
CANADA / JUDGMENT

R. v. Chen

2019 BCSC 2292

COURT

Supreme Court of British Columbia

DECIDED

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2019 BCSC 2292 R. v. Chen

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Chen,

2019 BCSC 2292

Date: 20190716

Docket: 27277

Registry: Vancouver

Regina

v.

Stephen Hai Chen

Restriction on Publication: Pursuant to 486.5(2) C.C.C.

Before: The Honourable Mr. Justice Schultes

Oral Reasons for Judgment

Counsel for the Crown:

L. Gibb (appearing on

behalf of M. Loda)

Counsel for the Accused Chen:

E. Doricic

Place and Date of Trial:

Vancouver, B.C.

June 10-14, 17-18, 20, 2019

Place and Date of Judgment:

Vancouver, B.C.

July 16, 2019

I. Introduction

- [1] Stephen Chen is charged with trafficking in MDMA between February and August of 2015. The single count alleges a continuing offence during that period, in which Mr. Chen is alleged to have repeatedly supplied that drug in one or two kilogram amounts to Tarsen Jawanda, who then sold them to an undercover police officer. The single count comprises nine such transactions.
- [2] The case against Mr. Chen is based on circumstantial evidence, in particular on the potential inferences to be drawn about his participation from police surveillance, interception of his private communications, documents connecting him to various relevant entities, and statements by Mr. Jawanda to the undercover officer that are said to conform to Mr. Chen's activities.
- [3] The essential issue is whether these inferences are capable of proving his guilt in relation to one or more of the transactions alleged beyond a reasonable doubt, or whether there are other reasonable inferences that emerge from the evidence.
- [4] The Crown and defence did a very good job in this trial of focusing on what is actually in dispute. Everything else was dealt with by detailed admissions of fact.

II. Evidence

A. Overview

- [5] The context for the evidence was an investigation into drug trafficking by the RCMP's Federal Serious and Organized Crime Section. In the course of that investigation W., an undercover police officer, formed a relationship with Mr. Jawanda. W. portrayed himself as being involved in the movie industry, transporting props north and south by truck, as well as with illicit drugs.
- [6] W. began receiving small samples of MDMA from Mr. Jawanda, then progressed to the kilogram-level purchases that Mr. Chen is alleged to have supplied. W. represented that these kilograms of MDMA were going to be resold through his connections back east, leading to the establishment of a regular supply of the drug from Mr. Jawanda for that purpose. Not strictly related to these transactions, but part of the overall context that was brought out in cross-examination, W. also engaged in ongoing discussions with Mr. Jawanda about using his transportation network to move MDMA and another drug to the U.S., and to

bring cocaine back. It was also brought out that W. was aware of and potentially interested in participating in a scheme involving Mr. Jawanda and another associate importing opium from India.

- [7] In furtherance of their relationship, Mr. Jawanda provided W. with BlackBerrys that had specialized encryption software, so that they could communicate covertly.
- [8] The intercepted communications relevant to the MDMA transactions, both between Mr. Jawanda and W., and between Mr. Jawanda and the person the Crown alleges is Mr. Chen, were played during the trial. There is no issue that the transcripts that were prepared to assist in listening to those communications accurately reflect their contents. However, the question of whether Mr. Chen, as the accused before the court, was actually the person who was speaking in the portions of the recordings that are attributed to him is very much a live issue.
- [9] Investigators also conducted surveillance during the investigation of Mr. Jawanda and a person alleged to be Mr. Chen. This process was carried out by a team of plainclothes officers, both drivers and passengers, using unmarked vehicles. Their individual observations of the surveillance targets were communicated to the entire group by radio and noted down by a designated recording officer. After the surveillance for a given day was complete, each officer verified the accuracy of the observations that had been attributed specifically to them in the recording officer's notes. Some members of the surveillance team kept their own personal notes of their observations as well. In this case, the Crown led only the observations of the officers who saw the relevant events themselves and referred to the overall activities of the surveillance team during those times only for context.
- [10] What I took to be the less critical, but still relevant, surveillance observations of Mr. Chen were made part of the admissions of fact.
- [11] W. ended up having extensive involvement with Mr. Jawanda, from being introduced to him in the fall of 2014 to his arrest in August of 2015. This was both in the course of their drug transactions and while socializing as part of the undercover scenarios. W. estimated that their total time in each other's presence was in the range of 24 to 48 hours. As a result, it was not disputed that he was capable of identifying Mr. Jawanda as the person depicted on the target sheet that was given to the surveillance officers, and of recognizing his voice in recordings of intercepted communications. In each case, he identified the voice attributed to Mr. Jawanda in the transcripts of the relevant calls as in fact being Mr. Jawanda's. He never met Mr. Chen.

B. The Transactions

1. February 14

- [12] Earlier in the day on February 14, 2015, W. and Mr. Jawanda had met at a restaurant in Richmond and arranged for W. to purchase a kilogram of MDMA. Mr. Jawanda also gave W. an encrypted BlackBerry.
- [13] Beginning at 6:29 p.m. on the 14th, a call was intercepted between Mr. Jawanda's phone and the one that is attributed to Mr. Chen in the Crown's theory. Keeping in mind that the identity of the speaker on the latter phone is a point of contention in the case, I will call it "the Chen phone" and the user of it "the speaker on the Chen phone", solely for ease of reference.
- [14] Mr. Jawanda asked the speaker on the Chen phone "if I can come and see you". The reply was, "I go get it now, in fact if you really want it, then I have to go get it now." When the speaker on the Chen phone asked whether "it has to be today", Mr. Jawanda replied, "No, it's today, buddy's taking off " The speaker on the Chen phone then suggested that they meet in "the Broadway and Nanaimo area" of Vancouver at around 7:15.
- [15] At 7:11 p.m., the Jawanda phone sent a text message to the Chen phone saying that he was behind a particular restaurant.
- [16] At 8:00 p.m., W. met Mr. Jawanda at the Starbucks at 64th and Granville, which would become the regular meeting point for their MDMA transactions. W. had been provided with the cash to purchase the drugs and was wearing a recording device. They then went to W.'s vehicle, which was within a block of Starbucks, and he received slightly more than one kilogram of MDMA from Mr. Jawanda. The admissions describe it as a "crystal-like white powder" in a vacuum-sealed bag, inside a white bag. W. paid Mr. Jawanda for the MDMA.
- [17] A fingerprint was later located on the plastic bag, but it was not Mr. Chen's. Indeed, the admissions provide that Mr. Chen's fingerprints were never located on any of the items that were seized after the purchases from Mr. Jawanda.
- [18] There were some comments during the meeting that the Crown submits are relevant to Mr. Chen's alleged role in the transaction.
- [19] When W. asked, "Which set?", apparently in relation to the nature of the drugs, this was, Mr. Jawanda said, "That's the one I gave you in the beginning". This is said to relate to previous samples of the MDMA that he had provided. Just before that comment, Mr. Jawanda had referred to not having gotten "the vitamins", which one could infer was a reference to MDMA in pill form, "but I got the other ki-" The rest of that word is cut off in the transcript and cannot clearly be heard in the recording, but it may have been "kind".
- [20] In addition, W. said, "I hate to rush" towards the end of the meeting, and added, "So I'll probably be out of town for a few days". This is said to correspond to Mr. Jawanda's earlier comment in his call with the Chen phone about the urgency in picking it up, because of "buddy" leaving town.

- [21] At 8:51, Mr. Jawanda called the Chen phone and said that, "Hey uh if you want to grab that uh paperwork", he was at a certain location. The speaker on the Chen phone declined so Mr. Jawanda said, "I'll hook up with you in the morning," which the speaker the Chen phone said was "fine".
- [22] There was further conversation between the phones the next morning at 10:41. After asking where Mr. Jawanda was, the speaker on the Chen phone said, "Okay, the guy need it," and asked Mr. Jawanda to drop "it" off at his house. He told him to "come in the front". Mr. Jawanda agreed.
- [23] There was no surveillance in relation to this transaction.
2. June 5
- [24] W. and Mr. Jawanda continued their relationship in the ensuing months. The next MDMA purchase was one kilogram for \$8,000. Those arrangements were made by phone calls and text messages between them.
- [25] There was a series of calls between Mr. Jawanda and the Chen phone before and after this transaction.
- [26] On June 4, the Chen phone called Mr. Jawanda. In addition to making a request that I will describe separately, the speaker told Mr. Jawanda that he would see him for breakfast "tomorrow morning for that". Mr. Jawanda said, "Okay, so you'll have it tomorrow morning", in response to which the speaker on the Chen phone explained, "I didn't have time to get it together." The speaker then asked, "It's okay though, right?" Mr. Jawanda replied, "Yeah, yeah I need it, yeah."
- [27] The other aspect of the conversation between Mr. Jawanda and the Chen phone on June 4 that is relevant to the issue of Mr. Chen's identity as the supplier of MDMA is that the speaker asked Mr. Jawanda to go into "the accountant" and "get a signed signature". He explained that "even though I was the director but you, under Sam's Concrete 2011, you are the co-sign you're the director in signing or authority so you have to sign it off right now." The connection to Mr. Chen is that a statement of registration of a sole proprietorship for Sam's Concrete Pumping 2011 was submitted in July 2011 by a Stephen Chen with an address on East 5th Avenue in Vancouver. A numbered company was listed as the only member of the sole proprietorship. That sole proprietorship was dissolved in 2015 and once again Stephen Chen, now with the same address on Lansdowne Road that the Crown seeks to attribute to the accused Mr. Chen in this trial, was listed as having submitted the request on January 1, 2014.

- [28] In addition, during a search of Mr. Jawanda's home on August 26, 2015, investigators found a promissory note in which Mr. Jawanda agreed to "pay back" Stephen Chen the outstanding amount of \$192,000 from the sale of the business "Sam's Concrete Plumbing 2011 Ltd", in three instalments on specific dates. The note purported to have been signed by Mr. Chen and witnessed by a notary.
- [29] Mr. Chen's counsel brought out during his cross-examination of W. that "Sam's Concrete Plumbing 2011" was the name on a pumper truck that Mr. Jawanda rented to him for use in the movie shoot that was part of an undercover scenario and that was shown on a business card that Mr. Jawanda gave him at one point in their relationship. Mr. Jawanda was known by the nickname "Sam", which is how W. addressed him[1].
- [30] On the morning of June 5, the Chen phone called Mr. Jawanda at 8:22 and they arranged for Mr. Jawanda to "come by [the] house" of the speaker on the Chen phone. At 9:02, the Chen phone called back and the speaker said they would meet "at the Denny's" at 9:30. At 10:11, the Chen phone called and the speaker asked Mr. Jawanda where he was. He responded, "I'm right here in front. You want to come out?" The speaker told him to "walk to my door", which Mr. Jawanda said he would do.
- [31] W. and Mr. Jawanda met at about 11:39 that morning, near the same Starbucks. W. was accompanied by M., another undercover officer who was portraying a driver within his organization. M. was parked close by in a different vehicle. This time the vacuum-sealed bag of MDMA was provided to W. by Mr. Jawanda in a gift bag with a flower pattern on it, which also contained five sample MDMA pills in a zip-lock bag. The substance is described in the admissions as "off-white MDMA powder".
- [32] After W. made reference to this type of MDMA as being of lower quality, Mr. Jawanda explained that "this is the type I already gave you earlier. You guys were okay with it And that's the same batch. It's...be the consistent, same many as you wanna be the same They got lots already. And the candy, they got lots of it." Although W. testified that "candy" was a term that he and Mr. Jawanda used to describe MDMA rather than a particular type, in this context it may have been a reference to the pill samples and pill-form MDMA that Mr. Jawanda had also provided.
- [33] When W. asked about "the crystal stuff", a different type of MDMA, Mr. Jawanda agreed that it takes a little bit more time, and added that it was also more expensive. Later, he elaborated that those who produced it were assholes and biker style, requiring the money first before providing the product. In contrast, he said that, "My Chinese buddies are easy going, they know me from long time."
- [34] Although the context is not completely clear, the following exchange occurred which may refer to the delivery of MDMA from this supplier for the transaction, with particulars that are inconsistent with the inference of a delivery earlier that morning from Mr. Chen [as read in]:

W: All right, brother um, yeah, that's about it. This is great. I'm happy, but remember, dude, whenever you think you're gonna be like it might be tomorrow, just tell me, like, just come here.

Jawanda: That's what I told you yesterday, right 'cause actually matter of fact he dropped it off at my house, 10 o'clock last night. I was sleeping. I wasn't feeling good yesterday no, once you said hey listen tomorrow, then I can reschedule and do all sorts of shit

[35] At 11:55 a.m., Mr. Jawanda called the Chen phone and they agreed to meet at the speaker's house.

3. June 13

[36] The intercepted call between Mr. Jawanda and the Chen phone that is alleged to pertain to this transaction occurred on June 12, beginning at 12:35 p.m. Mr. Jawanda called and told the speaker on the Chen phone, "It's not going to be Saturday He's on a trip when I get the answer, I will let you know."

[37] In response to the speaker of the Chen phone confirming, "It's not Saturday now?" Mr. Jawanda repeated, "It's not [,] because he's already on a trip, right?" Mr. Jawanda then asked, "Can you get me another one?" and the speaker replied, "Yeah, tomorrow."

[38] This purchase on the 13th had been arranged by phone calls and text messages between W. and Mr. Jawanda earlier on that day. They met at about 12:43 p.m. In this case, the vacuum-sealed bag, with what the admissions describe as "an off-white crystal-like powder" was contained in a white grocery bag. W. paid \$8,500 for the kilogram.

[39] During this meeting, he praised Mr. Jawanda's ability to respond quickly to his last-minute request for "the eight stuff" (perhaps referring to the price per kilogram). Mr. Jawanda explained, "I've got access to that lot, right? The other one, they're doing a new batch. I just don't want to give you something that was only one left " W. said, "Yeah, but can you get the good stuff?" Mr. Jawanda said he could but that it would cost "10 grand".

[40] Apparently referring to the current type of MDMA, Mr. Jawanda said, "If this one flies, I've got a lot of this." He then offered to "throw 10 of mine on if you want to take 10." W. said he would take it, "but we prefer the better stuff." Mr. Jawanda said, "Well, right now I've got access to this, but pretty soon I'll have access to the other on and the other thing too. I'll get you the price. They're making a new batch on that one too." The "other thing" appears to have been a reference to crystal methamphetamine, because W. said he had been trying to find out the price "out there", presumably back east, because he had not been asking about "the crystal meth" before. Mr. Jawanda suggested that the price "was probably pretty high", confirmed that the drug was good quality, and said, "It's our own guy that makes it too."

[41] They also discussed an earlier incident in which Mr. Jawanda, being concerned about possible police awareness of his drug activities, had arranged to have the information on W.'s encrypted BlackBerry remotely wiped. W. wanted to get additional devices of the same kind to advance his business and asked Mr. Jawanda to facilitate that with the supplier.

- [42] There were no specific comments by W. during this meeting that linked with the conversation between Mr. Jawanda and the speaker of the Chen phone on the 12th about the transaction no longer being on Saturday because the purchaser was "on a trip". I feel comfortable taking notice that June 13 of that year was a Saturday. W. said at one point that he was "probably going to stick around for a couple of days". W.'s reference to his last-minute request for the purchase might have been an indication of a change in plans, but the evidence is not clear.
- [43] The other potential contradiction to the inference that Mr. Chen was the supplier of this sale is that when W. asked him, "No problems?" when they first met, Mr. Jawanda said, "No problems at all. I had it last night but I guess you were tied up."
- [44] At 2:34 p.m. that day, the Chen phone called Mr. Jawanda. The speaker said, "Hey, that thing, no bank draft, they want cash in" and "let's just do cash in, just do cash." Mr. Jawanda responded that, "I'll have to go two days then. They won't get the whole thing," which the speaker said was okay.
4. June 24
- [45] The advance interaction between Mr. Jawanda and the Chen phone that is said to relate to this transaction took place at 4:50 p.m. on June 24. The Chen phone called him and the speaker asked, "You're going to come down, right?" He gave the location as "5th and Nanaimo", adding, "I think you've been here before."
- [46] At 5:21 p.m., Constable Hartl, a surveillance officer, turned onto East 5th Avenue and saw Mr. Chen walking from the front area of a house on that street - 2465 East 5th Avenue - down the sidewalk that led from the house to the street. He agreed on cross-examination that Mr. Chen had to open a gate to go onto the street at some point and that he did not recall seeing anything in Mr. Chen's hands. He believed that that was something he would have focused on. At 5:23, he saw Mr. Chen standing by the driver side of Mr. Jawanda's Escalade, which he had seen Mr. Jawanda driving on Knight Street 15 minutes earlier. The driver's side window was down, Mr. Chen was leaning in and his hands appeared to be inside the vehicle. Constable Hartl was 200 to 240 metres away when he saw this, but said that he had an unobstructed view.
- [47] Similarly, at 5:25, Constable Simpson, who was also participating in the surveillance, was 50 to 100 yards away on what he described was the street that runs perpendicular to East 5th in that area, which he believed was Nanaimo. He saw Mr. Chen in the window on the driver's side of the Jawanda vehicle.
- [48] The address on East 5th that Mr. Chen was seen coming from was the same one listed for Stephen Chen on the application to register the sole proprietorship in relation to Sam's Concrete Pumping 2011.

- [49] At 6:44 p.m., W. met Mr. Jawanda for a one-kilogram purchase of MDMA at their usual spot near the Starbucks. At this point, Mr. Jawanda was driving a GMC Canyon pickup truck, rather than the Escalade that he had been driving for the meeting on East 5th. It contained wood and what the surveillance officers described as "construction material". He referred to doing some "renos" during their conversation. W. again paid \$8,500 for the MDMA. It was provided in a pink plastic bag, inside which was a white plastic bag that held the vacuum-sealed bag containing the substance. The admissions described it as "brown MDMA powder".
- [50] Mr. Jawanda suggested that they increase the amount of MDMA in these transactions. He said, "We been doing one or whatever. Let's jump to four, at least we'll go two and two." He also referred to his source, explaining, "Yeah, this is in my backyard, this is my buddy, they make it, it's guaranteed. What you see is what you get there's lots left of it." W. explained his need to purchase in this amount by reference to their previous attempt to "go bigger" and that "that 10" (presumably a reference to the amount involved) had caused him "a lot of grief up there". (As I will discuss, there had been an unsuccessful attempt by W. to purchase a larger amount of MDMA through Mr. Jawanda in March.)
- [51] They discussed the markup on resale of the crystal stuff, in contrast to the type of MDMA that Mr. Jawanda was providing on that day.
- [52] Mr. Jawanda asked how W.'s associates liked the samples of pills that he had provided previously. He said, "There's still a bunch left" "at least a hundred thousand or two hundred thousand".
- [53] They also discussed W. having obtained another BlackBerry from the same business through which Mr. Jawanda had provided him with the original and W.'s plan to obtain additional devices for his associates. He referred to the person he dealt with in that business as "the Chinese kid." W. confirmed in his evidence he was referring to a specific person connected with that business, which was known as Phantom Secure. The reference has nothing to do with Mr. Chen or the drug-producing associates of Chinese descent whom Mr. Jawanda also described, as I will summarize.
- [54] They went on to discuss the other aspect of their drug business - using the trucks associated to W.'s fictitious business to transport drugs to the U.S. and bring other drugs back.
- [55] There were some statements by Mr. Jawanda during this transaction that are also potentially inconsistent with the inference that their meeting at East 5th shortly beforehand with Mr. Chen was for the purposes of obtaining MDMA from Mr. Chen. In response to a comment by W., "You're so funny with your times," Mr. Jawanda said the following:

"Oh, you know what happened was uh I was trying to get hold of my guy for he said get it last night. I couldn't make it last night, I got late He then described taking photos before his son's high school prom at 3:00 p.m.] And then my buddy's waiting at, uh, for me, I said, look, I gotta see Buddy at five or four right, five. So he's sitting at my home so he just left it in my barbecue."

[56] In addition, there were no intercepted conversations after this transaction between Mr. Jawanda and the Chen phone apparently making arrangements for Mr. Jawanda to provide payment, of the kind that were intercepted in relation to other transactions.

5. July 7

[57] On July 6 at 7:42 p.m., the Chen phone called Mr. Jawanda and the speaker asked him where he was. Mr. Jawanda said he was out and that he would "grab it" from the speaker "tomorrow morning, first thing". They then arranged for this interaction to take place at Mr. Jawanda's friend's house instead. Mr. Jawanda said he would tell the friend to come out and "grab it from you".

[58] At 7:53 that same evening, the Chen phone called and the speaker said, "Tell your friend to come out." Mr. Jawanda said the friend was outside - it appeared that the speaker was confused about the address. After further directions from Mr. Jawanda, the speaker said, "I see him," and the call ended.

[59] At 4:09 p.m. on the 7th, Mr. Jawanda met W. at their usual spot. Mr. Jawanda provided two kilograms of MDMA in exchange for \$17,000. The vacuum-sealed bags were in a green cloth bag. The admissions described the substance as "off-white coloured MDMA powder". This meeting was brief because they arranged a dinner meeting to take place shortly afterwards to discuss business.

[60] On July 8, Mr. Jawanda, in the presence of his former co-accused Gurchet Manhas, called the Chen phone. He and the speaker on the Chen phone discussed where each of them was. Mr. Jawanda said, "I can drop it at your house or whatever," and "I've got that, I've got it here." They ultimately agreed that the speaker would come to their location, which they described as being on a street behind the Costco.

6. August 14

[61] A call that is potentially related to this transaction took place between the person alleged to be Mr. Chen and Mr. Jawanda on August 13 at 12:21 p.m. The Chen phone was not used. Instead the caller said, "I'm using a public payphone, that's okay." He then explained, "Uh, listen, I don't have the sandy ones, I only got the powder ones, but it's the same strength You know, same chef, same people working, right, but they made it only powder instead of sandy." He continued, "So you want to go do it? You want to ask them first?" Mr. Jawanda asked, "Yeah, pink?" And the reply was, "Yeah, pink. 100 percent it's pink."

[62] The caller rebuffed Mr. Jawanda's request to "get a little bit just to show it", explaining, not entirely clearly, "because once I grab it, it's you know, that's where, I gotta grab it, right." He responded to Mr. Jawanda's question - "So it's the same but it's like a little different?", by saying, "It's hundred percent." Mr. Jawanda said, "Okay, get me two then, that's fine". Before signing off, the caller advised, "Let him know first, before."

- [63] Surveillance observations were made after that call that are alleged to be connected with the arrangements contained in it.
- [64] At 3:02 p.m., Mr. Chen was seen entering a business in Richmond. At 3:33, a BMW registered to him was seen "to follow in tandem with" a blue Dodge Durango out of the parkade of the business centre that contained the business that he had entered. The Durango had entered the parkade 17 minutes before. The two vehicles then went in opposite directions.
- [65] At 4:47, Mr. Chen and an unknown male were seen in the Durango, parked in the rear lane of the same address on East 5th that I have described in relation to previous surveillance. At 4:50, they observed what the observing officer -- they loaded what the observing officer, Constable Yee, described as a black "carry-on size" suitcase and what later turned out to be a portable air conditioner into the rear of the Durango. (Constable Yee agreed that the distance from which he observed this operation had limited the details of the suitcase that he could provide.) The Durango then drove away, with Mr. Chen as the passenger, at 4:54.
- [66] At 6:12 p.m., the Durango was seen parking at an apartment building on Katsura Street in Richmond. The observing officer, Constable Lavoie, saw Mr. Chen and an unknown male remove an air-conditioning unit and what she described as a "dark suitcase" (she could not recall its dimensions) from the rear of the vehicle and take them into the building. In cross-examination, she agreed that she did not recall "the details of the suitcase" and that she had not broadcast anything at the time other than that it was a suitcase.
- [67] The next morning at 9:45, Constable Yee saw Mr. Jawanda leave his house on Bryson Road in Richmond and put a suitcase in the rear of his Escalade. He was talking on his phone at the time. Constable Yee described the suitcase as a small carry-on, dark in colour, with black extendable handles and wheels. Mr. Jawanda then got into the Escalade.
- [68] He then met W. at 10:23, at their usual spot. As in the previous transaction, W. paid \$17,000 for two kilograms of MDMA. In return, Mr. Jawanda gave W. a black Heys brand suitcase. Inside it was a brown plastic Canadian Tire shopping bag that contained the two zip-lock bags of the drug. Mr. Jawanda gave him the code to unlock the suitcase during the meeting. W. described it as a briefcase in his evidence, but it is clear from the surveillance during the transaction, the photo of the item identified by Constable Simpson (who was also the exhibits officer), and the admissions that W. was mistaken about that detail.
- [69] Mr. Jawanda made some comments about these particular packages of MDMA that are alleged to correspond to Mr. Chen's description of it. In response to W.'s question about whether it was "good quality stuff", he explained, "Yeah, it's the same. But it's like a different texture, a little bit remember I told you yesterday " When W. said, "Uh, this guy's trust is right there," he responded, "Oh hundred percent, hundred percent, hundred percent. This is my main guy right. We've been doing business for like 20 years." He later rebuffed a suggestion that W. could "grab a coffee or something with this guy (that is, the supplier)", saying, "I'd rather not have him like, introduce you right now." They went on to discuss aspects of the parallel export/import scheme that I have mentioned.

[70] At 10:37 a.m., Mr. Jawanda called the Chen phone and said, "I got the paperwork for you. You want it now or later?" The speaker on the Chen phone said, "Later." This was followed by a bantering exchange between them that the Crown relies on to demonstrate that paperwork was a term they used to mean money:

Jawanda: "What if I spend it?"

Chen phone: "Then you know your house belong to me."

Jawanda: "What if I go gambling with it, double or nothing? You want double or nothing?"

Chen phone: "Then I'm taking your wife away."

[71] The speaker on the Chen phone then said, "1:30 at Home Depot, okay? I already arranged with them, okay?" He had given this time and location at the start of the call, after Mr. Jawanda asked, "Where you gonna be?"

[72] At 10:50, Mr. Jawanda's vehicle was located in the area of a house under construction on Hudson Street in Vancouver. He parked and left the vehicle, moving out of sight of the surveillance officers. Constable Yee agreed with the suggestion he could have gone into this house. His vehicle then backed out, to allow two other vehicles that were parked in the driveway ahead of it to leave.

[73] At 12:28 p.m., another surveillance officer, Constable Schamburger, saw Mr. Jawanda leave his own house in Richmond, access the rear passenger door of his Escalade, retrieve a green boutique bag, and go back into his house.

[74] At 12:31, the Chen phone called Mr. Jawanda. The speaker jokingly chastised Mr. Jawanda for still being at home and answered affirmatively Mr. Jawanda's question, "You there already?" Mr. Jawanda asked him to "order me a pho" and said he would be there in five minutes. The speaker on the Chen phone asked if he was sure he wanted pho, as opposed to another dish, but Mr. Jawanda confirmed his original request. There was also this exchange on the issue of payment:

Jawanda: I hey I took your money and I doubled it.

Chen phone: [M]ake sure you bring my fucking money I gotta pay my buddy.

Jawanda: I got it. I'm just fucking with you man.

[75] The call ended with Mr. Jawanda clarifying that it was beef pho that he wanted.

[76] The significance of the references to pho is that at 12:47 p.m., Constable Yee saw Mr. Jawanda and Mr. Chen eating together in a Vietnamese restaurant in Richmond called Pho Japolo, sitting across the table from each other. They ate lunch, conversed with each other, and were on and off their respective cellphones. Mr. Chen had a 12 inch by three inch bulge in his right front pocket. Constable Yee modified his description of the size as on cross-examination to four to five inches wide. He could see that whatever was in Mr. Chen's pocket

was wrapped in white plastic with a knot on top. They were observed by surveillance officers until about 1:17 p.m.

- [77] At 1:45, Constable Schamburger saw Mr. Jawanda park his vehicle at the Future Shop on Sweden Way in Richmond. Mr. Chen parked beside him in a Toyota Sienna. They both got out and met with two other unidentified men. All four shook hands in a seemingly friendly manner, according to Constable Schamburger. They were together for less than 10 minutes before Mr. Jawanda and Mr. Chen got back into their respective vehicles and left.
- [78] Constable Lavoie agreed on cross-examination that at 4:40 p.m., she saw Mr. Chen leaving the Katsura Street building and noted that he had a bulge in his front right pocket.
- [79] Constable Yee saw Mr. Chen again in the Sienna that day after exiting a Money Mart in Richmond at 6:00 p.m.

7. August 18

- [80] At 11:54 a.m. on that date, Mr. Chen was seen getting out of the same Sienna he had been driving on the 14th, at the same building on Katsura Street that he and the unknown male had entered with the suitcase and air-conditioning unit. According to Constable Yee, Mr. Chen appeared to use an electronic fob to enter the building and was carrying a green plastic bag tied at the top.
- [81] At 12:09 p.m., he left the building, carrying a brown paper bag with a thick green line on it. He carried it by rope handles that were about a foot long. He drove away in the Sienna.
- [82] At 1:55 p.m., the Chen phone called Mr. Jawanda and the caller said, "Hurry up, I'm leaving." Mr. Jawanda said he was just pulling into the driveway.
- [83] At 1:56, Mr. Jawanda called the Chen phone and asked where the speaker was because "I'm right here." The speaker referred to Mr. Jawanda having gone to Blundell and said he was on Cambie. He instructed Mr. Jawanda instead to turn left one block before Westminster Highway and wait for him there. He clarified that this was on Number 4 Road. He rejected Mr. Jawanda's suggestion that he "just go to the back of my house."
- [84] At 1:59, Corporal Tanguay saw the Escalade parked on a road west of Number 4 Road. The Sienna was parked beside it, in the driving portion of the road. The front passenger door of the Sienna was open and Mr. Jawanda was beside it in conversation with the Sienna's driver, whom Constable Tanguay did not identify.
- [85] At 2:02, he saw Mr. Jawanda in his Escalade in the parking lot of a shopping centre. He said Mr. Jawanda appeared to be waiting.
- [86] At 2:21, the blue Durango that has been described previously pulled up to the passenger side of the Escalade. The two vehicles then moved together in the parking lot, out of Constable Tanguay's view. There is an admission reflecting the observations of another surveillance officer that at 2:22 p.m., a male got out of the Durango carrying a white plastic bag. He went

to the front passenger door of the Escalade, opened it, leaned in, and then leaned out again. He closed the door and returned to the Durango, no longer holding the plastic bag. Mr. Jawanda then drove away in the Escalade.

- [87] Mr. Chen was observed by Constable Yee leaving a Starbucks on Bridgeport Road in the Sienna at 2:30.
- [88] At about 3:38, Mr. Jawanda met W. at the regular location. The transaction, which was arranged through their encrypted BlackBerries, consisted of \$16,000 being paid for two kilograms of MDMA, which the admissions describe as "white MDMA powder". The drugs were again in two zip-lock bags, this time inside vacuum-sealed bags which were then paced in a white London Drugs bag. W. referred to an extra payment of \$500, in addition to the cost of the drugs, being for Mr. Jawanda providing the drugs on short notice as a "rush". Mr. Jawanda referred to "it" being in grocery bags.
- [89] At 3:42, Mr. Jawanda called the Chen phone. The speaker answered by asking, "It's ready?" After being told that it was, he directed Mr. Jawanda to meet him at the TNT Supermarket on Cambie. The admissions specify that Mr. Chen was observed by surveillance inside that TNT Market between 3:41 and 3:50 p.m. Then at 3:51, the Chen phone called Mr. Jawanda. The speaker said, "I'll see you behind your house," and sought confirmation that Mr. Jawanda would not be long.
- [90] At 3:57, Mr. Jawanda arrived at the access road at the rear of his home and backed the Escalade into his rear driveway. The Sienna then pulled into the driveway beside the Escalade and Mr. Jawanda appeared to have a conversation with its occupant (the two driver's sides would have been next to each other because the Escalade had backed in). After a few minutes, the Sienna reversed out and left on the access road, followed by Mr. Jawanda in his Escalade.

8. August 21

- [91] The evidence with respect to this transaction began with a call from the Chen phone to Mr. Jawanda at 12:10 p.m. The speaker on the Chen phone asked Mr. Jawanda where he was. After learning that he was in White Rock, the speaker asked, "So-o-o?" Mr. Jawanda responded that he could leave right now and be there in half an hour. The speaker said, "Just go to your house" and to "hurry up".
- [92] At 1:04 p.m., the Chen phone called Mr. Jawanda and the following relevant conversation took place:

Jawanda: Hello.

Chen phone: I come f-, come to your house at 1:45, your house?

Jawanda: Uh, I gotta meet buddy at two, can you make it a little earlier?

Chen phone: No, I gotta meet that, that buddy at two as well.

Jawanda: Okay, that's fine. Okay, that's fine, just come when-

Chen phone: [b]ut if you can, you remember where I that's what I'm saying, I'm coming to you at two one o'clock, one, one forty-five. I'll bring you to somewhere, and then that's where you're gonna pick it up.

Jawanda: Okay, all right, just let me know.

Chen phone: It's really close by. So, be at home for me.

Jawanda: Oh, okay,okay, I'll be home.

Chen phone: At one forty-five, okay, be at, make sure -

Jawanda: Okay, all right.

Chen phone: -you be at home. And then, you gotta follow me.

[93] At 1:42, the Chen phone called again and the speaker asked Mr. Jawanda where he was parked. The answer was "in the back". The speaker said he was "coming down from Garden City and Alderbridge", which are streets in Richmond. At 2:18, the Chen phone called and the speaker asked Mr. Jawanda if he should "go to the back of your place again, with you then?" Mr. Jawanda agreed and said, "I'll be soon. He should be in a couple of minutes, so just go there."

[94] At 2:30, the Chen phone called and the speaker asked Mr. Jawanda to confirm he was on his way. Mr. Jawanda advised that he would be leaving soon and that "he's running a little bit late [in context likely a reference to W.'s arrival for the transaction]. I should be there in two minutes and then I'll be home in like what less than 10." The speaker said he had to catch the ferry. When Mr. Jawanda asked him which one, he said he would go look at the schedule.

[95] The transaction with W. began at 2:33 in the same location. Two kilograms of MDMA were purchased for \$17,000. Once again, it was white MDMA powder in vacuum-sealed bags, this time in a multi-coloured gift bag. In a comment that the Crown says corresponds to the information he had just received from Mr. Chen, Mr. Jawanda advised W., "I was helping, my buddy was leaving, he's going to Victoria so he's waiting for the door right now. He's (chuckles) catch the four o'clock ferry."

[96] W. spoke of needing two additional kilograms of MDMA next Wednesday. He said he was going out of town and that his driver, who had been played by M. in a previous scenario, would do the transaction. He told Mr. Jawanda that the next transaction would be the last time he purchased two kilograms. It would be four after that.

[97] Shortly after they parted, he called Mr. Jawanda back to apologize for forgetting to give him an additional payment he had promised. He said that M. would look after it on Wednesday.

[98] At 2:40 p.m., Corporal McLean saw the Sienna that had previously been associated with Mr. Chen pull into the driveway at the back of Mr. Jawanda's house. The Escalade then returned and the vehicles were "window to window". There was an exchange of words and the Sienna left and drove past Corporal McLean's position. She was able to see into the vehicle and identified Mr. Chen as the driver. She took photos of this encounter, which she described as being between the arrival of the Sienna at 2:42 and its departure at 2:50.

[99] At 2:48, the Chen phone had called Mr. Jawanda and the speaker had asked, "Where are you now? Come on, man." When Mr. Jawanda said he would be there in one minute, the speaker said, "I'm fucking at the back, burning."

9. August 26

[100] August 26 at 4:01 p.m., the Chen phone called Mr. Jawanda and the following conversation took place:

Jawanda: Hello?

Chen phone: Did you see him yet?

Jawanda: No, man, I'm still sitting at the same spot.

Chen phone: Oh. Uhh, I'm on my way back too, so-

Jawanda: U-,uh, alright.

Chen phone: -uhh, should I go there too or no, fuck.

Jawanda: It's up to you. I mean, I don't know if you want to give me a ca-

Chen phone: No, you, you be there in a couple of second, I'm sure

Jawanda: Well, then, that's fine. Then uh, you can just meet me at m-, my house.

Chen phone: Just wait there, just wait there, then. Just wait there, okay.

Jawanda: Okay.

Chen phone: You may see him, just wait there after, okay? I'm on my way.

Jawanda: yeah, he knows who I am, ri-

[101] The admissions provide that at 4:10 p.m. on that date, Mr. Chen drove into a parking lot on Number 6 Road, where Mr. Jawanda's Escalade was already parked. He initially stopped in the south of the lot, away from the Escalade. Then, after a minute, he moved his vehicle beside it. Surveillance video showed Mr. Chen sitting in his vehicle with the window open, conversing with the driver of the Escalade.

- [102] According to the admissions, a Lexus drove into the parking lot at 4:11 and parked "directly to the south" of the Escalade. A male then appeared from the area of the Lexus, opened the rear hatch of the Escalade, and then returned back in the direction of the area from which he had appeared. He reappeared carrying a closed cardboard box with Home Depot decals on it, placed it in the rear of the Escalade, then closed the rear hatch. The Escalade then left the parking lot.
- [103] The Lexus pulled out of the parking lot and "held" at the entrance, according to the admissions. Mr. Chen pulled his vehicle behind it and he and its unknown male driver had a conversation.
- [104] On August 26 at about 9:20 a.m. M., the second undercover officer, met with Mr. Jawanda in the same general area as W.'s drug purchase meetings had taken place. The admissions provide that he received a green gift bag with a yellow plastic bag inside it which contained the two kilograms of "white MDMA powder" in vacuum-sealed bags. He paid \$17,000 for the purchase plus a thousand dollars as a tip - \$500 for the current transaction and the \$500 that W. had forgotten to give him on the 21st. M. testified that the money was provided in a white bag with a Starbucks logo on it. Its dimensions were approximately eight by 10 by six inches - a size that would be suitable for fitting a travel mug into, as he put it. This fairly brief transaction was captured on video as well.
- [105] Constable Yee saw then Mr. Chen and Mr. Jawanda together at Lansdowne Mall in Richmond at 9:40 that same morning. Mr. Chen was holding a brown Starbucks bag, which Constable Yee described as having a pattern of rows of sunglasses on it, and looking at his cellphone. A minute later, Mr. Chen was seen walking towards the entrance of the building at 8180 Lansdowne Road that is alleged to have been his home at the time.
- [106] At 2:08 Constable Yee saw him driving the BMW registered in his name, at the same business centre where that vehicle had been observed driving in tandem with the Durango on August 14.
- [107] He then saw Mr. Chen driving that BMW at 2:40 in the parking lot near a Cactus Club restaurant on Number 3 Road. This time an unidentified male drove into the parking lot, walked over to the driver's side of Mr. Chen's vehicle and spoke to him. The trunk of the vehicle opened and the male received a medium-size silver boutique bag from it. Mr. Chen got out and closed the trunk, then left the parking lot in his vehicle.

C. Supporting Evidence

- [108] The Crown led additional evidence to support the inferences that Mr. Chen was the person who (1) participated in the intercepted calls with Mr. Jawanda that I have summarized, and (2) drove both the BMW registered in his name and the Sienna that figured in a number of the meetings, in addition to the times he was identified by a surveillance officer as doing so.

- [109] At 8:34 on the morning of April 1, 2015, the investigators placed what is known as a "drop call" to the cellphone number that is being attributed to Mr. Chen. Corporal Davies made this call, which was carried out under the guise of reaching a wrong number. It lasted 10 to 15 seconds and he noted that the voice at the other end was that of an Asian male, which he elaborated was based on the male having an accent from what he defined as "eastern Asia", such as China or Japan.
- [110] At the same time, Constable Zeeman was conducting surveillance on Mr. Chen and another Asian male inside the Starbucks on Number 3 Road in near the Lansdowne Mall. He saw Mr. Chen receive a call on his cellphone at 8:35 a.m. He was 20 feet away, so he could not hear the conversation, but he saw Mr. Chen pick up the phone, put it to his ear, and appear to be talking. In cross-examination, he said he saw him touch the screen before putting the phone to the side of his head.
- [111] Constable Badach was involved in listening to the calls that were intercepted in the investigation on a daily basis and became familiar with some of the voices involved. He phoned Mr. Chen on October 15 on that same cell number to arrange his arrest in relation to this matter. (I infer that the investigators believed that Mr. Chen would be cooperative and so intended to carry out the rest by prior arrangement.) They spoke for about five minutes and Constable Badach said he recognized the voice as belonging to the person he "knew to be" Stephen Chen from his time monitoring intercepted calls.
- [112] He spent approximately six hours with Mr. Chen following the arrest. He identified him in court, the person with whom he had dealt.
- [113] All of the surveillance officers who testified about their observations of Mr. Chen also identified him in court as the person they had observed. During the investigation they had identified him from the photos in the "target sheets" with which they were provided.
- [114] Records from Rogers Communication list that cellphone number as being registered to Sam's Concrete Pumping 2011 with the user name of S.C. and an address of "Attn: Stephen Chen, 7058180 Lamseown, Richmond, BC", with a postal code corresponding to that address. Land Registry records show that a Hai Pang Chen is the registered owner of 705 - 8180 Lansdowne Road in Richmond, with the same postal code as in the Rogers records. Mr. Chen was arrested entering the parkade of that building, once again in a Sienna minivan, on October 16.
- [115] The admissions specify nine other incidents between August 18 and 21 in which Mr. Chen was identified driving the Sienna, in addition to the ones that I have summarized.
- [116] In addition to the two observations by Constable Yee on August 26 that I have summarized, the evidence of the surveillance officers reveal two additional observations during which Mr. Chen was driving the BMW registered to him. There was also an earlier observation on June 24 in which the vehicle was seen leaving the Lansdowne Road building, thus associating it to that building, although it was being driven by a woman at the time.

- [117] Constable Simpson's description of the seized MDMA purchased by the undercover officers (the August 14 amount was processed and photographed by another officer, but Constable Simpson recorded the date and secured it in the evidence locker) were that the substances were for the most part a brownish-white colour - a sandy, grainy-type product. He said that for two of the transactions - August 14 and 18 - they were more of a whitish colour with the substance on the 18th approaching the colour of powder cocaine, he said The August 26 substance was back to the brownish-white colour of the earlier product.
- [118] Constable Simpson also referred to some of the packages containing "big dark brown chunks, one inch by one inch, a rocky brown crystal". However, when I asked him when that type of substance had appeared, he said it was not depicted in any of the exhibit photos and that he would have noted it if any of these drugs had contained it. Thus the only potential support for a connection between what was sold to W. on August 14 and Mr. Chen and Mr. Jawanda's respective assertions about the difference in the type of MDMA being provided was that it was whiter than the majority of the kilograms that were sold during the investigation, (although not as white as on August 18) rather than that it had any different consistency, as their comments might suggest.
- [119] Corporal Simpson responded to the suggestion on cross-examination that the June 13 and July 6 purchases were different colours by saying that if they were different, it was "only by a shade". He accepted that the July 6 shipment appeared to have a pinkish tinge in one of the photos, which he attributed to "the optics of that photograph". He accepted that one of the two kilograms depicted in another photo also appeared to have such a colour. He did not know if it was the lighting or the reflection that had caused it.

D. Relevant matters brought out in cross-examination

- [120] Mr. Chen's counsel elaborated on the focused transactions and supporting evidence led by the Crown to bring out a greater range of observations, which he argued give rise to alternative inferences to the ones urged by the Crown. In particular, evidence was brought out of the diversity of Mr. Jawanda's drug enterprises and suppliers, beyond these specific transactions, and Mr. Chen's involvement in a variety of innocent activities while under surveillance. For example:

- Mr. Jawanda's representations during the early stage of his relationship with W., in the context of the import/export operation, that he represented some "big players" and that he had a role as a point man for transporting drugs - coordinating suppliers to put together shipments and arrange transport. He accessed a variety of drugs for transportation purposes, such as bringing cocaine into Canada from the U.S.; had an interest in transporting marihuana to the eastern U.S. and Alaska; and had another scheme of his own of importing heroin from India that he wanted W. to participate in. Along these lines, on February 14, he spoke of having been "running around meeting with all these idiots trying to get a date" (that is, for the international transport setup).

- During a discussion on December 14 about the transportation of drugs, he referred to meth or MDMA going south and said, "We have lots of molly"- a type of MDMA.
- On January 15, Mr. Jawanda had given W. samples of MDMA and explained that "they" have good quality MDMA and pills. There were different styles of MDMA - crystal and powdered, or "old school" and "new style" as he described them. Mr. Jawanda said these samples did not represent the products W. would be buying later. Instead, "the next batch is being made right now."
- Similarly, on January 21 he provided various coloured pills and crystal MDMA in a baggie, as well as what was described as "black meth" in a bag. He said he would be meeting his cook tomorrow and getting another sample. After this evidence was put to him, W. agreed that it was possible that Mr. Jawanda had access to multiple suppliers of MDMA.
- On January 28, Mr. Jawanda provided a sample that he said was better than the last one. He said it was \$9,000 - \$10,000 per kilo and was "[his] deal". He could provide a volume of it but wanted to get a quantity for himself so he could sell to others.
- During their meeting on February 5, he said he knew several groups of "Chinese" who were in the drug business.
- During the undercover scenario on February 9, he referred to having had 20 kilograms of MDMA at his house for transport, before the suppliers took it back because of delay and uncertainty surrounding the transport. Carrying on in this vein, he also referred to these suppliers as "four Chinese" who had each put in five kilograms to try "it", (presumably his transportation service). He also told W. that he did not have the kind of MDMA that W. wanted, but would provide a kilogram from a different sample that he had given previously, and could do it tomorrow. In this context of there being multiple sources, he also said, "I talked to my Chinese guy and the other guy" about possibly being able to get the kind of MDMA represented by that previous sample.
- W. confirmed that Mr. Jawanda had more than one phone or electronic device on which he communicated, in addition to the BlackBerry that they used to communicate with each other. W. spoke to him on other numbers as well.
- Earlier in the day on February 14, during the meeting in which he had arranged the forthcoming MDMA purchase with Mr. Jawanda, the latter had said that he could provide larger quantities of the substance, depending on the type W. wanted. When W. said he wanted "whatever you can get tonight", Mr. Jawanda said, "I already have it, I just got to pick it up." In response to W.'s inquiry about the newer ecstasy pills, he said, "Oh, I'll grab that too. I'm just going to run out to Surrey..." The kilogram he actually provided was the same kind he had given W. "in the beginning" - that is, back in November.

- In the aborted 10-kilogram MDMA purchase set for March 11, which was to have been arranged through Mr. Jawanda's former co-accused, Anoop Garcha, Mr. Jawanda ultimately returned the purchase money to W. He gave the explanation that the drugs from his supplier were not the drugs that he and W. had agreed on. W. agreed with the suggestion in cross-examination that Mr. Jawanda had, in effect, inspected the drugs and, not being satisfied with them, had "unwound the deal".
- As I have previously summarized in a different context, in the June 5 transaction Mr. Jawanda said he had been able to get the type of MDMA he had spoken about bringing him. Despite W.'s concerns that it was lower quality, he stressed that it was of a type that W. had been previously satisfied with. This is again relevant to the defence position that Mr. Jawanda worked with multiple sources.
- Similarly, there was an exchange between them by BlackBerry on June 11 in which W. asked, "Any word on the better shit?" Mr. Jawanda replied, "Not ready, I'll try elsewhere."
- On June 12, Mr. Jawanda's message at 8:23 p.m. was that if W. wanted to meet that day, that is to purchase MDMA, he was "good". This left W. with the understanding that Mr. Jawanda had MDMA and was ready to sell. Mr. Jawanda had answered affirmatively to the question, "You got the 1?" This required W. to put him off to set up an undercover scenario which could not be done on the fly. When they met, he confirmed once again, as I have mentioned, that he had had "it", but W. "could not do it then".
- Before the first intercepted conversation between Mr. Jawanda and the Chen phone on August 21, there had been a previous one, at 11:03 a.m., in which Mr. Jawanda had asked, "Can I grab two of those things?" The speaker alleged to be Mr. Chen had responded, "Uh y-no tomorrow", although when Mr. Jawanda echoed that response, the speaker modified it to, "Uh, I'll see, I'll let you know later, all right."
- On August 21, W. asked at 11 a.m. if he could "grab 2 today." Mr. Jawanda said it would be no problem. In their subsequent exchange at 11:18 and 11:20, Mr. Jawanda said, "I'm trying to get it today maybe tomorrow." When W. said he really needed "it" today, Mr. Jawanda said, "OK let me put some pressure on bro." The point was that he was trying to obtain MDMA from his supplier and did not have it.

[121] Counsel also brought out evidence of Mr. Chen engaging in normal activities, such as going to a bank to have an ATM card activated, golfing (the parking lot where the transfer of the box to Mr. Jawanda's Escalade was made was at a driving range), and attending to a house in Richmond and interacting with a teenage boy, whom I can readily infer was his son.

III. Positions

A. Defence

- [122] Mr. Chen's counsel framed his overall submission within the analysis in Supreme Court of Canada in *R. v. Villaroman*, 2016 SCC 33, on the proper approach to be taken to a case based on circumstantial evidence. That decision made clear that when a trier of fact is considering whether the guilt of an accused has been proven by circumstantial evidence beyond a reasonable doubt, they should consider what are described as "other plausible theories and other reasonable possibilities" that are inconsistent with guilt. Crucially, those do not have to be inferences based on the evidence, as was previously expressed in some of the cases. They only need to be based on logic and experience applied to the evidence or the absence of evidence. In essence, the evidence relied on by the Crown should be such that "it excludes any other reasonable alternative".
- [123] A helpful gloss on this analysis was provided in *R. v. Knight*, 2019 ONSC 2443 at para. 20:
- ... it is not enough for the Crown to prove that guilt is the strongest reasonable inference. It must be the only reasonable inference.
- [124] In overview, counsel set out the variety of features of the evidence that give rise to competing reasonable inferences here, such as Mr. Jawanda's operation of a legitimate business as well as his drug trafficking; the indications of a gambling problem on his part and the resulting accumulation of debt giving credence to loan arrangements being necessary; his access to a variety of different drugs and suppliers, as I have summarized; and his use other devices for his communications.
- [125] The documentary evidence also associates Mr. Chen with Mr. Jawanda's concrete business and the promissory note indicates that there was a money-lending relationship between them in connection with it, which may still have been ongoing at the time of the investigation.
- [126] Mr. Chen was seen engaging in the normal family activities with a young male, as well as a recreational pursuit that links to one of the locations of an alleged transfer of drugs.
- [127] Counsel emphasizes that there is no actual basis to infer that he was carrying drugs on any of the occasions he was seen with bags. He was observed at the nearby Starbucks more than once in the investigation, and it is easy walking distance to what was ultimately not disputed was his home on Lansdowne.
- [128] And while the Crown placed considerable stress, as I will explain, on the cryptic or guarded nature of the telephone conversations between the person said to be him and Mr. Jawanda, his counsel submits that dissecting conversations between friends or business associates on the basis that they fail to explain themselves sufficiently to facilitate the understanding of a third-party listener is not an exercise that yields probative evidence.

- [129] Put simply, the defence submits that while one could draw the inferences sought by the Crown solely on the basis of the evidence the Crown has referred to, when one considers the evidence in totality, it is simply not possible to exclude other reasonable inferences arising from it.
- [130] With respect to the identification of Mr. Chen as the speaker on the phone being attributed to him, Mr. Chen's counsel referred me to the CRIMJI instructions on the admissibility of tape recordings, which proceed from the assumption that the Crown will tender evidence purporting to identify the speaker as the accused. He points out that there is no direct evidence purporting to identify the voice in the recordings as Mr. Chen's. Corporal Badach's comparison was with the voice identified to him throughout the investigation as Mr. Chen's, not his own primary experience, so it is circular in that sense and therefore capable only of identifying the similarity among the calls, not attributing them to a speaker. He was not asked to bring his subsequent contact with Mr. Chen to bear and identify him as the speaker on those calls. Corporal Davies did not compare the voice of the person to whom he briefly spoke on the drop call to any other voice either.
- [131] The defence acknowledges that the trial judge as trier of fact is permitted to compare the voices and make an identification (the cases cited on this point by the Crown were *R. v. Chan*, 2001 BCSC 1180, *R. v. Pal*, [2007] B.C.J. No. 2194 (Supreme Court), as well as *R. v. Malvoisin*, [2006] O.J. No. 3931 (CA), for an analogous comparison of handwriting.) But Mr. Chen's counsel points out that in both *Chan* and *Pal*, the judges were ultimately unable to be satisfied of identification on that basis. Despite this route technically being open to the trier of fact, he also submits that voice identification lacks the same level of objective verifiability of physical identification from a photo or video when compared to the presence of the accused in court. As a result, our situation is not directly analogous to the authorities that permit the trier of fact to make identifications themselves.
- [132] Dealing with circumstantial evidence of Mr. Chen's identity as the speaker, the registration of the number to Mr. Chen's attention at Sam's Concrete is equally consistent with its status as a company phone, to which others may have had access. The drop call ends up being equivocal evidence, it is argued, because Mr. Chen may just have been touching the screen to make a call to a preprogrammed number at that particular time, or the phone may have belonged to the male he was with. It is meaningful on that point that Constable Zeeman did not see Mr. Chen with anything in his hands, such as his own phone, before he sat down at the table.
- [133] More generally, while the surveillance offers evidence that Mr. Chen may have used that phone on some occasions, it falls short of demonstrating that his is the voice on any of the calls. These concerns are compounded with respect to the payphone call, which lacks even the circumstantial surrounding evidence of the cellphone and its use.
- [134] Of course, without my being satisfied that the voice is Mr. Chen's, the surveillance and circumstantial evidence of his identity as the supplier of MDMA must fall short.

[135] However, even if I end up being satisfied he is the speaker on the phone, the defence submitted that the evidence of what he said and did in relation to each transaction is either equally consistent with innocent behaviour, or contains elements that contradict the Crown's theory, thus giving rise to the reasonable alternative that he is not the supplier in that transaction.

[136] To demonstrate this, counsel examined the key elements of circumstantial evidence relied on by the Crown for each transaction and sought to demonstrate how they either fall short of providing a basis for the suggested inference or give rise to other reasonable possibilities.

[137] For February 14:

- The "it" referred to in the conversation between Mr. Chen and Mr. Jawanda was never clearly or unequivocally defined. It may have related to the cement business or "countless other topics";
- There was no evidence that W. had told Mr. Jawanda before this transaction that he was leaving town, so there is no link to the subsequent sale in his comments during the conversation that "buddy's taking off";
- It is speculative to infer that the reference to the restaurant during their conversation meant that a meeting took place there in which MDMA was provided by Mr. Chen;
- When Mr. Jawanda and W. met on the morning of the transaction, Mr. Jawanda referred to already having the drug and just having to pick it up, and having to "grab" the ecstasy pills, which he mentioned in the same part of the conversation in which he described "run[ning] out to Surrey". Since the conversation with Mr. Chen about obtaining the drugs did not take place until 6:29 p.m. that evening, there is a very plausible inference that these drugs were not obtained from him; and
- The theory of the Crown that the reference to paperwork in their conversation means the money that Mr. Jawanda received from W. is subject to the same reasonable alternatives as their earlier conversation about it. It may have referred to the cement business or a loan payment. In particular, it is argued that Mr. Chen's comment, "The guy need it", does not make sense as a reference to drug payments, but would make sense as a reference to business-related documents like plans or contracts. The other important point is that in the Crown's theory, "the guy [who] need[ed] it" was Mr. Chen.

[138] For June 5:

- As in the case of the February 14 transaction, the "it" discussed in relation to this one was never identified in a clear enough way as MDMA to distinguish it from the other reasonable possibilities unrelated to drugs that arise from the conversation;

- Also as in the case of the earlier transaction, Mr. Jawanda described the contact with his supplier to W. in a way that tends to exclude Mr. Chen - referring to the drug having been dropped off at his house at 10 o'clock the previous night when, in the Crown's theory, the pickup and the conversation relating to it took place that morning;
- The post-transaction conversation between Mr. Chen and Mr. Jawanda contained no references at all to money or payment, whether cryptic or otherwise.

[139] For June 13:

- Once again, the Crown's theory of Mr. Chen's involvement, which is based on his conversation with Mr. Jawanda on June 12, in which he spoke of supplying the drugs "tomorrow", is contradicted by Mr. Jawanda's statements to W. on the 13th, in which he said, "I had it last night, but I guess you were tied up," which W. confirmed as the conversation progressed. There is no surveillance evidence of meetings between Mr. Chen and Mr. Jawanda in advance of this transaction that would place the supplying of the MDMA into a time period that supports the Crown's theory; and
- As to the theory of the payment for the drugs in the post-transaction conversation, the defence says that references to a bank draft and wanting "cash in" cannot reasonably be interpreted as applying to a drug transaction. They fit much more reasonably within the topics of business activities or loan repayment.

[140] For June 24:

- There is no evidence of the purpose of the meeting between Mr. Chen and Mr. Jawanda on East 5th before the transaction, and surveillance did not establish the exchange of any items. Crucially, the observing officer saw nothing in Mr. Chen's hands when he walked through the gate of the residence;
- There was a gap of about an hour, during which Mr. Jawanda changed his vehicle to a pickup truck and his activities were not under observation, before the meeting with W. Two weeks later he was seen by surveillance officers in that pickup truck in the area of the home of one of his other drug associates, as he described him to W. In other words, there is evidence of a subsequent connection between his use of that vehicle and a person besides Mr. Chen who was involved in drug trafficking. This adds to the reasonableness of the possibility that Mr. Jawanda obtained the MDMA from someone else during the unobserved period on the 24th;
- As in the previous transactions, there were statements by Mr. Jawanda to W. that run counter to the inferences about Mr. Chen's role as the supplier urged by the Crown. Here, he described to W. that he had been caught up in his son's graduation activities and the supplier had left the drugs in his barbecue; and
- Meaningfully from the defence perspective, there is no post-transaction evidence about a payment being passed on to Mr. Chen.

[141] For July 7:

- In addition to the lack of any reliable definition of the "it" being discussed, as I have noted for previous transactions, there are no specific details indicating a drug delivery being carried out during Mr. Chen's subsequent attendance at Mr. Jawanda's friend's house for the discussed "drop-off"; and
- The arrangements for the post-transaction meeting behind the Costco also do not contain any statements that are reasonably referable only to drug payments. Various items relating to the concrete business could also have been the subject matter, for example.

[142] For August 14:

- An important discrepancy in the pre-transaction call is that both Mr. Chen and Mr. Jawanda assert that the drugs to be delivered were "pink". This is contrary to Corporal Simpson's description of them as white. It acquires further significance in light of his concession of at least a pinkish tinge in photos of the drugs seized following the July 7 transaction;
- The lack of direct evidence that the suitcase Mr. Chen was seen with was the one that Mr. Jawanda delivered to W., and the fact that his reference to his "main guy" could refer to any number of suppliers, make it plausible that he originally planned to obtain pink MDMA in the pre-transaction call with Mr. Chen and then had to substitute with a white product from another supplier when the original transaction did not pan out.
- It is also plausible that the pre-transaction call was actually with the driver of the Durango who delivered MDMA to Mr. Jawanda at the shopping centre. That vehicle was associated to the Katsura Street address to which Mr. Chen was seen bringing a suitcase, along with the air-conditioning unit; and
- While the defence concedes that the post-transaction call refers to money in some manner, the language used still does not exclude the reasonable possibility that it related to the concrete business or a loan, as has been pointed out in relation to previous conversations. Mr. Jawanda's post-transaction visit also raises the reasonable alternative that he was arranging to provide money to Mr. Chen that he obtained at the house under construction, in return for the completion of some other kind of work.

[143] For August 18:

- There is no intercepted conversation between Mr. Chen and Mr. Jawanda before this transaction;
- In the absence of the admission about the exchange of the plastic bag between the driver of the Durango and Mr. Jawanda at the shopping centre at 2:29 p.m., an inference would have been sought by the Crown that the MDMA had been provided by Mr. Chen in their meeting a few minutes earlier off of Number 4 Road. This illustrates the danger of inference drawing in the absence of knowledge and consideration of all the circumstances. That inference has been contradicted and there is no evidence to support the Crown's alternative explanation that Mr.

Chen arranged to provide Mr. Jawanda with the drugs from Mr. Chen's associate. Instead, a reasonable alternative explanation emerges that Mr. Jawanda obtained the drugs directly from the driver of the Durango, without Mr. Chen's involvement; and

- As in the case of the other transactions, Mr. Chen answering the post-transaction call with, "It's ready," does not, when considered in light of all the circumstances, exclude business or other matters unrelated to drugs as the reasonable subject matter of the call and the meeting between them that it arranged.

[144] For August 21:

- The first difficulty for the Crown that is said to arise is that Mr. Chen on that date initially responded, "No, tomorrow," to Mr. Jawanda's request at 11:03 a.m. to "grab two of those things". Notwithstanding the modification of the Crown's theory after the admission of this conversation, to suggest that Mr. Chen ultimately managed to accommodate Mr. Jawanda later that day by supplying two kilograms as requested, this response still casts doubt on the inference of Mr. Chen's involvement and makes it more likely that it was about something business-related, such as equipment or materials to be picked up, rather than MDMA;

- A reasonable interpretation of Mr. Jawanda's description of his "buddy" who was "leaving" and "going to Victoria" is that he was a little rushed because he had been helping a friend who was going to Victoria, and that he now had to go and see him off or help him get ready. There is no basis on which to prefer an inference that "buddy" was his MDMA supplier; and

- As in the case of previous meetings of this nature, the post-transaction conversation between Mr. Jawanda and Mr. Chen and the meeting that was discussed during it do not provide any meaningful support for an inference that money changed hands during it as a result of a sale to W.

[145] Finally, for August 26,

- There are no intercepted conversations with Mr. Jawanda and Mr. Chen from which it could be inferred that any transaction was being arranged.

- The meeting in the driving range parking lot on the 25th does not support inferences of Mr. Chen's involvement in supplying the MDMA that was ultimately sold to W. the following day. There is no evidence of the purpose of the meeting. The Home Depot box loaded into Mr. Jawanda's vehicle is consistent with construction supplies suitable for a concrete business and, regardless of its contents, it is no more than speculation to assert that it contained the MDMA that was supplied to W. the next day. Further, as I have adverted to previously, Mr. Chen's demonstrated recreational pursuit of golfing meant that it would not be an unusual matter for him to meet friends or those involved in the concrete business in the parking lot of a driving range;

· The Starbucks bag that was provided to Mr. Jawanda by M., containing payment from the MDMA, does not resemble at all the one that Constable Yee saw Mr. Chen holding during his meeting with Mr. Jawanda later that morning. Given the evidence that he attended the nearby Starbucks, which is two to 300 metres from his home on Lansdowne Road, during the investigation, a reasonable inference is that he obtained the bag from there.

[146] Thus, Mr. Chen's counsel submitted that when the evidence is considered in totality, as it must be, there are simply too many instances where it is inconsistent with the Crown's theory of liability, or supports reasonable inferences other than guilt, to meet the standard of proof beyond a reasonable doubt for any of the transactions contained in the single count.

B. Crown

[147] Because it was not ultimately disputed that Mr. Chen, as the accused before the court, was the person who the surveillance officers purported to identify in their observations, I do not need to review the Crown's submissions on physical identification. Nor was there any issue that Mr. Jawanda was the speaker identified by that name in the transcripts of intercepted conversations that are alleged to have been with Mr. Chen.

[148] With respect to the identification of Mr. Chen's voice, Crown counsel pointed to the various items of direct and circumstantial evidence supporting that finding, and submitted that as a result it is the only reasonable inference available. These items included the registration of the cellphone; the drop call; the correspondence between the references to pho in an intercepted call and his subsequent presence eating pho with Mr. Jawanda in a restaurant; and his presence at the rear of Mr. Jawanda's home after describing that as his location. As I have referred to when summarizing the defence submissions, the Crown says that it is also open to me to review the conversations and find that, leaving aside whether the speaker alleged to be Mr. Chen is the accused before the court, it is definitely the same person speaking throughout the calls.

[149] On the issue of trafficking, Crown counsel provided a helpful appendix to their submissions, setting out the essential points of the intercepted conversations and surveillance that are said to support Mr. Chen's role in each transaction. She argued that an overall consideration of these interactions reveals certain compelling common features:

· The pattern of Mr. Jawanda and Mr. Chen meeting before and after each transaction. More specifically, there was a sequence consisting of communications between them, followed the sales to W., and then the arrangements between them for a follow-up meeting for payment. This included repeated references to "paper" and "paperwork" to connote money, as well as one reference to Mr. Chen paying his own supplier, which the Crown says I should infer from the comment "the guy need it" on February 14.

- The corresponding details between the Jawanda/Chen communications and the information shared between Mr. Jawanda and W. (such as W. leaving town imminently, the change in consistency of the product on August 13, and the need for Mr. Jawanda's buddy to catch the ferry on August 26);
- Mr. Jawanda's ongoing references to his lengthy relationship with his supplier, resulting in guarantees of the quality of the product supplied; and,
- The correspondence between the number of kilograms requested from Mr. Chen each time and the number provided to W.

[150] Crown counsel began her response to Mr. Chen's submissions by noting that the defence approach had been to attack each individual piece of evidence in isolation, without acknowledging the significance of the totality of it. In contrast, the trier of fact's task in a case based on circumstantial evidence is to look at its totality in a common sense way. She pointed out that what Villaroman requires are alternate reasonable inferences, not merely possible ones. It should therefore have been possible for the defence to articulate any such inferences in the form of specific examples rather than simply referring to countless alternatives as has been done here.

[151] Here the Crown says that when considering alternate inferences I am being asked by the defence to go beyond anything that is reasonable. For example, the theory that an employee of the concrete business made use of the phone that the Crown seeks to attribute to Mr. Chen is inconsistent with the results of the drop call, as well as the documents showing that the business entity to which Mr. Chen had a connection was dissolved in 2015.

[152] On the general issue of voice identification, the Crown emphasized that it simply involves the use of a different sense to perceive it than physical identification, and that there are many characteristics of voices that make them distinctive and capable of being recognized. It is also important to keep in mind that voice identification is simply an item of evidence subject to findings of fact. Unlike an essential ingredient of the offence, it does not have to be proven beyond a reasonable doubt.

[153] Crown counsel analyzed the contradictions in the evidence with respect to Mr. Chen's involvement that were put forward by the defence, submitting that on closer examination they do not actually undermine the Crown's theory of liability. Mr. Jawanda's comments that "I already have it, I just gotta pick it up," in reference to the February 14 transaction, can readily be understood as meaning, "It's ready, I just have to pick it up." Mr. Chen's comment that "the guy need it" in reference to payment makes sense, Crown submits, in that Mr. Chen had to have obtained the MDMA from somewhere and, likely the Katsura Street address (and of course had to pay for it, I infer the Crown is saying).

[154] The Crown acknowledges two instances in which Mr. Jawanda's accounts of when or how he received the MDMA are inconsistent with the surveillance. His statement that he "had it last night" for June 13, and the story that his supplier left it in his barbecue for June 24.

However, these comments, which he made in the context of trying to gain the undercover officer's trust and protect his supplier, have no objective evidence to support them, so the inferences provided by the intercepted conversations and surveillance should be preferred. In fact, saying that he had it last night is not inconsistent with it having been in Mr. Chen's possession, given the rewards that Mr. Jawanda received from W. for the quick turnarounds and the quick changes in Mr. Chen's ability to provide drugs that the whole of the evidence demonstrates. The best example of the second factor, according to the Crown, is Mr. Chen supplying MDMA for the August 21 transaction after responding "no, tomorrow", and then promising to update Mr. Jawanda.

- [155] Another potential contradiction addressed by the Crown was the white colour of the MDMA purchased on August 14, when set against the reference "100 percent it's pink" in the preceding call between Mr. Jawanda and Mr. Chen. First of all, the most that Constable Simpson was prepared to accept was that in two of the pictures the drugs looked pinkish, in one case likely because of the angle at which it was taken or the flash. Second, in the intercepted conversation, the reference to pink is simply a statement. The participants are not insistent that the substance is that colour.
- [156] The fact that the driver of the Durango appears to have been involved in the trafficking enterprise does not undermine the inferences being sought, Crown counsel argued. It simply indicates that Mr. Chen obtained the assistance of a third party, likely so he did not have to touch the drugs involved. As for the explanation for the guarded language in the interceptions offered by the defence, the Crown maintained that calls between friends or business associates would not be so devoid of proper names, identification of the commodity involved, or indeed of any context for them whatsoever, as the ones in question here.
- [157] Finally, on the question of whether some of the conversations could be read as business discussions, Crown counsel observed that on the only evidence we have of either Mr. Chen's involvement in the concrete business or his money lending with respect to it were historical by the time of these transactions. According to Crown counsel the only contemporaneous reference to the business was the registration of Mr. Chen's cellphone (although, as I have summarized, there is also the conversation about attending to the accountant). There is no evidence of his actual participation in the business during the relevant period.

IV. Discussion

A. Circumstantial Evidence and a Continuing Offence

- [158] There was no meaningful dispute on the manner in which the analysis required by Villaroman is to be carried out. Just as individual pieces of evidence are not subjected to the standard of proof beyond a reasonable doubt, a conclusion on the sufficiency of the circumstantial evidence must be based on a consideration of the evidence as a whole, not the individual pieces which, standing alone, may well be subject to competing inferences.

However, despite the applicability of all of the evidence to the circumstantial analysis, the essential elements of Mr. Chen's involvement in one or more of the specific incidents of which the alleged continuing offence is comprised must still be proven beyond a reasonable doubt in order for there to be a conviction: see *R. v. G.L.M.*, 1999 BCCA 467 at paras. 25-28. In considering whether the evidence meets that standard for the essential elements of each incident, it is possible that alternative reasonable inferences to guilt will arise in relation to some of the incidents, but not others.

B. Mr. Jawanda's Statements

[159] It is also common ground that the statements of Mr. Jawanda to W. are admissible for the truth of their contents. Crown counsel reviewed the applicability of the co-conspirator's hearsay exception to his evidence in the course of her submissions and Mr. Chen's counsel did not dispute that analysis. This common position has the potential to advance the positions of both the Crown and the defence, because Mr. Jawanda's substantively admissible statements may support or undermine the inferences of guilt that the Crown says should be drawn from the evidence.

C. Voice Identification

[160] Mr. Chen's counsel is correct to say that this issue is frequently addressed by evidence from witnesses who are familiar with an accused's voice and testify that they recognize it in the recordings in question. This is clearly the practice on which the CRIMJI instruction is based. It is also correct that the officers who spoke to Mr. Chen during the investigation were not asked to identify his voice in their evidence. But, like any matter in issue in a trial, voice identification can also be proven circumstantially. In this case, there is what I conclude is a convincing body of evidence that Mr. Chen is the speaker identified by his name in the transcripts. This includes his status as the name attributed to the person to whose attention the phone is directed in its registration (keeping in mind its nominal status as a company phone), and the links between the statements of the speaker on it about his intended and current locations and the observations of him at those locations in subsequent surveillance.

[161] The drop call is certainly not conclusive in itself. The evidence of the times that it was placed and received differ slightly, and it is possible that Mr. Chen dialled a pre-programmed number on a different phone or received a call on such a phone at the same time. But it does not have to be conclusive to be of some use. The fact that a phone in his possession rang and he spoke on it at the same time the police called a number to which his name was associated is simply another piece of circumstantial evidence that can be considered with all of the other evidence on this issue.

- [162] I also take into account the similar manner in which the person alleged to be Mr. Chen communicated across all of the calls, including the call on the payphone, especially the cryptic terminology used, the consistency of approach in discussing whatever transaction is being contemplated (leaving aside for now the question of whether it involved drugs), the speaker's distinctively abrupt but jocular manner, and the similarity in the accent, pitch, and cadence of the speech in each case means that the calls involved the same speaker.
- [163] On this point, I think that both the defence and Crown are correct to a degree on the difference between physical and voice identification. While Mr. Chen's counsel is correct that voice identification is not anchored in the physical appearance of the accused, which is readily verifiable in court in comparison to recorded images, I ultimately find force in the Crown's point that voices and manners of speech also have distinctive features that may, in appropriate circumstances, be capable of reliable recognition and accorded weight, as indicated in Pal and Chan.
- [164] Thus, I find that Mr. Chen, the accused before the court, is the speaker in the calls that have been entered.

D. Generally Applicable Evidence and Other Reasonable Inferences

- [165] I accept some of the defence assertions about the general factual background within which the strength of the Crown's inferences and the reasonableness of any alternative ones must be assessed.
- [166] First, it is clear that Mr. Jawanda described working with multiple drug suppliers in his various enterprises including, crucially for our purposes, four Chinese MDMA suppliers, the "other guy" with whom he would check in addition to his "Chinese guy", and the "biker-style" supplier of a different type of that drug. He also expressed the ability and willingness to look elsewhere when it appeared that the timing of W's requests could not otherwise be met. These are meaningful references to alternative sources.
- [167] Mr. Jawanda also communicated on other devices besides the one in which calls in evidence were intercepted, and had gambling issues and personal financial problems that could well have given rise to a need to borrow money.
- [168] There is reliable documentary evidence of Mr. Chen's involvement in Mr. Jawanda's business at some point, in the form of the phone registration directed to his attention from that business, the historical connections with the registration of the business, and the promissory note reflecting a loan in relation to it from him. In addition, the conversation between them on June 4 involving a request for Mr. Jawanda to perform some kind of function in relation to a corporate document of that business tends to support its status as an ongoing matter between them to some degree.

[169] Finally, I accept that the evidence also reveals Mr. Chen engaging in legitimate family and banking activities while under surveillance, and patronizing Starbucks for reasons apparently unrelated to drug trafficking activity.

E. General Nature of the Intercepted Communications

[170] I conclude that these communications are accurately characterized overall by the Crown as cryptic and guarded, to an extent that is inconsistent with normal conversation in the course of ordinary human experience, even as part of a close friendship or ongoing long-term business relationship. Crown counsel makes the telling point that they are almost entirely devoid of context and focus to a striking degree on the mechanics of carrying out whatever transaction was either being arranged, or paid for after the fact. There is some banter, such as in relation to Mr. Jawanda spending the "paperwork", but the focus is overwhelmingly on meeting locations and times to obtain and pay for "it", which is quite conspicuously never defined. In my opinion, what most convincingly shows that these conversations involved surreptitious activity, rather than a friendship or business, is the more frank and open conversation in the call during which Mr. Chen advised he was on a payphone, and provided sufficient detail then provided about the texture of what was currently available to support a finding that they were discussing an illicit substance of some kind.

[171] Despite Mr. Chen's past connections with a concrete-pumping company, as well as the ongoing registration of the phone and the conversation about the accountant, there is really nothing in the nature of the key intercepted conversations that is reasonably referable to any such business or to the discharge of loan payments, whether in relation to the business or Mr. Jawanda's personal debts (except to the extent that arranging to pick up and subsequently pay for an undisclosed "it" does so generically). To this I would add the absence of evidence of Mr. Chen's active participation in the concrete business in the form that it was apparently being carried on by Mr. Jawanda, as opposed to simply utilizing a cellphone associated to it, and featuring in and dealing with some of its associated documents.

[172] In addition, I am satisfied that the conversation in which Mr. Jawanda jokingly discussed the possible consequences of spending the paperwork convincingly demonstrates what I would have inferred from the context of their post-transaction conversations in any case: that it was a code word between them for money.

F. Contradictory Statements by Mr. Jawanda

[173] Before determining whether there are other reasonable inferences than proof beyond a reasonable doubt of the guilt of Mr. Chen for one or more of the transactions, it will also be useful to consider the proper approach to Mr. Jawanda's statements to W., which in certain cases contradict the intercepted communications and/or surveillance evidence in support of Mr. Chen's liability. Such contradictions obviously provide another reasonable alternative, which is that Mr. Chen was not the supplier in that particular transaction.

[174] I disagree with the Crown's submission such comments by him can uniformly be characterized as puffery intended only to protect his supplier or impress W. On the other hand, neither does the presence of any contradictory statement lead automatically to the exclusion of Mr. Chen's participation. It is a question of the overall evidence that applies to that particular transaction, including whether there is any specific basis to doubt the statement in the form of objective evidence to the contrary.

G. The Transactions

1. February 15

[175] When the evidence is viewed in light of the ongoing pattern of communications between Mr. Jawanda and Mr. Chen before and after the transactions, including the specific link in this case between the statement "buddy's taking off" in their call and W.'s reference during the purchase to being away for a few days, I am satisfied that it is consistent only with Mr. Chen's role as the supplier of the drug, and inconsistent with any other reasonable inference, including, for the reasons I have said, a business or a loan transaction.

[176] I do not consider Mr. Jawanda's statement "I already have it, I just gotta pick it up" in reference to the kilogram of MDMA to be necessarily inconsistent with an intention to obtain it from Mr. Chen later. "Have it" is an ambiguous term in that sense. Similarly, when one listens to the actual conversation, it is ambiguous whether "I am just going to run to Surrey" was intended by Mr. Jawanda to modify the statement, "I'll grab that too," in response to the inquiry about the newer ecstasy pills. And contrary to the defence submissions, I consider Mr. Chen's statement, "The guy need it," to be quite consistent with the essential onwards transmission of the proceeds of the sale to some earlier participant in the chain. It certainly does not contradict the inference sought by the Crown.

2. June 5

[177] The statement on this date to W. "actually matter of fact he dropped it off at my house, 10 o'clock last night, I was sleeping, I wasn't feeling good yesterday," is more of a problem for the Crown. The context appears to relate to W.'s appreciation for Mr. Jawanda having obtained the MDMA for him and it runs directly counter to the inference that the product had been supplied by Mr. Chen that morning. If it was false, it would have to have been a very detailed falsehood, and would not have advanced Mr. Jawanda's reputation for prompt turnaround.

- [178] On the other hand, in their June 4 conversation, Mr. Chen appeared to confirm Mr. Jawanda's suggestion that he would have "it" tomorrow morning and they communicated for that apparent purpose at that time, and Mr. Jawanda sought to meet with him again immediately afterwards.
- [179] Looking at the totality of the evidence, including the pattern of communications between them of ordering pickup and payment, I think that the absence of anything in the pre- and post-transaction communications that is reliably referable to supplying this particular shipment, I conclude that Mr. Jawanda's statement about the drop-off being the night before must raise a reasonable alternative inference that Mr. Chen did not end up being the supplier, and thereby a reasonable doubt with respect to this transaction.

3. June 13

- [180] This transaction also contains some potential contradictions. Despite Mr. Chen advising on June 12 that he would provide "another one" "tomorrow", Mr. Jawanda stood ready to sell a kilogram to W. on the 12th, only to be put off so that an undercover scenario could be arranged, and he told W. during the transaction the next day that he "had it last night, but I guess you were tied up." The post-transaction conversation between Mr. Jawanda and Mr. Chen refers to a bank draft being unsuitable and two days being required as a result, but this does not align particularly closely with the transaction that had previously taken place, including the cash payment received, nor is it as proximate to the transaction as other such calls.
- [181] Once again, despite the inferences available from the totality of the evidence about the pattern of communications in relation to the transactions, and my rejection of friendship or business as the reasonable subjects of them, I conclude that a reasonable alternative to Mr. Chen having been the supplier arises for this transaction as well, and therefore a reasonable doubt.

4. June 24

- [182] Similar difficulties arise here. The absence of any observations of Mr. Chen carrying anything during the meeting with Mr. Jawanda on East 5th, the absence of any related details in the call between them beforehand, the unexplained hour between that meeting and the transaction, Mr. Jawanda's use of a different vehicle for that transaction, the absence of any intercepted conversations apparently relating to payment and, most importantly, the elaborate story about the drugs being left in his barbecue while he was at his son's graduation must inevitably serve, in my opinion, as the basis for a reasonable alternative to Mr. Chen's involvement, and a reasonable doubt. This is once again despite the inferences available about the pattern of the pre- and post-transaction communications and their trafficking purposes that are available from a consideration of the totality of the evidence.

5. July 7

[183] In contrast, this transaction featured explicit discussions about Mr. Jawanda grabbing "it" from Mr. Chen on the day that it took place, a contemporaneous narrative of Mr. Chen's execution of the drop-off, and a relatively explicit dialogue the following day about having "it" and meeting behind Costco to drop "it" off. Viewed in light of the overall pattern of communications and meetings between them in the evidence, and the absence of any reasonable alternative for the ongoing purpose disclosed in the evidence, I am satisfied beyond a reasonable doubt that Mr. Chen supplied this MDMA.

6. August 14

[184] The same is true for this transaction. Mr. Jawanda's description to W. of the differences in the texture of the product resonates strikingly with Mr. Chen's earlier description to Mr. Jawanda, right down to the catch phrase "100 percent", which he repeated. Minutes after the transaction, he and Mr. Chen discussed paperwork (which, as I have discussed, the overall context defines convincingly as money) and later met under surveillance. (However the fact that also had similar bulge in his pocket at Katsura Street renders the observation of the envelope with the bulge in his pocket at the restaurant a neutral factor.)

[185] While the various descriptions of the suitcases that moved from the East 5th residence to Katsura Street to the transaction with W. vary in detail, they are not inconsistent with each other - only lacking in an equal amount of detail among the observations.

[186] Constable Simpson's somewhat confusing evidence, which was incapable of supporting any of the comments in the transactions by reference to his observations of the drugs seized, does not establish that the MDMA that was eventually seized had anything other than a pinkish tinge in two of the photographs, possibly due to the manner in which they were taken.

[187] I frankly do not know what to make of the conversation in which Mr. Chen and Mr. Jawanda discuss something being "a hundred percent pink", except to say that even after taking it into account, the evidence in support of this transaction, when viewed as a whole, robustly refutes to the criminal standard of proof any reasonable alternative participation than Mr. Chen's role as the MDMA supplier.

7. August 18

[188] I agree with the Crown that the involvement of the driver of the Durango in apparently providing the MDMA that was sold to W. slightly more than an hour later does not, in itself, contradict the Crown's theory of Mr. Chen's involvement. His communications with Mr. Jawanda in advance, their personal meeting on the road, and his past association with the Durango and the Katsura address to which it was associated all link him convincingly to what occurred. His immediate question, "It's ready?" when called by Mr. Jawanda as soon as the transaction was concluded, and the telephone arrangements to go to Mr. Jawanda's house where a vehicle that he regularly drove was seen with its occupant conversing with Mr. Jawanda, when added to the inferences in the overall evidence about their patterns and

purposes of association, exclude any other reasonable explanation than his role as the supplier.

8. August 21

[189] In my opinion, the totality of the evidence in relation to this transaction meets the same standard. The conversation between Mr. Jawanda and Mr. Chen in advance of comes as close to describing Mr. Chen's meeting with his own supplier as the guarded nature of their communications ever permitted. The correspondence between Mr. Chen's agitation about catching the ferry and Mr. Jawanda's comments to W. about his "buddy's" similar problems are as striking as the ones in their previous conversations that I have cited, and act as a strong circumstantial link between the two conversations. I am satisfied that this is so even if, as the defence contends, "buddy" is not necessarily being referred to as the supplier.

[190] And once again, there is immediate and urgent communication for Mr. Chen after the transaction about his whereabouts which were confirmed by surveillance.

[191] I can identify no reasonable alternative inference than Mr. Chen's integral role in this transaction.

9. August 26

[192] With respect to this final transaction, I do not regard the conversation the previous day as being ultimately inconsistent with Mr. Jawanda's role as supplier. He followed "no tomorrow" with a modification, "I'll see and let you know later." It is clear from the conversation at 4:01, which in context that can only be referable to the meeting that is about to occur with the driver of the Lexus, viewed in light of all of the other evidence of the interactions in relation to the sales to W., that Mr. Chen was facilitating the meeting that was about to occur. This was further confirmed by his conversation with the driver that was observed after the driver had unloaded the box into Mr. Jawanda's Escalade. I reject as implausible and speculative in this context the suggestion that the box could have contained construction material or other items related to the concrete business, given the nature of the transaction and Mr. Chen's advance communications.

[193] The post-transaction evidence does not really assist the Crown, however. The Starbucks bag that Mr. Chen was seen holding during his meeting with Mr. Jawanda a few minutes later at Lansdowne Mall differs markedly from the one that M. described giving Mr. Jawanda. But Constable Yee did not purport to observe the entirety of their interactions at that point, so no inconsistency with the inferences arising from Mr. Chen's pre-transaction activities necessarily arises. His meeting with an unidentified male later that afternoon to provide a boutique bag, while suspicious in light of all of the other circumstances, is too remote to offer a meaningful connection to this transaction and I have not considered it.

[194] Viewed in light of the totality of the evidence of the interactions, and the notable relationship between his conversation with Mr. Jawanda and the unloading of the box, I am satisfied beyond a reasonable doubt that Mr. Chen's participation as supplier is also the only reasonable inference.

V. Conclusion

[195] Therefore, I am satisfied beyond a reasonable doubt that the incidents on February 14, July 7, and August 14, 18, 21, and 26, in the evidence are consistent only with Mr. Chen's guilt and inconsistent with any other reasonable inference.

[196] Accordingly, I find him guilty of the offence with which he is charged on the indictment.

[197] The lesser number of transactions that I found he participated in will obviously be a relevant factor for sentencing.

"Schultes J."

[1] These connections were explored in cross-examination in support of an alternative inference that the conversations intercepted in this matter related to the concrete business, or to some other legitimate business relationship between Mr. Jawanda and Mr. Chen.

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