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CANADA / JUDGMENT

## R. v. Chualna

2003 BCCA 650

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COURT

British Columbia Court of Appeal

DECIDED

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COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Chualna,

2003 BCCA 650

Date: 20031128

Docket: CA30344

Between:

Regina

Respondent

And

Francis Sundown Chualna

Appellant

Before:

The Honourable Chief Justice Finch

The Honourable Mr. Justice Esson

The Honourable Madam Justice Levine

G.D. McKinnon, Q.C.

Counsel for the Appellant

W.L. Rubin

Counsel for the Respondent

Place and Date of Hearing:

Vancouver, British Columbia

November 5, 2003

Place and Date of Judgment:

Vancouver, British Columbia

November 28, 2003

Written Reasons by:

The Honourable Chief Justice Finch

Concurred in by:

The Honourable Madam Justice Levine

Dissenting Reasons in part by:

The Honourable Mr. Justice Esson (Page 19, para. 43)

Reasons for Judgment of the Honourable Chief Justice Finch:

## I. INTRODUCTION

[1] The appellant appeals his conviction in Provincial Court at Nanaimo on 29 July 2002 on the following five Counts:

1. Possession of stolen property (motor vehicle): s.355;
2. Possession of an unloaded firearm: s.95(1);
3. Possession of a loaded prohibited firearm: s.95(1);
5. Possession of firearms for a purpose dangerous to the public peace: s.68(1); and
11. Possession of firearms and ammunition while under a court order not to possess such objects: s.117.01(1).

[2] The court made additional findings of guilt against the appellant on four related Counts (numbers 6 to 9) but conditionally stayed those Counts on the principles laid down in *R. v. Kienapple*, [1975] 1 S.C.R. 729.

[3] The sole ground of appeal advanced is that the convictions were unreasonable: Criminal Code, s.686(1)(a)(i).

[4] The Crown says the convictions were not unreasonable, and that in any event, a conviction on Count 9, for which a stay was entered, should be substituted.

## II. FACTS

- [5] The appellant was a passenger in a van on route by ferry from Horseshoe Bay to Departure Bay on the evening of 22 January 2002. An off-duty police officer, Sergeant Phillips, saw the appellant and another man, Arran Lee McLellan, on the ferry getting into the van at about 9:40 p.m., some 40 minutes into the ferry trip. Something about the two men aroused Sergeant Phillips' suspicions. He noted the license plate number on the van, and caused a search to be done by telephone. The vehicle had been reported stolen earlier that day. R.C.M.P. at Nanaimo were notified. When the ferry docked at about 10:30 p.m., and the van drove off, it was stopped by police.
- [6] McLellan, the driver, and the appellant, the passenger, were told to get out of the vehicle. They did so. A police officer, Constable Watt, sent her police dog into the van through the driver's door. She had a gun in one hand and a flashlight in the other. The van had two bucket seats in front. The dog stepped first onto the driver's seat and then onto the passenger's seat.
- [7] Constable Watt then directed her dog to go towards the rear of the van. In doing so the dog stepped on a sports bag, about 30 inches long, 12 inches high and 12 inches wide, located between the two front seats. The bag had a zipper on top, running the length of the bag. However, the zipper did not work and the bag was open. When the dog stepped on the bag Constable Watt saw two sawed off shotguns. Constable Watt said "Guns." Her partner, Constable Parker, heard McLellan say to him "Tell her to be careful, there is one in there."
- [8] Subsequent inspection of the bag disclosed: a twelve-gauge sawed off Cooley Model 840 shotgun, twenty-three and one-half inches long; a twelve-gauge sawed off Winchester Model 1200 shotgun loaded with one shell in the chamber, and one shell in the magazine; four twelve-gauge shotgun shells wrapped in plastic; two balaclava face masks; and a hammer.
- [9] Further investigation showed that the ignition cylinder of the van had been removed. The driver McLellan used a six inch screwdriver to start and stop the van. When not in use he placed the screwdriver in a cup holder.
- [10] The appellant had personal belongings in a bag in the rear of the van. McLellan had some personal items in another blue duffle bag in the rear of the van. His bag contained a small amount of cocaine, a police frequency scanner, and a B.C. frequency guide book.

## III. REASONS OF THE TRIAL JUDGE

- [11] McLellan and the appellant were jointly charged on an eleven Count Information. The day before their joint trial was scheduled to commence, McLellan pleaded guilty to Counts 1, 2 and 3.

- [12] The appellant's trial proceeded as scheduled. The Crown called the three police officers, and filed some admissions. McLellan was called to testify for the defence. The appellant did not testify.
- [13] The trial judge generally disbelieved McLellan's testimony, the thrust of which was to show that he and the appellant were strangers, that the appellant had no knowledge that the van was stolen, and that the appellant had no knowledge of the guns or other objects contained in the bag between the two front seats.
- [14] The learned trial judge said this about McLellan's testimony:
- [30] I turn now to the further consideration of Mr. McLellan's evidence on behalf of Mr. Chualna. Having seen Mr. McLellan in the witness stand and having considered his evidence in light of all the other evidence, I am of the view that his story is almost devoid of fact. I realize that it is not necessary that I believe Mr. McLellan's evidence in order for a reasonable doubt to arise in favour of Mr. Chualna. I also realize that disbelief of Mr. McLellan in no way adds anything, so to speak, on the scales against Mr. Chualna. I accept Mr. McLellan's evidence that he knew the van was stolen and was aware of all the contents of the gun bag, and that he was using a six-inch screwdriver to stop and start the van. I also accept that he kept the screwdriver in the cup holder for this purpose.

[emphasis added]

- [15] Later in his reasons, the judge explained in some detail why he disbelieved the rest of McLellan's evidence. He rejected it as "an elaborate fabrication".
- [16] The issue for the learned trial judge, on the evidence he did accept, was whether the Crown had proven beyond a reasonable doubt that the appellant was in "possession" of the stolen vehicle, and the firearms and ammunition specified in the other Counts. The trial judge instructed himself on the definition of possession in s.4(3) of the Criminal Code:

For the purposes of this Act,

- (a) a person has anything in "possession" when he has it in his personal possession or knowingly
- (ii) has it in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or of another person; and
- (b) where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them.

- [17] The judge then referred to a number of the pertinent authorities: *R. v. Amado*, [1996] B.C.J. No. 1943 (S.C.); *R. v. I.A.*, [1995] B.C.J. No. 2272 (C.A.); *R. v. Terrence*, [1983] 1 S.C.R. 357, 147 D.L.R. (3d) 724, 4 C.C.C. (3d) 193 [cited to S.C.R.]; and *R. v. To*, [1992] B.C.J. No. 1700 (C.A.). The judge also instructed himself on reasonable doubt by reference to *R. v. W.(D.)*, [1991] 1 S.C.R. 742, 63 C.C.C. (3d) 397; and *R. v. Lifchus*, [1997] 3 S.C.R. 320, 118 C.C.C. (3d) 1.
- [18] The judge concluded that the Crown had proven the appellant's possession of the van, firearms and ammunition. The essence of his reasoning is in these passages:
- [39] In the facts of this case the cumulative totality of the evidence compels me to the belief that the only reasonable inference that can be drawn from the location of this bag in the vehicle, the duplicate nature of its contents, the fact that the bag is not bound up, the dangerous nature of its contents, the missing ignition cylinder, and the stopping and starting procedure with a screwdriver kept in a cup holder is that Mr. McLellan and Mr. Chualna were not chance met strangers, but partners in crime. Unlike Amado this bag is in plain sight and unzipped. It is literally within the reach of the left forearm of Mr. Chualna as he sits in the front passenger bucket seat or while reclining in it. The gun bag, the stolen van, and the frequency scanner present as a package assembled for the commission of an offence by two participants. The fact that Mr. McLellan would be comfortable with having Mr. Chualna in the van as a passenger under such circumstances bespeaks a non-arm's-length relationship.
- [40] In all of the circumstances I am satisfied beyond a reasonable doubt of the joint possession of the stolen van and the prohibited weapons, both loaded and unloaded, on the part of Mr. Chualna and Mr. McLellan, and I find Mr. Chualna guilty with respect to Counts 1, 2, 3, 5, and 11.

[emphasis added]

#### IV. POSITIONS OF THE PARTIES

- [19] The only issue before the trial judge, and on this appeal, is whether the Crown has proven the appellant's joint possession of the van and prohibited weapons within the meaning of s.4(3)(b).
- [20] Counsel for the appellant contends that the learned trial judge's "partners in crime" or "joint venture" analysis was erroneous. He says the evidence falls short of establishing a joint venture but that, in any event, even a finding of joint venture would not properly ground a finding of possession. The appellant says that accepting, as the trial judge did, that McLellan knew the van was stolen and the bag contained the guns, the evidence does not establish that McLellan had possession of those things with the appellant's "knowledge and consent". He says that apart from the presence of the appellant, and his personal bag, in the van, there is no evidence that the appellant knew the van was stolen or that the bag between the front seats contained guns. Counsel says the appellant's passive acquiescence in accepting a ride in the van is insufficient to show joint possession. There is no evidence of an intention, common or otherwise, to exercise control over the van or weapons by any conduct or words

on the appellant's part.

- [21] Counsel for the appellant says it is as though the appellant were merely "present at the scene of the crime". He says the trial judge's conclusion of a joint venture is speculative, and even if a reasonable inference, it is not the only inference to be drawn from the facts.
- [22] Counsel for the Crown supports the verdict, and the trial judge's reasoning. Crown counsel does not rely on s.21 of the Code to argue "party liability". She says the evidence is sufficient to support the trial judge's conclusion that the appellant was a participant in a joint venture, and that the joint venture involved the joint possession of the stolen van and weapons. She says that as a person engaged in a joint enterprise the appellant is shown to have the knowledge, consent and control necessary for a finding of possession. The judge's inferences were the only reasonable ones in the circumstances. Counsel concedes that if the evidence does not support the trial judge's finding of a joint venture, then the inferences of knowledge, consent and control cannot be supported.
- [23] In the alternative, the Crown says that if the trial judge's joint venture finding is unsound, a conviction may nevertheless be entered on Count 9:

Arran Lee MCLELLAN and Francis Sundown CHUALNA, on or about the 22nd day of January, 2002, at or near Nanaimo, in the Province of British Columbia, occupied a motor vehicle in which they knew there was a firearm or prohibited weapon, contrary to Section 94(1)(a)(i) of the Criminal Code.

- [24] Counsel says this Count does not require a finding of possession, so the elements of consent and control need not be established. She maintains there is sufficient evidence in the circumstances to support the conclusion that the appellant had the requisite knowledge to support the charge laid under s.94(1)(a)(i):

94.(1) Subject to subsections (3) to (5) and section 98, every person commits an offence who is an occupant of a motor vehicle in which the person knows there is a firearm, a prohibited weapon, a restricted weapon, a prohibited device, other than a replica firearm, or any prohibited ammunition, unless (Exceptions not applicable.)

## V. ANALYSIS

- [25] The elements of possession as defined in s.4(3)(b) of the Code are knowledge and consent. If knowledge and consent are proven, control over the property is deemed to exist.
- [26] In my respectful opinion, the learned trial judge's analysis at ¶39-40 of his reasons is an impermissible approach to the issue of possession. The learned judge inferred that the two men were "partners in crime", or engaged in a joint venture, and reasoned from that inference that they had joint possession of the stolen van and prohibited weapons. But to conclude that there was a joint venture between the two is to assume the very facts the Crown was obliged to prove - namely, the appellant's knowledge and consent. The trial judge's reasoning by-passed an analysis of the evidence to see whether the appellant's

knowledge and consent was the only reasonable inference that could be drawn. The appellant and McLellan could not have been "partners in crime" to the extent necessary to fix the appellant with requisite knowledge, unless that knowledge was the only reasonable inference available on the evidence. A positive answer to the question of whether there was a joint venture assumed knowledge and consent.

- [27] One begins with the issue of knowledge. There is no direct evidence that the appellant knew either that the van was stolen, or that the sports bag between the two front seats contained the prohibited weapons. The question is whether the circumstantial evidence taken as a whole supports the appellant's knowledge of those matters as the only reasonable inference: see *R. v. To*, *supra*.
- [28] As to the van, there is no evidence that the appellant was a passenger in it prior to Sergeant Phillips seeing him enter the van at about 9:40 p.m. while the van was on the ferry. Sergeant Phillips did not see the appellant take his bag into the vehicle, so it is a reasonable inference that the bag was already in the van when the appellant was seen to enter it at 9:40 p.m. However, whether the appellant had been a passenger in the van at some earlier time, and if so for how long, is a matter of speculation. In my view, neither his entry into the van on the ferry, nor the presence of his bag in the van when he did so, necessarily leads to a conclusion that the only reasonable inference is that the appellant had been a passenger at some earlier time.
- [29] The appellant's knowledge that the van was stolen could therefore only be inferred from his presence in the van when McLellan started it on one occasion before leaving the ferry, using the screwdriver, or from an observation by the appellant while in the van for the preceding hour or so that the ignition cylinder had been removed or both. The evidence is that it was dark, and that there were no interior lights on in the van.
- [30] In considering evidence of a somewhat similar nature, McEachern C.J.B.C. in *R. v. I.A.*, *supra*, said:
- [5] The trial judge said this:

The point that is being argued is this. The defence suggests that the Crown has to prove who is the driver, otherwise, as it were, they are both entitled to be considered as not having been in care and control of the car.

I have the profoundest problems with that because even the one who is sitting in the passenger seat first of all must have been able to see that the ignition of the car had been punched out. There was a great hole where the ignition was.

- [6] Exercising the jurisdiction to examine we have to re-examine, re-weigh and consider the effect of the evidence, I conclude that the evidence does not support these findings. An absent ignition cylinder does not create a great hole, and it cannot be assumed beyond a reasonable doubt that a non-driver would see and understand that an ignition cylinder was missing and that the car was accordingly stolen: *R. v. Yebes* (1987), 36 C.C.C. (3d) 417 (S.C.C.); *R. v. R.W.* (1992), 74 C.C.C. (3d) 134 (S.C.C.).
- [31] I do not think it can be said on the evidence in this case that the only reasonable inference is that the appellant either saw the hole created by the absent ignition cylinder, or saw McLellan use the screwdriver to start the van on the one occasion before leaving the ferry. However suspicious one may be of the appellant's awareness, in my view the evidence does not establish beyond a reasonable doubt knowledge on the appellant's part that McLellan was in possession of a stolen vehicle.
- [32] As to the contents of the sports bag between the two front seats, I think similar reasoning must apply. There is no evidence that the guns were visible, or capable of being seen by anyone either inside or outside the van, until Constable Watt's dog entered the van and stepped on some part of the bag when moving from the front to rear seats. At the time that occurred, the driver's door was open and there was likely some interior light on in the van. Constable Watt had one knee on the driver's seat and a flashlight in one hand. It was in those circumstances, and after the dog had stepped on the bag, that Constable Watt was able to see what the bag contained.
- [33] The appellant's inferred knowledge of the bag's contents must be examined from the circumstances surrounding his opportunity to view it. While the bag was close at hand, and unzipped, I do not consider the only reasonable inference to be that the appellant knew what it contained. Furthermore, this is not the type of situation contemplated in *R. v. To*, supra, where the court might appropriately draw an inference of the accused's knowledge of the contents of the bag. The primary basis for such an inference in that case was evidence establishing that the accused had actual physical possession and control of bags which he carried to his vehicle, but denied knowing they contained \$12 million worth of heroin. In this case the appellant did not have similar actual physical possession or control over the bag containing the prohibited weapons.
- [34] The facts are not identical with those in *R. v. Amado*, supra, but there is a close enough similarity to make useful the analysis of the trial judge in that case. The judge was unable to draw an inference of the accused's knowledge in that case, and I can see no circumstances in this case that would tend to increase the likelihood that the appellant was aware of the bag's contents.
- [35] As Bouck J. said at ¶33:

Not everyone who drives or rides in a car containing concealed illegal objects necessarily knows the nature of those objects. If there is to be a conviction for possession of such objects based upon the knowledge of the occupants of the car, the evidence relating to their knowledge must rise above mere suspicion.

- [36] In my view, the appellant's knowledge of the bag's contents is not the only reasonable inference to be drawn from all of the evidence. Again, however suspicious one may be, the evidence does not rise to proof beyond reasonable doubt that the appellant knew what the bag contained.
- [37] My finding, that the trial judge's conclusions that the appellant knew that the van was stolen and that the bag contained prohibited weapons are not the only reasonable inferences, is fatal to the counts charging possession. It is not necessary to consider the issue of consent. The appellant could not consent to McLellan being in possession of a stolen van or prohibited weapons if he did not know the van was stolen or that McLellan possessed the weapons.
- [38] However, in any event, consent requires more than indifference or passive acquiescence: see *R. v. Williams* (1998), 125 C.C.C. (3d) 552 (Ont.C.A.); *R. v. Piaskoski* (1979), 52 C.C.C. (2d) 316 (Ont.C.A.). There is no evidence of any acts or words on the appellant's part to indicate that he consented to McLellan's possession of the stolen van or of the prohibited weapons.
- [39] Furthermore, it is settled law that knowledge and consent cannot exist without the co-existence of some measure of control over the subject matter: see *R. v. Terrence*, supra, at 362-64 and *R. v. Colvin and Gladue* (1942), 78 C.C.C. 282 at 287, [1943] 1 D.L.R. 20, 58 B.C.R. 204 (C.A.). There is no evidence that the appellant exercised control over the stolen van or the prohibited weapons.
- [40] In my respectful opinion, the appeal against conviction on all five counts must be allowed.
- [41] The Crown contends that in any event a conviction on Count 9 can be entered because the charge under s.94(1) requires only proof that the appellant was an occupant (rather than was in possession) of "a motor vehicle in which the person knows there is a firearm, prohibited weapon ". There is no doubt that the appellant was an occupant of a vehicle. However, this count still requires proof of the appellant's knowledge that the vehicle contained a firearm or prohibited weapon. As I have said above, I do not consider the evidence will support such knowledge on the appellant's part as the only reasonable inference.

[42] I would therefore direct that an acquittal be entered on Count 9 as well.

"The Honourable Chief Justice Finch"

I Agree:

"The Honourable Madam Justice Levine"

Reasons for Judgment of the Honourable Mr. Justice Esson:

- [43] I agree with the Chief Justice that this appeal must succeed in respect of the appellant's conviction on the five counts set out in ¶1 of the reasons and that he must be acquitted on those counts. I respectfully disagree, however, with the conclusion stated in ¶41 of the reasons that a conviction should not be entered on count nine.
- [44] The conviction on the five counts could stand only if the trial judge's conclusion that the Crown had proved both knowledge and control was a reasonable one. That conclusion, the Crown concedes, could stand only if the judge's finding that the two accused were engaged in a joint venture could be upheld. I agree, substantially for the reasons stated by the Chief Justice, that there was no reasonable basis in the evidence for finding that the appellant had control.
- [45] However, count nine, laid under Code s.94(1), required proof only of the appellant being an occupant of the motor vehicle with knowledge of the presence of the firearms in it.
- [46] The trial judge's reasons deal mainly with the theory of joint venture but included a finding of knowledge of the presence of firearms. In ¶39 he said:

Unlike Amado this bag is in plain sight and unzipped. It is literally within the reach of the left forearm of Mr. Chualna as he sits in the front passenger bucket seat or while reclining in it.

- [47] The evidence of the co-accused McLellan was to the effect that the top of the bag was open but that he had tucked one side of it over the other so that the firearms were not visible. That evidence was, of course, included in the evidence expressly disbelieved by the trial judge. The evidence of Constable Watt was that, when she entered the vehicle, the top was open and the two shotguns were visible. The appellant seeks to meet that by suggesting that, because the dog entered the van before the Constable and stepped on the bag he may thus have caused the top to open.
- [48] The other principal foundation for the appellant's contention that he did not have knowledge of the presence of the guns was not proved rests on the premise that, once McLellan's evidence is rejected, there is no evidence of the appellant being in the van other than the evidence of the police officer who saw the two accused enter the van together about 40 minutes before the ferry docked in Nanaimo. That premise does not meet the fact that the appellant's tote bag was found in the back of the van by the police but was not being carried by either accused when the officer saw them return to the van.
- [49] One of the circumstances which must be kept in mind in deciding whether the inference of knowledge was reasonable is that the accused elected to call McLellan to give evidence to the effect that the appellant's presence in the van was innocent, evidence which was characterized by the trial judge as "an elaborate fabrication". The most obvious element of fabrication was the account of how McLellan met the appellant and how the appellant came to be riding in the van. The gist of that evidence was that McLellan had struck a deal with unknown persons to convey the firearms from Vancouver to Victoria, had bought the van (which was stolen earlier that day in Burnaby) in order to carry the guns to Victoria, that he

did not know how to get from downtown Vancouver to Victoria and therefore drove to the bus depot with the intention of following the bus to Victoria via the Tsawwassen-Swartz Bay Ferry. At the bus depot, he met the appellant, asked him where he could find the bus to Victoria and, when the appellant offered to guide him to Victoria, he accepted that offer which for some unexplained reason was carried out by following the more roundabout route to Victoria through Horseshoe Bay.

[50] In my view, the decision of this court in *R. v. To*, [1992] B.C.J. No. 1700 (B.C.C.A.) is very much on point. The facts and the gist of the decision are set out in the headnote:

This was an appeal from a conviction for possession of narcotics for purposes of trafficking. The accused was observed by police leaving the apartment in which he was staying with two plastic shopping bags which he placed in a car. A large amount of heroin was found in one of the bags. The trial judge did not believe the accused, who claimed another person told him to bring the bags and the car to him and inferred possession for trafficking purposes from the amount of value of the drugs.

HELD: The appeal was dismissed. The trial judge erred in inferring guilt merely from disbelieving the evidence of the accused without considering the consciousness of guilt. Having disbelieved the evidence of the accused, the trial judge was required to consider whether it would be rational, beyond a reasonable doubt, to infer knowledge from the remaining evidence including the facts of the case such as the unstamped passport of the accused on a trip to Hong Kong. Here it was legitimate to infer knowledge from the physical possession given the suspicious circumstances. The accused failed to offer any explanation to displace the inference and give rise to reasonable doubt.

[51] At p.7 McEachern C.J.B.C. giving judgment for the court said:

I have reached the conclusion that it would be legitimate, on the broad facts of this case, to infer beyond a reasonable doubt that the accused knew the plastic bag contained a prohibited drug. In fact, I think that would be the only reasonable inference which could be drawn. I believe that not just because the accused was found in physical control of the drugs, but also because of the highly suspicious circumstances and the immense quantity and value of the drugs. These facts make it so unlikely that such a large quantity of drugs would be entrusted to anyone who did not know what was in the bags that such a possibility may safely be rejected. In addition, his antecedent, highly suspicious conduct, most of which was proven affirmatively before he gave his disbelieved evidence, make it impossible to draw any inferences which would displace the legitimate inference which may be drawn from physical possession that he knew what he was possessing.

It must be remembered that we are not expected to treat real life cases as a completely intellectual exercise where no conclusion can be reached if there is the slightest competing possibility. The criminal law requires a very high degree of proof, especially for inferences consistent with guilt, but it does not demand certainty. I do not think it could properly be said that an inference of knowledge in this case would be unreasonable or unsupported by the evidence.

[52] I conclude that the inference of knowledge drawn in this case was supported by the evidence and was not unreasonable. It follows that I would allow the appeal and set aside the conditional stay entered by the trial judge on count nine. Applying the procedure endorsed in *R. v. Provo* (1989), 49 C.C.C. (3d) 417 (S.C.C.) I would remit count nine back to the trial court for entry of a conviction and imposition of the appropriate sentence.

"The Honourable Mr. Justice Esson"

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