although its origins were in the experience of Cpl. Connolly, no effort was made to draw a link between Cpl. Connolly's prior experience and the appellant's state of mind, including her knowledge of the contraband in her suitcases.

- [61] Nevertheless, "[a]fter anxious consideration", Watt J.A. was satisfied the reception of the impugned portion of Cpl. Connolly's evidence, coupled with the absence of a remedial instruction to the jury, warranted setting aside Ms. Burnett's conviction and ordering a new trial: Burnett at para. 80. Justice Watt explained:
- [75] Despite the differences in the manner in which the experts testified in Sekhon and in this case, I am satisfied that Sekhon controls the determination of the admissibility issue in this case. What Sekhon enjoins is evidence that invites a trier of fact to reason from a generalized conclusion based on prior experience to a specific state of mind of the person charged. The guilt or knowledge of one (the person charged) cannot be determined by reference to the guilt or knowledge of unrelated others. And that prohibition applies here.
- [62] In Liu, during a warranted search, police found Mr. Liu in the basement of a suspected grow-op surrounded by hundreds of marihuana plants: Liu at paras. 4-10. Mr. Liu was subsequently convicted of production of marihuana. This Court allowed Mr. Liu's appeal on the basis the judge misapprehended and misused expert opinion evidence: Liu at paras. 41-44.
- [63] At trial, Mr. Liu testified he had been present at the house containing the grow-op a number of times to cook for a Mr. Liang. When Mr. Liu saw the marihuana plants, he asked Mr. Liang if the grow operation was legal. According to Mr. Liu, Mr. Liang said it was and showed him four licenses. Although the licences were not in Mr. Liang's name, were for other locations and had expired, Mr. Liu was unable to read them (due to his limited English skills). He trusted Mr. Liang. Regarding being found in the basement on the day of the search, Mr. Liu testified he had agreed to water the marihuana plants while Mr. Liang was out of town but had not begun that work: Liu at paras. 15-17, 20, 34.
- [64] The trial judge rejected Mr. Liu's evidence, in part, on the basis of expert opinion evidence the judge had misapprehended. In his reasons for judgment, the judge twice referred to the expert evidence of Staff Sergeant Murphy to the effect that only trusted individuals engaged in the work of a significant grow-op would be permitted to attend the grow-op. While Staff Sgt. Murphy testified in direct that people at the grow-op would be there "purposely", he acknowledged in cross-examination that a "trusted confidant" who was not necessarily a "criminal confederate" might also attend: Liu at paras. 33, 36-37. As Justice Bennett put it for the Court:

[37] [I]t is clear that the trial judge misapprehended the evidence of Staff Sergeant Murphy. He confused the notion that only trusted individuals would be permitted to attend at the grow operation (for whatever reason), with the notion that only trusted individuals who were working at the grow operation would be permitted to attend the same. In my view, this misapprehension was also material, as the mistake completely undermined Mr. Liu's evidence and critically influenced the trial judge's rejection of it.

[Emphasis in original.]

[65] Relying on Sekhon, Justice Bennett held Staff Sgt. Murphy's anecdotal evidence that anyone found at the grow-op had to be there to engage in criminal activity was inadmissible. The evidence was logically but not legally relevant. However, on my reading of her reasons, Bennett J.A. allowed the appeal on the basis the judge misapprehended Staff Sgt. Murphy's evidence and inferred guilt based on that misapprehension: Liu at paras. 40-44.

Analysis

[66] In my respectful view, Mr. Cashman's argument rests on a mischaracterization of Sgt. Rettie's evidence. Mr. Cashman's submissions focus on Sgt. Rettie's testimony that any person allowed access to locations where large amounts of drugs and cash are stored "would be trusted persons within the [drug trafficking] organization". However, the trial transcript reveals Sgt. Rettie's testimony was broader and also referenced persons trusted by the people in control of the organization. The key exchange arose in the Crown's direct examination of Sgt. Rettie:

Q I see. And so just in terms of what you were saying about a location used for larger quantities of drugs, mixing, where large amounts of cash are kept, and wanting to keep that location sort of more secret, so is it common in your experience to limit the number of people who have access to that type of storage, mixing site?

A Yes. You would want to limit the access and the amount of people that would know about it. And those people that did know about it or were allowed access would be trusted persons within the -- the organization or at least trusted to the person that's in control of the organization.

[Emphasis added.]

[67] Although the judge imperfectly summarized this aspect of Sgt. Rettie's evidence (RFJ at para. 50), its admissibility must be assessed based on the testimony actually given. I will address the judge's alleged misapprehension of Sgt. Rettie's opinion in the next section of my analysis. At this point, I only note that in her analysis, the judge did not refer to her imperfect summary of Sgt. Rettie's opinion. Rather, she referenced the importance of trust to those engaged in drug trafficking operations generally and inferred "Mr. Harmes was, at the very least, confident that Mr. Cashman would not interfere with his illicit operation": RFJ at para. 71.

- [68] There is no question Sgt. Rettie's opinion, as imperfectly summarized by the judge, would not be admissible for all the reasons advanced by Mr. Cashman. Sekhon, Burnett and Liu all make clear Mr. Cashman's guilt could not be determined by reference to the guilt of unrelated persons encountered by Sgt. Rettie in other investigations. But, what about the testimony actually given by Sgt. Rettie? Was that evidence inadmissible?
- [69] In my view, the evidence given by Sgt. Rettie is distinguishable from the evidence given by the experts in Sekhon, Burnett and Liu. Those cases all involved prosecutions of individuals found in possession of controlled substances. The outcomes turned on whether they knew they were in possession of contraband. If they knew, then they were obviously involved in the drug trafficking operation. In each case, the trial judges admitted expert opinion evidence that spoke directly to the issue of knowledge but was legally irrelevant and unnecessary.
- [70] Here, Mr. Cashman was not found in possession of any controlled substances. The Crown case was largely built on Mr. Cashman's arguably unfettered access to the upper floor of the Columbia Street residence coupled with the unlikelihood he would have access to such large quantities of drugs and cash if he was not involved in illicit activity. The Crown sought to establish Mr. Cashman's knowledge of the contraband by his access to it, not by expert opinion evidence derived from the knowledge of accused persons the expert had encountered in analogous cases.
- [71] In my view, Sgt. Rettie's evidence regarding access and trust was the type of general opinion evidence characterized as "unobjectionable" by Watt J.A. in Burnett at para. 71. Similar to the admissible expert evidence in Sekhon, Burnett and Liu, Sgt. Rettie's evidence boiled down to evidence, rooted in his experience, that only trusted individuals would have access to large quantities of controlled substances. Consistent with Sgt. Rettie's evidence, trusted individuals would obviously include, but not be limited to, individuals involved in the drug trafficking operation. I see no difference between Sgt. Rettie's full opinion regarding access and trust, and the admissible expert evidence in Sekhon and Burnett that drug traffickers place trust in their couriers, especially when dealing with large quantities of drugs: see Sekhon at para. 19; Burnett at para. 40.
- [72] Properly characterized, Sgt. Rettie's evidence did not do what Sekhon prohibits. It did not invite the judge to infer Mr. Cashman's guilt based on Sgt. Rettie's experience with other guilty individuals. Rather, it supported an inference Mr. Cashman was involved in illicit activity based on the trust reposed in him by Mr. Harmes. Sgt. Rettie's evidence was therefore both logically and legally relevant.
- [73] Of course, Mr. Cashman also submits Sgt. Rettie's evidence regarding access and trust was unnecessary. He argues the judge was perfectly capable of making the necessary findings about whether he was involved without Sgt. Rettie's evidence.

[74] There is some force to this aspect of Mr. Cashman's submission. Why is an expert opinion needed to establish only trusted individuals would have access to large quantities of drugs and cash? Isn't that obvious?

[75] "Necessity" is one of the four factors that must be established at the threshold stage of the admissibility analysis: *R. v. Mohan*, [1994] 2 S.C.R. 9 at 20, 1994 CanLII 80 (SCC). According to *Mohan*, expert opinion evidence must be necessary in the sense of providing information "which is likely to be outside the experience of a judge or jury": *Mohan* at 23, citing *R. v. Abbey*, [1982] 2 S.C.R. 24 at 42, 1982 CanLII 25 (SCC).

[76] As explained in *D.D.*, the necessity factor "exists to ensure that the dangers associated with expert evidence are not lightly tolerated": *D.D.* at para. 46. While some degree of deference is owed to a trial judge's discretionary determination of whether the *Mohan* requirements have been met in a particular case, that discretion cannot be used to water down the requirement of necessity: *D.D.* at para. 47. Mere helpfulness is not enough:

[E]xpert evidence must be necessary in order to allow the fact finder: (1) to appreciate the facts due to their technical nature, or; (2) to form a correct judgment on a matter if ordinary persons are unlikely to do so without the assistance of persons with special knowledge.

[*D.D.* at para. 47, citing *J. Sopinka, S.N. Lederman and A.W. Bryant, The Law of Evidence in Canada* (2nd ed. 1999), at p. 620, in turn citing *Mohan*, *supra*, at 23.]

[77] Here, Sgt. Rettie was qualified to give expert opinion evidence to assist the trier of fact understand how wholesale drug traffickers operate, a subject well outside the experience and knowledge of ordinary persons. Sgt. Rettie testified, among other things, about:

- how various drugs are manufactured and distributed;
- the value of various drugs at the wholesale and street level;
- the cash nature of the drug trafficking business;
- the frequent presence of firearms on involved properties, primarily to defend against intrusions by rivals;
- the frequent use of security cameras to protect drug trafficking operations from rivals or the police; and
- the importance of trust being afforded to people having access to storage and mixing sites.

[78] In my view, Sgt. Rettie's general opinion evidence regarding matters of security and trust were integral to and formed an essential part of his explanation of wholesale drug trafficking operations. Without that evidence, the judge would have been left with an incomplete picture of how such operations function.

- [79] Rather than merely permit the judge to leap, without analysis, to a conclusion about Mr. Cashman's guilt, Sgt. Rettie's general opinion evidence provided a foundation for her to draw appropriate factual inferences in the specific circumstances of Mr. Cashman's case. In other words, Sgt. Rettie's general opinion evidence was "necessary" to enable the judge "to form a correct judgment" on matters outside the experience and knowledge of ordinary persons: Mohan at 23; D.D. at para. 47.
- [80] Expert evidence concerning the importance of trust within drug trafficking organizations is routinely proffered and found to be admissible in drug trafficking prosecutions: see e.g., Burnett at para. 71; Sekhon at para. 77. Were it otherwise, presumably Mr. Cashman would have objected to, and appealed on, the basis of Sgt. Rettie's evidence about the importance of drug traffickers avoiding detection, having security systems to warn of unwanted intrusions by rivals or the police, and having firearms to protect their valuable commodity. Indeed, all of this testimony might be seen to be as "obvious" as Sgt. Rettie's evidence about access and trust.
- [81] Having concluded Sgt. Rettie's evidence about access and trust was logically relevant, legally relevant and necessary, I would not accede to this ground of appeal.

Issue Two: Did the judge materially misapprehend the evidence?

- [82] Mr. Cashman contends the judge misapprehended: (1) Sgt. Rettie's evidence regarding who would be permitted access to a location where large amounts of drugs and cash are kept; (2) Sgt. Rettie's and other evidence about the security system at the Columbia Street residence; and (3) the pre-search video. I will address each below. But first, I set out the standard of review and the proper approach to appellate review of reasons for judgment.

Standard of Review

- [83] A miscarriage of justice can occur where a trial judge misapprehends evidence and then relies on that misapprehension in convicting the accused. Misapprehension can take many forms, including: a failure to consider relevant evidence, a mistake in the substance of the evidence, and failing to give proper effect to evidence: *R. v. Morrissey* (1995), 22 O.R. (3d) 514 at 538, 1995 CanLII 3498 (ON CA).
- [84] The standard for establishing a misapprehension of evidence warranting appellate intervention is stringent. The misapprehension must be material to the judge's reasoning. In other words, it must go to the substance, rather than the detail of the judgment. The alleged error must play an essential part in the reasoning process leading to conviction, not merely in the narrative of the judgment: *R. v. Lohrer*, 2004 SCC 80 at para. 2, citing *Morrissey*.
- [85] Further, there must be an actual misapprehension in the sense that "the plain language or thrust of the reasons must disclose an actual mistake.": *R. v. Swales*, 2014 BCCA at para. 48, citing *R. v. Sinclair*, 2011 SCC 40 at para. 53. Mere differences in interpretation on factual matters are not misapprehensions: *Swales* at para. 49.

- [86] If the error rendered the trial unfair, resulting in a miscarriage of justice, then the conviction must be quashed and a new trial ordered: Liu at para. 31.

Appellate Review of Reasons for Judgment

- [87] Trial reasons are to be read functionally and contextually. That means they must be read as a whole and in the context of the live issues at trial, informed by the positions of the parties. Trial reasons are not to be finely parsed in search for error: R. v. G.F., 2021 SCC 20 at para. 69; R. v. Pastro, 2021 BCCA 149 at para. 53.
- [88] In reviewing trial reasons, it is critical to review the record. Even if the trial reasons do not explain the "what" and the "why" of the outcome, where those answers are clear from the record, there will be no reviewable error: G.F. at para. 70.
- [89] Trial judges are presumed to know the law and are not required to "expound on features of the criminal law that are not controversial in the case before them": G.F. at para. 74. Where trial reasons are ambiguous, interpretations that are consistent with a correct application of the law are to be preferred: G.F. at paras. 78-79.

Sgt. Rettie's Evidence Regarding Access

- [90] Mr. Cashman submits the judge materially misapprehended Sgt. Rettie's evidence about who would have access to locations where significant amounts of drugs and cash are kept.
- [91] I agree with Mr. Cashman that the summary of Sgt. Rettie's evidence provided by the judge in this case appears to have "confused the notion that only trusted individuals would be permitted to attend [the drug trafficking] operation with the notion that only trusted individuals who were working [in the] operation would be permitted to attend the same...": Liu at para. 37. The issues are whether the judge actually misapprehended Sgt. Rettie's opinion and, if so, whether her misapprehension was material.
- [92] Mr. Cashman contends his case is "nearly [a] carbon copy" of Liu. I do not agree for two reasons. First, I am not convinced the judge actually misapprehended Sgt. Rettie's opinion and, second, in any event, I am not convinced her alleged misapprehension was material.
- [93] As noted above, in Liu, the judge erred by relying on misapprehended expert evidence to reject the exculpatory evidence of Mr. Liu: Liu at paras. 23, 36. The judge's misapprehension was express and had a clear connection to the outcome of the case. It was material. It was not an innocent misstatement within the narrative of the judgment.
- [94] Here, as noted by Mr. Cashman, the judge stated she accepted and relied on Sgt. Rettie's opinion to make factual findings: RFJ at para. 42. And, she expressly relied on aspects of Sgt. Rettie's testimony to draw various inferences. For example, she expressly relied on Sgt. Rettie's testimony about the importance of security to drug traffickers and their need to avoid detection to draw inferences regarding the presence of a security system and firearms at the Columbia Street residence, and Mr. Cashman's attendance at the Garden Street

residence: RFJ at paras. 67, 73.

- [95] However, a functional and contextual review of the reasons for judgment as a whole reveals the judge did not express or rely on her inaccurate summary of Sgt. Rettie's evidence in concluding Mr. Cashman was a co-participant in Mr. Harmes' drug trafficking operation. For ease of reference, I set out the key passage of the judge's analysis:
- [71] Another factor that I have considered is the importance of trust to those engaged in a drug trafficking operation. In *Dipnarine*, the person in that case who was "working at the table and chair in the basement to prepare packages from \$12,000 worth of cocaine was plainly quite confident that the other co-tenant was not going to interfere": This "demonstrable level of trust" with regard to the valuable drugs supported a "common sense inference about co-participation" (para. 28). The same common sense inference is applicable to Mr. Cashman: It was apparent from the fact that the drugs and drug paraphernalia were in plain view throughout the second floor of the residence that Mr. Harmes was, at the very least, confident that Mr. Cashman would not interfere with his illicit operation. This demonstrable level of trust, in the circumstances, supports an inference of co-participation. Additionally, the presence of the firearms and the security system at the residence demonstrate that those engaged in the illicit operation at the Columbia Street Residence were aware of the need to ensure their valuable inventory was protected from threats from those outside the trusted group. Applying logic and common sense to the circumstances, I conclude it is inconceivable that Mr. Harmes would expose his valuable illicit drug operation to someone outside his trusted group of associates, especially someone residing within his own residence.

[Emphasis added.]

- [96] As can be seen, the judge did not explicitly refer to, never mind rely on, the impugned aspect of Sgt. Rettie's evidence in her analysis. Instead, she referenced the true import of Sgt. Rettie's opinion-that trust is important to those engaged in drug trafficking. She considered the evidence regarding Mr. Cashman's access, finding the facts analogous to the facts in *Dipnarine*. Her analysis was consistent with a correct understanding of Sgt. Rettie's expert opinion that persons with access to the drug trafficking operation would be "at least trusted to the person that's in control of the organization." In my view, the reasons as a whole demonstrate the judge understood Sgt. Rettie's evidence regarding access and trust. Mr. Cashman therefore has not established an actual misapprehension.
- [97] Further, the judge expressly relied on "logic and common sense", rather than her inaccurate summary of Sgt. Rettie's evidence, to infer in the specific circumstances of Mr. Cashman's case that he was part of Mr. Harmes' operation. Mr. Cashman therefore has not established that any possible misapprehension was material.

[98] In my respectful view, the judge's analysis was not tainted by her inaccurate summary of Sgt. Rettie's evidence. Her summary played no role in her ultimate decision and I would not accede to this ground of appeal.

Evidence Regarding the Security System at the Columbia Street Residence

[99] Mr. Cashman asserts the judge materially misapprehended Sgt. Rettie's and other evidence about the security system at the Columbia Street residence in two ways. First, he submits the judge misapprehended that Sgt. Rettie testified the security system found in the Columbia Street residence was put in place to protect the controlled substances at the residence, when Sgt. Rettie gave no such evidence. Second, he submits the judge misapprehended that there was "no evidence" as to how the security system operated (recording versus live monitoring), when there was evidence one of the investigating police officers reviewed recorded footage from the hard drive.

[100] I will address each of Mr. Cashman's submissions in turn.

[101] Mr. Cashman's first submission is based on the following passage from the judge's summary of the evidence of Sgt. Rettie:

[48] As Sgt. Rettie explained, reducing any risk of detection is crucial to those involved in the drug business. Similarly, the firearms and security system at the Columbia Street Residence were security measures put in place to protect the valuable commodity housed at the residence.

[Emphasis added.]

[102] It is true Sgt. Rettie did not testify "the firearms and security system at the Columbia Street residence were security measures put in place to protect the valuable commodity housed at the residence." Read in isolation, the judge appears to have misapprehended Sgt. Rettie's evidence. But, to determine whether there was an actual misapprehension, the judge's reasons must be read functionally, contextually and as a whole. Two further passages are particularly relevant.

[103] At para. 7 of her reasons for judgment, the judge says she will indicate her findings of fact as she summarizes the evidence. Then, in her analysis, the judge returns to Sgt. Rettie's evidence about the importance of security to drug traffickers and says:

[67] Importantly, the monitor for the residence's security system (including the two exterior cameras) was located inside Mr. Cashman's bedroom. The fact that the hard drive for the system was bolted to the wall in the closet suggests that this was installed as a permanent fixture. Sgt. Rettie explained that security is critical to those engaged in a drug trafficking operation. I find this is precisely why the residence had a security system, and why the two firearms were present in close proximity to the large quantity of valuable drugs.

[Emphasis added.]

- [104] Reading the relevant passages functionally and in the context of the reasons as a whole, it becomes apparent the judge did not actually misapprehend Sgt. Rettie's evidence. Rather, she made a finding regarding why the Columbia Street residence had a security system in place. This finding was open to her based on the evidence (including Sgt. Rettie's evidence), and common sense.
- [105] Mr. Cashman's second submission is based on the following passage from the judge's analysis:
- [68] I have considered the fact that there was no evidence regarding how the security cameras operated (live monitoring vs. recording).
- [Emphasis added.]
- [106] Contrary to the highlighted passage, Constable MacKenzie testified a CCTV hard drive was seized from Mr. Cashman's bedroom, he reviewed its contents, and it contained videos from at least two vantage points of the exterior of the Columbia Street residence. Both the Crown and Mr. Cashman acknowledged in their trial submissions the security system was being used, at least at some point, to record the exterior of the residence. Neither Cst. MacKenzie's testimony nor the parties' positions is mentioned or reflected in the reasons for judgment. Again, read in isolation, the judge appears to have misapprehended the evidence. But, the issues are whether there was an actual misapprehension and, if so, whether the misapprehension was material.
- [107] A functional and contextual review of the judge's reasons and the record as a whole reveals the judge was well aware of the importance of evidence concerning the operation of the security system. Specifically, in her review of Sgt. Rettie's evidence, she held:
- [48] ... Sgt. Rettie acknowledged that real time monitoring of a security system was more effective than recording. He also acknowledged that a surveillance system that only records could be incriminating and, in his opinion, ill-advised in the context of illegal activity.
- [108] Further, although not mentioned by the judge, I consider it helpful to note Sgt. Rettie specifically rejected Mr. Cashman's suggestion in cross-examination that recording video from security cameras would be inconsistent with efforts to protect a drug trafficking operation. Instead, Sgt. Rettie testified a video recording could be played back to "see if anyone has been snooping around" such as "a plain clothes police officer".
- [109] More to the point, it appears to have been common ground at trial there was no specific evidence regarding precisely how the security system was operating when the search warrant was executed. For example, defence counsel (not counsel on appeal) accurately submitted:

The security system is -- it is something that leads to a great deal of speculation. I will say there are certain things that are quite clear. There is no evidence led as to what was on the screens, the -- the screen in Mr. Cashman's bedroom when the police attended. We just know it was -- the -- the evidence is the ERT members disabled the security system. We don't know if it was showing anything, we don't know what -- what the state of it is. We just know it was disabled. So we don't even know if it was in an active or -- an active surveillance or a recording surveillance mode.

I asked Staff Sergeant Rettie in cross-examination about the general use of the systems, and he said -- in response -- I put a proposition to him that a system that is recording is more consistent with being used for legitimate purpose than a system that's being used in pure surveillance mode, and he agreed with that. So the surveillance - the -- that's why I say the surveillance system is open to a great deal of speculation because we don't know what it was looking at, what -- if it was in an active surveillance mode, if it was -- what was being recorded, when it was being used, all we know is the screen was on.

[Emphasis added.]

[110] Considered in its full context, it is apparent the judge did not misapprehend the evidence regarding the security system. Properly understood, when the judge said "there was no evidence regarding how the security cameras operated", she was imperfectly expressing there was no way to determine whether the security cameras were being used to monitor activity outside the Columbia Street residence in real time, to record goings on, or potentially both.

[111] In any event, even if the judge misapprehended the evidence regarding the operation of the security system, her misapprehension was not material. Her analysis of Mr. Cashman's co-participation in Mr. Harmes' drug trafficking operation did not turn on which type of surveillance was being used at the Columbia Street residence. Rather, regardless of the mode of operation of the security system, what was important to the judge was the fact the security system existed at all and that a monitor was located in Mr. Cashman's bedroom. On the evidence, it was clearly open to her to find Mr. Cashman and Mr. Harmes were security-conscious because of the drug trafficking operation. As noted by the judge, the risks associated with the operation applied to Mr. Harmes and Mr. Cashman equally: RFJ at paras. 68-69.

[112] Mr. Cashman has not established the judge actually and materially misapprehended Sgt. Rettie's and other evidence about the security system at the Columbia Street residence. I would therefore not accede to this ground of appeal.

Pre-search Video

[113] Mr. Cashman contends the judge misapprehended the pre-search video evidence by finding there was no evidence any of the inside doors had locks and there was no barrier to Mr. Cashman and Mr. Harmes entering each other's bedrooms. Mr. Cashman submits the pre-search video clearly shows there were locks on the doors. That being the case, Mr. Cashman further submits it was "unfair" for the judge to assume the locks did not function rather than to assume they did.

[114] Mr. Cashman's submission is based on the following passage from the judge's analysis:

[67] I begin my analysis by considering the configuration of the Columbia Street Residence. The front door entry provided unrestricted access to both levels of the residence. The only hinderance to movement was the piles of clothes in the first-floor kitchen and the general clutter throughout the first floor. Contrary to defence submissions, there was no evidence to suggest that some of the interior doors had locks and there was certainly no evidence that any of the interior doors had functioning locks

[Emphasis added.]

[115] The judge's findings were consistent with the evidence provided by Cst. MacKenzie (who took the pre-search video). In cross-examination, he denied there appeared to be a deadbolt and keypad on Mr. Cashman's bedroom door and a key slot on the door handle to Mr. Harmes' bedroom. However, after reviewing the pre-search video carefully, I agree with Mr. Cashman there appear to be locks on Mr. Cashman's and Mr. Harmes' bedroom doors. Assuming my review of the pre-search video is sufficient to establish the judge misapprehended this evidence, the question remains whether the misapprehension was material. In my view, it was not. I say this for several reasons.

[116] First, the firearms, a great deal of drug trafficking paraphernalia and most of the drugs were found in Mr. Harmes' bedroom. Therefore, Mr. Harmes' bedroom door was the most relevant door in determining whether Mr. Cashman had access to the controlled substances.

[117] Second, Mr. Harmes' bedroom door was open when the police executed the search warrant. This was a piece of evidence capable of supporting an inference Mr. Harmes did not keep his door closed or locked.

[118] Third, Mr. Cashman suggests Mr. Harmes' bedroom door may have been open because Mr. Harmes was likely panicking, gathering up contraband and trying to escape the residence. That may be so but, if Mr. Harmes routinely kept his door closed and locked, he would have had to use a key to open the door during his state of panic. Keys to locked doors, safes, lockers and so on are often very important pieces of evidence in drug trafficking prosecutions. Yet, on arrest, Mr. Harmes was not found in possession of a key and there was no evidence to suggest the police located a key to Mr. Harmes' bedroom door within the Columbia Street residence.

[119] Fourth, even if Mr. Harmes kept his bedroom door closed and locked, Mr. Cashman had access to the rest of the upper floor, including the kitchen where Mr. Harmes was openly mixing drugs, and the second bedroom where the police recovered a box containing over \$100,000 in cash.

[120] Fifth, Mr. Cashman elected to call no evidence. The judge could not and did not infer anything from Mr. Cashman's trial strategy but the fact is the evidentiary record consisted only of the admissions filed by the parties and the evidence adduced through Crown witnesses. There was no direct evidence Mr. Harmes kept his door closed, never mind locked.

[121] Finally, and most importantly, whether Mr. Harmes' bedroom door had a lock was a relatively minor piece of circumstantial evidence in a substantial body of far more damaging evidence. In my view, it was a detail that did not play an essential role in the judge's reasoning process.

[122] I would not accede to this ground of appeal.

Issue Three: Is the verdict unreasonable?

[123] In *R. v. Choi*, 2021 BCCA 410, this Court succinctly set out the standard of review applicable to an appeal alleging unreasonable verdict:

[58] The standard of review to be applied when an appellate court decides whether to set aside a verdict under s. 686(1)(a)(i) of the Criminal Code as unreasonable or unsupported by the evidence is also well-established. The role of the appellate court is not to substitute its own view for that of the trial judge. Rather, the role of the appellate court is to re-examine and, to a limited extent, re-weigh and consider the effect of the evidence, viewed through the lens of judicial experience: *R. v. Biniaris*, 2000 SCC 15 at paras. 36-42; *R. v. Kwok*, 2002 BCCA 177 at para. 27. As Justice Cromwell explained in *R. v. Villaroman*, 2016 SCC 33, a verdict is reasonable if a properly instructed jury acting judicially could reasonably have rendered that verdict. As he also explained, where the Crown's case depends on circumstantial evidence, the question for determination is whether the trier of fact, acting judicially, could reasonably be satisfied that the guilt of the accused was the only reasonable conclusion available on the totality of the evidence: *Villaroman* at para. 55.

[124] In determining whether the guilt of Mr. Cashman was the only reasonable conclusion on the totality of the circumstantial evidence, there is no need to exclude all other conceivable inferences. A verdict is not unreasonable merely because alternative possibilities do not raise doubt for the trier of fact; it is the role of the trier of fact to make this determination: *R. v. Villaroman*, 2016 SCC 33 at para. 56.

[125] Mr. Cashman contends a number of points support the finding of an unreasonable verdict. Many of his arguments rely on the judge's alleged material misapprehensions of the evidence. Having found no such misapprehensions, I take no further account of these arguments.

[126] Mr. Cashman's other arguments include:

There is no evidence Mr. Cashman was inside the Garden Street residence and, even if he was, all the drugs were located in a locked safe in a bedroom. Thus, it is unlikely Mr. Cashman knew the residence was being used to distribute drugs. Furthermore, Mr. Cashman only attended the Garden Street residence twice out of the 17 days where surveillance was taking place there. There was no evidence as to whether the recording on the hard drive was taken when Mr. Cashman or Mr. Harmes was residing at the Columbia Street residence. Mr. Harmes' and Mr. Cashman's bedrooms are *prima facie* "private" locations, even against a co-occupant of a residence: *R. v. Reeves*, 2018 SCC 56 at paras. 96, 112. Absent evidence to the contrary, it is unreasonable to infer Mr. Cashman had knowledge and control over the contents of Mr. Harmes' bedroom. Mr. Cashman was "utterly incapable of organizing any of his possessions in any fashion whatsoever" and thus would have been unable to have removed any drug trafficking paraphernalia from his living space, yet no paraphernalia was found on the lower floor. Further, being an active participant in a drug trafficking operation would require a considerable amount of organization that does not align with the state of Mr. Cashman's living quarters. Mr. Cashman had no reason to believe the blender, measuring cups, and food colouring in the kitchen of the upper floor were being used for the purposes of drug trafficking. Similarly, the controlled substances found in the freezer were hidden behind some meat. Unlike the basement in *Dipnarine*, the kitchen was not being used for the sole purpose of cutting drugs into packages. It was also being used to prepare food. A co-tenant would not need to hide the proceeds of the drug trafficking within the residence if it was jointly possessed by both occupants.

[127] Overall, Mr. Cashman contends he was an uninvolved co-tenant who did not know about or control--and thus possess--the drugs found in the Columbia Street residence. In doing so, he largely repeats arguments made at trial. In effect, he is asking this Court to re-evaluate the evidence and come to different conclusions than the judge. Respectfully, that is not the role of this Court.

[128] The findings of the trial judge were open to her. I will explain why.

[129] First, nothing much turns on the facts that: (1) the controlled substances within the Garden Street residence were found in a locked safe; (2) Mr. Cashman was only observed there twice; and (3) there was no evidence Mr. Cashman ever entered that residence. The judge found it to be more compelling that Mr. Cashman co-occupied the Columbia Street residence with Mr. Harmes and attended the Garden Street residence with him. This was important evidence linking Mr. Harmes and Mr. Cashman to illicit activity at both residences: RFJ at para. 72. The judge's finding was open to her on all of the evidence.

- [130] Second, the judge found the hard drive was part of the security system located in Mr. Cashman's bedroom. Despite the uncertainty of the timing of the recordings on the hard drive, on all of the evidence, especially including the scale of the drug trafficking activity taking place within the Columbia Street residence, it was open to the judge to find the security system was active during Mr. Cashman's tenancy there: RFJ at paras. 67-68.
- [131] Third, Mr. Cashman's reliance on Reeves to establish bedrooms as prima facie private locations is unhelpful. Leaving aside that the discussion in Reeves appears in concurring minority reasons and relates to a s. 8 Charter analysis, the judge found Mr. Cashman had unfettered access to the upper floor, including Mr. Harmes' bedroom: RFJ at para. 67. In my view, this finding was open to the judge but, in any event, given the state of the upper floor kitchen, Mr. Cashman's unfettered access to Mr. Harmes' bedroom was a nonessential detail.
- [132] Fourth, I am not persuaded by the argument Mr. Cashman was too disorganized to participate in organized crime. The state of disarray of the first floor of the Columbia Street residence was before the judge. It was open to her to find Mr. Cashman's lack of cleanliness was not exculpatory.
- [133] Fifth, it was open to the judge to reject Mr. Cashman's arguments he had no reason to believe there was illicit activity occurring in the upstairs kitchen. There was ample evidence to support the judge's finding drugs were being mixed in plain view in the kitchen of the Columbia Street residence: see RFJ at para. 75.
- [134] Finally, the fact a large sum of cash was hidden in the second upstairs bedroom was hardly exculpatory. Sgt. Rettie stated, and common-sense dictates, drug traffickers need to be concerned about intrusions by rivals. Mr. Cashman's suggestion there would be no need to hide large sums of cash if they were jointly owned by Mr. Cashman and Mr. Harmes is at odds with the risks faced by drug traffickers.
- [135] I would not accede to this ground of appeal.

Disposition

- [136] With thanks to counsel for their helpful submissions, I would dismiss the appeal.

"The Honourable Chief Justice Marchand"

I AGREE:

"The Honourable Justice Griffin"

I AGREE:

"The Honourable Justice Horsman"

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