

CANADA / JUDGMENT

R. v. El Amine

2010 BCSC 2022

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Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. El Amine,

2010 BCSC 2022

Date: 20101028

Docket: 25236

Registry: Vancouver

Regina

v.

Hussein Ali El Amine

Restriction on Publication: Pursuant to 486.5(1) C.C.C.

Before: The Honourable Mr. Justice Willcock

Oral Reasons for Judgment

Counsel for the Crown:

Andrea J.C. Spence

Counsel for the Accused:

Scott Wright

Place and Date of Trial:

Vancouver, B.C.

October 18-21, 25-27, 2010

Place and Date of Judgment:

Vancouver, B.C.

October 28, 2010

[1] THE COURT: The accused, Hussein Ali El Amine, stands charged with intentionally damaging by fire the building at 1330 East 66th Avenue in Vancouver on January 28, 2008, contrary to s. 434 of the Criminal Code, which reads as follows:

Every person who intentionally or recklessly causes damage by fire or explosion to property that is not wholly owned by that person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

[2] He is also charged with public mischief in relation to statements he made to police officers after seeking medical care at the Royal Columbian Hospital in New Westminster on January 29, 2008. That offence is defined in s. 140 of the Criminal Code as follows:

140(1) Every one commits public mischief who, with intent to mislead, causes a peace officer to enter on or continue an investigation by

...

(c) reporting that an offence has been committed when it has not been committed ...

[3] The Crown's arson case is founded upon statements made by the accused. There is circumstantial evidence of Mr. El Amine's involvement, including notably his burns and his friendship with and telephone calls to the owners of the property made on the day of the fire. Cellphone records put him near the scene of the fire at about the time that it started. However, there is no real case against Mr. El Amine in relation to the arson charge other than that which can be made out on his own words. Those words put him at the scene of the fire at the time of its ignition by an individual named Farhaz Janif. The question in relation to the arson charge on the evidence is whether he was present as a mere witness or as a party to the offence. That central issue can only be addressed with the aid of his own evidence.

[4] There is no doubt that the essential elements of the mischief charge have been proven, but for the question of whether the statement constituting the mischief was voluntarily made by Mr. El Amine. The accused admits he made a false statement to the police, reporting that an offence had been committed when it had not been committed. The statement was intended to conceal how he was injured. It caused a peace officer to enter on an investigation. The accused's guilt or innocence, in relation to the mischief charge, hinges upon whether his evidence that the misleading statement was induced by duress has an air of reality to it and, if so, whether the Crown has rebutted the defence that arises from that evidence.

Evidence

[5] At about 11:15 p.m. on January 28, 2008, a fire was reported at an old industrial warehouse near the north end of the Knight Street bridge, at 1330 East 66th Avenue in Vancouver. The building was quickly consumed by fire. Because the destruction was significant, the investigation revealed little. There was enough, however, for the investigating fire officer, Raymond Bryant, to conclude that the fire had been intentionally set. He commenced his investigation knowing that there had been a fire set at two locations at the same building eight days prior. The earlier fire led to the disconnection of electrical and gas supplies to the building. There ought to have been no activity in the building, and there was no apparent source for fuel for an accidental fire. The January 28, 2008, fire appeared to have burned very quickly, despite the generally flame-resistant construction of the building, suggesting that it was started with an accelerant.

Mr. El Amine's Statements at the Royal Columbian Hospital

[6] At approximately 12:30 a.m. on January 29, 2008, the accused, Mr. El Amine, was admitted to Royal Columbian Hospital with burns primarily to his forearms, his lower legs, and the area of his mouth. His statement to the admitting staff is summarized in the record, Exhibit 19, as follows:

States running out of forest and confronted by perhaps four individuals (states doesn't know) gasoline thrown on body/fire. Burns to body. Patient dropped off at [Royal Columbian Hospital] wrapped in a sheet. No history of trauma other than pushed to the ground.

[7] The trauma resuscitation record indicates that the history given to the medical staff was:

Gasoline thrown on patient by unknown person (Caribou Hill Park, per patient. [Meaning from the patient.]

[8] Mr. El Amine was reported to be alert and oriented, but received medication for pain, including ten doses ranging from two to five milligrams of morphine between 00:37 and 01:18 hours. He also received two doses of an anxiolytic, midazolam, at 00:46 and 00:47 hours.

[9] Mr. El Amine's report of an assault came to the attention of the police and an RCMP officer, Constable Hunter, came to take a statement from him. The hospital chart indicates that Mr. El Amine spoke to the RCMP at 01:00 and 01:55 hours, before being transferred to the Vancouver General Hospital burn unit at about 3:00 a.m.

[10] It is Constable Hunter's evidence that Mr. El Amine gave her a story that was somewhat rambling and disjointed, but amounted to the following:

He had been at his girlfriend's house at 8122 16th Avenue until about 8:30 PM. on the evening of the 28th. He had left by bus to visit a friend, Sunera Samarakoon, near the intersection of 16th Avenue and Wright Street in New Westminster. No one was home there. When he was walking

home from Samarakoon's house, he was accosted by 4 males on 16th Avenue at about 9:45 PM. He described them as 2 white men one brown man and an asian man. He provided a detailed description of their clothing. He said they tried to pick a fight with him and then poured a canister of gas on him and set him alight. He reported that they took a valuable ring from him. He claimed to have rolled in the snow and removed his burning clothes and left them at the scene of the assault. He claimed that the assailants disappeared into the trails off 16 Avenue in the direction of Caribou Road near the George Derby Centre. He got a ride to the hospital from a passerby.

The Investigation

[11] As a result of that statement, the RCMP conducted an investigation that day and in the days following and went to the scene of the alleged crime. An officer searched with a dog; neighbours were interviewed; the scene was inspected at least twice; and a media release was issued advising the public of the claims made by Mr. El Amine. Not surprisingly, the investigation uncovered nothing, as the story told by the accused was a fiction told to conceal his connection to the fire on East 66th Avenue.

The Charge

[12] The police investigation eventually turned up information that cast suspicion upon Mr. El Amine. The arson fire was reported. Mr. El Amine's cellphone records revealed that he had been in communication with the owner of the burned building, Mohammed Hanif, and his son, Farhaz Janif, on the day of the fire. Mr. El Amine's friend, Mr. Samarakoon, said he was home on the night in question, but Mr. El Amine had not visited.

[13] Mr. El Amine was arrested on suspicion of arson and interviewed by Detective Darren Carr of the Burnaby RCMP on May 6, 2008, from 14:05 to 16:22 hours. The statements made by Mr. El Amine at that time and his statements at trial are the principal basis for the charges he now faces.

The Admissions

[14] During the course of the interview, Mr. El Amine made the following admissions and offered the following explanations for his conduct:

- He knows Mr. Mohammed Hanif, the owner of the warehouse, and he used to work for him.
- He also knows his son, Farhaz Janif.
- He spent the early evening of January 28, 2008, with his girlfriend, having met her at work, after work, at Metrotown.
- Farhaz called him and asked him to come with him to the warehouse.
- He got a ride to the warehouse from Farhaz in Farhaz's sister's car. He himself has no driver's licence.

- When shown telephone records, he agreed that he appeared to have called Mohammed Hanif's number at about 6:00 p.m. on the 28th of January, but he had no recollection of that call. The records revealed numerous calls to Farhaz Janif. He agreed that he frequently calls Farhaz.
- In the car on the way to the warehouse, he says that Farhaz said he was going to burn the place down.
- He thinks Farhaz was angry with his father.
- Farhaz told him to turn off his cellphone at the warehouse, without explaining why.
- He admitted that he was at the warehouse and says he did not set the fire.
- He says he was just there watching. He says, at a point indicated as 15:04 on the video record of the interview, "We went there, poured gasoline, I was just watching, that was it." [The transcript of the interview inaccurately, in my view, at line 542 reads, "I went there, poured gasoline, I was just watching."] The audio-visual recording is not clear, and most unclear when Mr. El Amine says "poured gasoline". He may in fact have said "he poured gasoline", referring to Farhaz. There is, however, no doubt in my mind that he says, "we went there" and "I was just watching". He does not say, "I went there, poured gasoline" or "I poured gasoline". This passage is not, in my view, a confession of direct involvement.
- He said that the gas was there at the warehouse when he arrived.
- He said Farhaz also told him that he was going to burn the place down when they got there.
- He had no idea the fire was planned. He was there and watching. He was just there at the wrong time.
- At a point marked at 15:10 on the video recording of the interview, transcribed at line 621-627, he said that Farhaz told him that they were going to the shop, then they "went there, poured the gas and that was it". He again said that Farhaz poured the gas and lit the fire. He did not know where the gas came from.
- He claimed he did not pour any gas. He moved cans, they may have splattered and that is how gas got on him.
- He said Farhaz poured gas everywhere.
- He said he was not with him the whole time at the warehouse.
- He first said he could not remember how the fire was lit. He added "with a lighter" and added he could not remember where he was when this happened.
- When the fire was lit, he hid his face, his legs got burnt. He ran to put out the fire and tore his clothes off.
- After the fire, they passed by Farhaz's place and then went to the hospital.

- He said he was not paid anything for the fire.
- After the fire, he says he was scared to say what happened because he knows Farhaz. Farhaz knows where his girlfriend and his family live.
- He said the story at the hospital came from Farhaz saying that he should not say anything about the fire.
- He said if his fingerprints were on jerry cans, it is because he moved them to get into the building.
- He repeated many times that he did not pour the gasoline.
- He was adamant that Farhaz could not blame him for the fire.

Evidence of Mr. El Amine at Trial

- [15] Mr. El Amine testified. It was his evidence that he had known Farhaz since high school and had considered him a good friend. He spoke with him on the phone regularly and often passed time with him at the warehouse. He continued to deny any recollection of speaking with Mohammed Hanif on the 28th of January, 2008.
- [16] He says he met his girlfriend at Metrotown after work and then went to her house on that date. He left her house on foot and went to meet Farhaz Janif at Farhaz's request. He lied to his girlfriend, telling her he intended to go downtown, because she disapproved of him spending time with anyone else and was possessive.
- [17] Farhaz suggested that they go to the warehouse to "hang out". There was a kitchen there, cars to work on, some exercise equipment, and a bench outside. They met there regularly. Sometimes they would go to a nearby coffee shop. The accused says there was nothing unusual in the plan to go there.
- [18] On the way to the warehouse, Farhaz spoke of fights with his father and mentioned that business was not good. He announced that he was going to burn the warehouse down. Mr. El Amine says he did not take that seriously. While he knew Farhaz to be violent, he says he was prone to exaggeration. He knew there had been an attempt to burn the building down a week before, and he did not think Farhaz would be stupid enough to set it on fire so soon after that.
- [19] At the warehouse, Farhaz asked him to turn off his cellphone. He says he thought that was because he did not want his father to call. He sometimes reached Farhaz through Mr. El Amine. Again, Mr. El Amine says the request was neither unusual nor suspicious.
- [20] He remembered entering the building through the side door on East 66th Avenue. He said Farhaz had a key and entered first. There were jerry cans blocking the way and the building was dark. Mr. El Amine moved the cans. He says the building smelled like gas and when he moved the cans, some gas splattered on the floor.

- [21] Farhaz picked up two cans and started pouring gas on the floor as he walked away from him. Mr. El Amine lost sight of him as he walked into the dark building. Mr. El Amine says he was in shock. He remained near the door doing nothing for what may have been ten or twenty minutes until fire suddenly engulfed him and he covered his face as he was burned. He had not thought to leave the warehouse once it became clear to him that Farhaz really did plan to burn it. He did not think Farhaz would light the fire before leaving the building. For that reason, he was not worried where he was waiting for Farhaz.
- [22] When the fire reached him, he tried to put out his burning legs with his hands and in doing so burned his arms. He ran outside, rolled in the snow, and removed his burning clothes.
- [23] He says he was then taken by Farhaz to a house in New Westminster owned by Mohammed Hanif. He asked Farhaz to take him to the hospital, but Farhaz refused, thinking his connection to the fire would be discovered. Mr. El Amine thought he was dying. He says he tried to deal with the pain at that home, but he could not. He agreed to Farhaz's demand that he tell a story about being assaulted as a condition of being taken to the hospital. He says Farhaz threatened that if he revealed Farhaz's connection to the fire, he would kill him, his family, or his girlfriend. Having seen assaults, aggravated assaults, and vandalism committed by Farhaz, and knowing the reputation of his father, Mr. El Amine says he was afraid, and for that reason told the false story given to Constable Hunter.
- [24] He acknowledged that after the fire he lived in a house provided to him by the Hanif family, after a dispute with his parents led him to leave his family home. He says he did so in part to remain close to Farhaz, so as to avoid suspicion that he was cooperating with police.
- [25] On cross-examination, Mr. El Amine was occasionally evasive, particularly when asked to describe the room in which he stood in the warehouse when the fire was ignited and when he was asked to identify the person who took him to the hospital. He says this may have been either Farhaz or a friend, Rohan, whose last name and address he purports to forget.

Evidence of other Witnesses

- [26] Other witnesses testified to the motives of Mohammed Hanif and his family to set fire to the building. His business was slow; the building had structural problems; it sat on valuable land; and it had recently been insured to higher limits. Witnesses also testified to the Hanifs' reputation as unscrupulous people involved in illegal activity who were prone to violence. One witness described them as weird, evil people.
- [27] There is an admission of fact to the effect that the Hanifs had made a suspicious auto theft claim and a related arson prior to February 12, 2008.
- [28] The evidence of Crown witnesses was generally consistent with Mr. El Amine's statement and his evidence at trial.

The Law

General Principles

[29] Both the Crown and defence have cited passages describing the principles that should be borne in mind in addressing the charges before me. I am of course conscious of the rule that the onus of establishing guilt beyond a reasonable doubt rests always with the Crown. The presumption of innocence should lead to an acquittal in every case unless the judge or jury, in the words used in *R. v. Lifchus*, [1997] 3 S.C.R. 320, at para. 39, is "sure" that the accused committed the offence. It is not enough to say the accused probably or likely committed the offence or, in the case at bar, probably or likely participated in the offence in some manner.

[30] This is a case like *R. v. W.(D.)*, [1991] 1 S.C.R. 742, where the accused has testified as to his innocence. As Cory J. for the majority of the Court noted in that case, it is essential in such cases not to regard the case as a contest between the accused and the complainant (at paras. 27-28):

27 In a case where credibility is important, the trial judge must instruct the jury that the rule of reasonable doubt applies to that issue. The trial judge should instruct the jury that they need not firmly believe or disbelieve any witness or set of witnesses. Specifically, the trial judge is required to instruct the jury that they must acquit the accused in two situations. First, if they believe the accused. Second, if they do not believe the accused's evidence but still have a reasonable doubt as to his guilt after considering the accused's evidence in the context of the evidence as a whole. See *R. v. Challice* (1979), 45 C.C.C. (2d) 546 (Ont. C.A.), approved in *R. v. Morin*, supra, at p. 357.

28 Ideally, appropriate instructions on the issue of credibility should be given, not only during the main charge, but on any recharge. A trial judge might well instruct the jury on the question of credibility along these lines:

First, if you believe the evidence of the accused, obviously you must acquit.

Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

... The requirement that the Crown prove the guilt of the accused beyond a reasonable doubt is fundamental in our system of criminal law. Every effort should be made to avoid mistakes in charging the jury on this basic principle.

[31] I appreciate that absolute certainty is never possible. I have reviewed and considered the authority cited by the Crown on circumstantial evidence and in particular the passage cited from the judgment of Bauman J.A., as he then was, in *R. v. He*, 2008 BCCA 418 at para. 66:

66 As to the competing inferences from the evidence which counsel urges were open to the trial judge, in *R. v. To* (1992), 16 B.C.A.C. 223, Chief Justice McEachern considered the judicial task of drawing inferences in a case of circumstantial evidence. At para. 41 the Chief Justice said:

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.

[32] The Crown asks the court to consider the judgment in *R. v. Wild*, [1971] S.C.R. 101. In that case, Martland J. for the majority held:

In the result, it is my opinion that the learned trial judge failed properly to apply the rule in *Hodge's case* to the facts before him in that he acquitted the appellant, not because he found that there was a rational conclusion on the facts inconsistent with his guilt, but because there was, in his opinion, a conjectural conclusion which he considered might be inconsistent with his guilt.

[33] In coming to that conclusion, the Supreme Court of Canada upheld the decision of the Alberta Court of Appeal ([1970] 1 C.C.C. 67), and cited with approval the following portions from that decision:

... In my view, the evidence referred to amounts to no more than conjecture or surmise that this was the course of events. It seems clear to me that the trial judge's doubt as to whether the respondent was the driver has "no evidence to support it" and "lacks factual support" just as much as the contention in *Reg. v. Torrie* [1967] 2 OR 8, 50 CR 300, [1967] 3 CCC 303 (C.A.), that the tire of *Torrie's* car may have been cut by a sharp object thrown against it by some other traffic, was found to be without any evidence to support it. See also *Reg. v. Lemire* [1965] SCR 174, 45 CR 16, [1965] 4 CCC 11, reversing 43 CR 1, per Martland, J., concurred in by Fauteux, Abbott, and Ritchie, JJ. at pp. 191, 192.

I agree with and consider that the following statement of Evans, J.A. for the court of appeal of Ontario in *Reg. v. Torrie*, supra, at p. 303 (CR) is applicable to the case at bar. That statement is as follows:

With the greatest respect, I am of the opinion that the learned trial judge misapplied the rule in *Hodge's Case* (1838) 2 Lew 227, 168 ER 1136, as to circumstantial evidence in that he based his finding of reasonable doubt on non-existent evidence. In *Reg. v. McIver* [1965] 1 OR 306, at 309, [1965] 1 CCC 210, McRuer, C.J.H.C. said:

The rule (in *Hodge's Case*) makes it clear that the case is to be decided on the facts, that is, the facts proved in evidence and the conclusions alternative to the guilt of the accused must be rational conclusions based on inferences drawn from proven facts. No conclusion can be a rational conclusion that is not founded on evidence. Such a conclusion would be a speculative, imaginative conclusion, not a rational one.

This statement was approved on appeal to this Court, [1965] 2 OR 475, 45 CR 401, [1965] 4 CCC 182, and an appeal therefrom to the Supreme Court of Canada was dismissed, [1966] SCR 254, 48 CR 4, [1966] 2 CCC 289.

I recognize that the onus of proof must rest with the Crown to establish the guilt of the accused beyond a reasonable doubt, but I do not understand this proposition to mean that the Crown must negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused.

[34] Last, in terms of general principles, the Crown asks the court to weigh the evidence of the accused by the criteria identified in the case of *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.), restated by the Court of Appeal in *R. v. Jeng*, 2004 BCCA 464, at para. 53.

Parties to an Offence

[35] The Crown seeks to establish that the accused Mr. El Amine was a party to the offence of arson by participating in a crime that appears to have been orchestrated by another. Both the Crown and the defence have cited the criteria described by the Supreme Court of Canada in *R. v. Dunlop*, [1979] 2 S.C.R. 881. In that case, the majority of the court held at p. 890:

Mere presence at the scene of a crime is not sufficient to ground culpability. Something more is needed: encouragement of the principal offender; an act which facilitates the commission of the offence, such as keeping watch on enticing the victim away, or an act which tends to prevent or hinder interference with accomplishment of the criminal act, such as preventing the intended victim from escaping or being ready to assist the prime culprit.

[36] The Court then referred to the case of *R. v. Coney* (1992), 8 Q.B. 534, which decided that non-accidental presence at the scene of the crime is not conclusive of aiding and abetting, and cited with approval a passage from the judgment of Hawkins J. at p. 557 of that case:

In my opinion, to constitute an aider and abettor some active steps must be taken by word, or action, with the intent to instigate the principal, or principals. Encouragement does not of necessity amount to aiding and abetting, it may be intentional or unintentional, a man may unwittingly encourage another in fact by his presence, by misinterpreted words, or gestures, or by his silence, or non-interference, or he may encourage intentionally by expressions, gestures, or actions intended to signify approval. In the latter case he aids and abets, in the former he does not. It is no criminal offence to stand by, a mere passive spectator of a crime, even of a murder. Non-interference to prevent a crime is not itself a crime. But the fact that a person was voluntarily and purposely present witnessing the commission of a crime, and offered no opposition to it, though he might reasonably be expected to prevent and had the power so to do, or at least to express his dissent, might under some circumstances, afford cogent evidence upon which a jury would be justified in finding that he wilfully encouraged and so aided and abetted. But it would be purely a question for the jury whether he did so or not. So if any number of persons arrange that a criminal offence shall take place, and it takes place accordingly, the mere presence of any of those who so arranged it would afford abundant evidence for the

consideration of a jury of an aiding and abetting.

[37] At p. 893 of *Dunlop*, the Court noted that it had previously considered the nature of aiding and abetting:

In this Court the question of aiding and abetting was canvassed in *Preston v. R.* [[1949] S.C.R. 156]. The appellant and another were accused of having set fire to a school. Mr. Justice Estey delivered the majority judgment in this Court, in the course of which he stated that in order to find the appellant guilty of aiding, abetting, counselling or procuring, it was only necessary to show that he understood what was taking place and by some act on his part encouraged or assisted in the attainment thereof. Later he said that mere presence does not constitute aiding and abetting, but presence under certain circumstances may itself be evidence thereof. ...

[38] The Crown also refers to *R. v. Briscoe*, 2010 SCC 13, [2010] 1 S.C.R. 411, as the most recent statement by the Supreme Court of Canada of the nature of aiding and abetting:

14 The actus reus of aiding or abetting is doing (or, in some circumstances, omitting to do) something that assists or encourages the perpetrator to commit the offence. ...

15. Of course, doing or omitting to do something that resulted in assisting another in committing a crime is not sufficient to attract criminal liability. ...

16 ... The Crown must prove that the accused intended to assist the principal in the commission of the offence. The Court emphasized that "purpose" should not be interpreted as incorporating the notion of "desire" into the fault requirement for party liability. ...

17 As for knowledge, in order to have the intention to assist in the commission of an offence, the aider must know that the perpetrator intends to commit the crime, although he or she need not know precisely how it will be committed. That sufficient knowledge is a prerequisite for intention is simply a matter of common sense.

[39] The Crown refers to examples in the jurisprudence of the minimal nature of the assistance that is sometimes determined to amount to abetting. Readiness to assist the culprit with the commission of the offence may amount to sufficient abetting to make the accused a party to the offence. The Crown in this case says Mr. El Amine was lending support to Mr. Janif sufficient to amount to abetting.

[40] The Crown, in addition, has drawn the court's attention to *R. v. Klassen* (1995), 65 B.C.A.C. 130, where presence, flight, and circumstances suggesting the accused acted as a lookout were sufficient to result in a conviction. Macfarlane J.A. for the court in that case, however, notes at para. 15 that neither presence at the scene itself nor flight are sufficient to ground culpability as an abettor. *Klassen* and *R. v. White*, [1998] 2 S.C.R. 72 are cited and relied upon as examples of consideration of post-offence conduct generally and I have borne them in mind.

Duress

[41] In *R. v. K.D.L.*, [1999] B.C.J. No. 932 (P.C.B.C.), the Honourable Judge de Villiers considered a case where, as here, the actus reus was admitted, but a defence of duress was advanced in response to a charge of public mischief. The court, referring to *R. v. Hibbert*, [1995] 2 S.C.R. 973, noted that the onus of proof of duress does not rest on the defence. Once duress is raised as a defence that has an air of reality on the evidence, the onus falls upon the Crown to disprove the defence beyond a reasonable doubt.

[42] In *K.D.L.*, the accused made a false report to the police that she had been raped and robbed. She made that complaint at the insistence of an older man with whom she was living. He was said to be a notorious drug trafficker and thug. As in the case at bar, that man had not been called to defend his honour and the evidence of his character was uncontradicted. The court held that the defence of duress was not open to the accused because the person making the threat was not present, as was then required to make out the narrow defence which was then available under s. 17 of the Criminal Code. That has since been set aside on constitutional grounds in *R. v. Ruzic*, 2001 SCC 24, [2001] 1 S.C.R. 687.

[43] The court's consideration in *K.D.L.* of the safe avenue of escape, however, is instructive. First, the court noted:

18 The accused can only rely on the excuse of duress if she did in fact act under compulsion, and she cannot claim that she acted under compulsion if there was a safe way out, which made it unnecessary for her to commit the offence. See *Hibbert* paras. 53 and 54.

19 In *Hibbert*, at para. 60, the Chief Justice said:

The defences of self-defence, duress and necessity are essentially similar, so much so that consistency demands that each defence's "reasonableness" requirement be assessed on the same basis. Accordingly, I am of the view that while the question of whether a "safe avenue of escape" was open to an accused who pleads duress should be assessed on an objective basis, the appropriate objective standard to be employed is one that takes into account the particular circumstances and human frailties of the accused.

[44] Judge de Villiers in *K.D.L.* concluded on the facts before him:

48 ... the excuse of duress fails if the evidence shows that the accused had a safe avenue of escape.

49 Looked at objectively, this accused did have a clear avenue of escape after her initial statement to the police. Her avenue of escape lay in her opportunity to tell the constable when she made her visit to the police station that she was under compulsion of threats, and to have asked the police to help her escape from B.S., instead of repeating her false accusations when she was out of earshot of B.S. But that is not the end of the inquiry.

[45] The court went on to ask, at para. 50:

50 Do the "particular circumstances and human frailties" of this accused mean that, objectively looked at, she did not really have a safe avenue of escape? ...

- [46] The court in that way engaged in the subjective and objective exercise urged upon this court by defence counsel in the case at bar. It was not enough to say that there was objectively an alternate means of escaping from the situation. That is what the Crown does in urging upon the court the conclusion that a defence of duress is never available to one who makes a false complaint to a police officer.
- [47] To paraphrase Judge de Villiers, looked at objectively, this accused did have a clear avenue of escape when he spoke with Constable Hunter. His avenue of escape lay in his opportunity to tell the constable that he had been threatened and to have asked for police protection instead of making a false accusation, but that is not the end of the inquiry. I have to ask, do the "particular circumstances and human frailties" of this accused mean that, viewed objectively, he did not really have a safe avenue of escape? That is also the exercise that is required according to the decision in Ruzic.

Argument

- [48] The Crown says the evidence of the accused is improvised and inconsistent and not worthy of credit. His memory is said to be selective and his version of events unbelievable. The Crown urges the court to accept as true the accused's statement of May 6, 2008, to the police, insofar as it is consistent internally and with other evidence. The Crown says that evidence is sufficient to establish the accused's participation as a party with Farhaz Janif to the offence of arson.
- [49] The Crown says there is no issue with respect to the elements of the charge of mischief. It is submitted that I should reject the accused's evidence of compulsion or threats, but even if I do accept the accused's evidence, the Crown says there was an alternate means of escape from those threats and the defence of duress is not available to the accused.
- [50] I turn first to the Crown's argument on the credibility of Mr. El Amine. The Crown makes the following observations on the accused's evidence at trial:
- (a) he lied to his girlfriend about his intentions on January 28, 2008. The Crown says that is evidence both of his intent to conceal his plans generally and of a propensity to lie;
 - (b) he was reluctant at trial to explain why his cellphone was not in his name;
 - (c) he said at trial that Farhaz had keys to the building, but he did not remember keys when he spoke to the police. Crown suggests that he is inventing evidence as necessary;
 - (d) his evidence that he was going to the warehouse simply to hang out with Mr. Janif, the Crown says, makes no sense, because there was somewhere else where they could smoke and talk;

- (e) Mr. El Amine's testimony that he turned his cellphone off to avoid calls from Mr. Janif, the Crown says, is implausible;
 - (f) his evidence about the fire being started with a lighter is inconsistent;
 - (g) his failure to recollect a call from Mohammed Hanif on the afternoon of January 28th is said to be suspicious;
 - (h) his evidence that he did not take Farhaz' threat to burn the warehouse down seriously is inconsistent, the Crown says, with his evidence that he later took the threat to his own life seriously;
 - (i) the Crown says in small things his evidence was inconsistent. He says he does not drink coffee, but then says he drank coffee with Farhaz at the warehouse;
 - (j) the Crown says he was obviously less than forthcoming with evidence about Rohan taking him to the hospital.
- [51] Turning to its substantive case, the Crown says that not only does the evidence of the accused fail to establish a defence, but it establishes a circumstantial case of guilt. The Crown says the accused admitted that he knew Farhaz Janif's plans to burn the building. The Crown says it is improbable that he did not believe Farhaz was going to set a fire. Knowing Farhaz as he did, he should have taken him seriously. He knew he had committed aggravated assaults. He knew there had been a fire on the premises a week before.
- [52] The Crown says the accused's evidence of his conduct at the scene should not be accepted in its entirety. It is improbable that someone would stand for 10 to 20 minutes in a pool of gasoline in a dark building that someone is threatening to burn. Crown says one would not do that. He would only have stayed that long if he knew what was going on. His evidence that he was in a state of shock is not believable. Reason tells us he should have escaped from that position of peril. Not having done so, the Crown says, is evidence of his participation in the arson.
- [53] The Crown says it does not make sense for Farhaz to bring the sole witness to the crime to the warehouse without an agreement that he would participate. The Crown says there is evidence that Mr. El Amine poured gas in the fact that he was burned on his legs and arms. His evidence that he spilled gas is a fabrication to explain why he ended up with gas on him and on fire.
- [54] The Crown says the admission that he moved gas cans is enough to lead to the conclusion that he assisted in the commission of the offence. He says he moved them to get into the warehouse. Despite the fact the suggestion was not directly put to him, it was suggested that he went into the building to assist in setting the fire. Crown now suggests that he moved the cans to assist in the process of setting the fire.

- [55] The Crown says the evidence on the mischief charge should also be weighed in relation to the arson charge. The Crown says post-fire conduct in not calling the police or going for help is some evidence of participation in the arson.
- [56] The Crown says Mr. El Amine did not report Farhaz' alleged threats to the police. His testimony about specific threats, Crown says, is inconsistent with what he told the police on May 6, 2008, which is simply that Farhaz made him promise not to say what had happened and that he was afraid of Farhaz. Crown asks why, if his evidence is accurate, he did not mention that Farhaz had a gun or ask for protection or describe the threats made by Farhaz. Crown says the evidence of threats should be rejected.
- [57] The defence says, in relation to the arson case, first, that Mr. El Amine's evidence that he simply witnessed events should be believed. Further, however, defence counsel says that in order to establish Mr. El Amine's guilt as a party, the Crown must show some act that was done by the accused. We cannot say that he did any act that encouraged or assisted in the attainment of the illegal purpose, says defence counsel.
- [58] On credibility, defence counsel says that the differences between Mr. El Amine's May 6, 2008, statement and his evidence at trial are minor. He was reluctant and scared when he gave his statement. It is certainly not effusive. It is not surprising that some detail is missing. He did not specifically describe threats made by Farhaz or that Farhaz dictated what story he should provide to the police at the hospital, but that was not discussed in detail. I note that he does not appear to have been charged with mischief at the time the statement was given to the police.
- [59] The defence says that acceptance of Mr. El Amine's evidence as a whole should result in his acquittal. In response to the suggestion that Mr. El Amine may have abetted the arson by moving gas cans, defence counsel points out that at lines 886 to 888 of the transcript of the interview he says the cans were in the way. At line 1224 he says the cans were moved out of the way. He did not say that he passed gas cans to Farhaz. Farhaz did not take those cans. Mr. El Amine's evidence was consistent that he was only watching and that Farhaz poured the gas and set the fire himself. Defence counsel says there is no doubt that that was the accused's evidence on the statement, and that the statement cannot be read as an admission of guilt. The defence says the Crown cannot "cherry pick" words and phrases to make a statement into a confession.
- [60] In response to the argument that Mr. El Amine was in the warehouse so long that he could not have been a mere spectator, the defence says his story is not implausible. There were few options available to him and his evidence was that whatever Farhaz intended, he did not expect him to be so stupid as to light the gasoline while they were still in the building.

- [61] In relation to the mischief charge, defence counsel argues that Mr. El Amine has been consistent in saying that he lied about his presence at the warehouse because of fear of Farhaz. In considering the subjective aspect of the test, he says it should be borne in mind that when he was admitted to the hospital, Mr. El Amine was severely burned, was hyperventilating. His conduct should be weighed in light of his recent burning and his pain. He was not in a position to carefully assess his options.

Analysis of the Arson Charge

Credibility of the Accused

- [62] Dealing with the credibility of Mr. El Amine, I find much of the Crown's criticism of the accused's testimony to be unfounded and the accused's evidence to be generally credible.
- [63] The Crown points to minor discrepancies in the testimony. Much of that criticism, in my view, is misplaced.
- [64] I find Mr. El Amine's evidence to be generally consistent with the chronology and the testimony of other witnesses.
- [65] The Crown, in my view, fails to give adequate weight to the fact that Mr. El Amine has provided much evidence to the police which was unknown to them, and that evidence is in part inculpatory as well as exculpatory. In my view, that lends significant credibility to his evidence.

Criticism of Accused's Testimony Misplaced

- [66] In my view, some of the Crown criticism of the accused's testimony is unfounded. For example, I make nothing of Mr. El Amine lying to his girlfriend about going downtown. He offers a perfectly plausible explanation for that. It is dangerous to suggest that such a deception makes one generally incredible.
- [67] Some questions were not properly put to Mr. El Amine. He cannot be called a liar for saying he does not drink coffee on one occasion and later saying he went to Starbucks for coffee with friends, if the suggested inconsistency has not been put to him. There may be a reasonable explanation: for example, he may have had something else while his friends were having coffee. He may be using the colloquial expression "going for coffee" to mean something other than actually drinking coffee. This is a minor point, but it was raised by Crown as a factor that the court should consider in weighing the evidence on this very significant charge.
- [68] Crown cast doubt upon Mr. El Amine's evidence that he was going to the warehouse simply to hang out with Mr. Janif. In light of the evidence of the others that he had done so in the past, I see no reason to conclude that that was implausible. The fact that there was somewhere else they could smoke does not cast doubt upon Mr. El Amine's evidence.

- [69] Similarly, there is no basis, in my view, to reject as implausible Mr. El Amine's testimony that he turned off his cellphone at Farhaz's request to avoid calls from Mr. Janif. It should be borne in mind that he did receive a text message from his phone at 10:12 p.m., while he was at the site. If, as Crown suggests, he was so familiar with technology as to know that that call would identify his location, he would have known it was too late to conceal his location when he turned off his phone.
- [70] Crown says Mr. El Amine's evidence about the fire being started with a lighter that was given the police is inconsistent with his evidence at trial that he could not see the fire being started. However, Mr. El Amine expressly told the police that he was uncertain when he said that the fire was started with a lighter, and he did not make anything of that evidence. It was not important to him.
- [71] Crown is critical of the accused's failure to recollect a call from Mohammed Hanif on the afternoon of January 28, but the accused says that he occasionally got calls from him and he cannot recall what the call on January 28 was about. There is no reason to reject that evidence. The call may have had no significance to him at the time. As defence points out, it would have been an easy thing for Mr. El Amine to say he remembered the call and that it was about trying to find Farhaz.
- [72] Crown says the accused's evidence that he did not take seriously Farhaz's threat to burn the warehouse down is inconsistent with his evidence that he later took seriously the threat to his own life. As I pointed out in argument, the first threat was an empty gesture until gas was poured. The second threat came after a serious crime and while Mr. El Amine had suffered potential life-threatening injury and medical care was being withheld. It is not at all unusual, in my view, that the intervening events might have altered Mr. El Amine's assessment of Farhaz's threat.
- [73] There are certainly inconsistencies in Mr. El Amine's testimony, but they are not, in my view, so numerous or glaring as Crown suggests. They are not such as to make Mr. El Amine's testimony generally untrustworthy.

Consistency of Mr. El Amine's Testimony with the Evidence of Others and the Chronology.

- [74] Much of Mr. El Amine's evidence is corroborated. Mr. El Amine's evidence that he feared the Hanif family, for example, is consistent with the evidence of others, particularly Mr. T. and Mr. F. His evidence that he frequently hung out at the warehouse is consistent with Mr. T.'s evidence. His evidence that he spent a normal afternoon and early evening with his girlfriend and his evidence of the time he left her is consistent with hers. His evidence that he suffered pain for some time before getting a ride to the hospital is consistent with the lengthy delay between the outbreak of the fire reported by the fire department just after 11:00 p.m., and his arrival at the hospital at 12:30 a.m.

- [75] Because most of the case is made out on his statements alone, there are few other facts against which to measure his story. Most of what can be tested for consistency, however, is consistent. The internal inconsistencies are not, in my view, such as to cause me to reject Mr. El Amine's evidence as implausible.

Statements were Against his Interests

- [76] The Crown says Mr. El Amine knew, before arriving at the warehouse, of Mr. Janif's criminal intentions. The Crown invites the court to dismiss Mr. El Amine's evidence that he placed no credence on Mr. Janif's threats until he started pouring gas, and to convict Mr. El Amine on the basis of his own description of the content of the conversation. The only evidence about prior knowledge of Mr. Janif's intention is Mr. El Amine's own evidence. I credit him for disclosing the conversation, for admitting his presence at the warehouse, and for admitting that the fire was set in his presence. I find him credible in part because of those admissions against his own interests. I accept both his testimony that Farhaz said he would burn the building down and his evidence that he did not believe that Mr. Janif was serious.

The Crown's Case

- [77] The Crown and the investigating police quite properly, in my view, describe this as a "statement case" where the Crown must prove that the accused was a party to this arson through his own words. In my view, the accused's words make out his defence to the charge of arson; that he was a mere spectator. I accept his evidence that, although he heard Mr. Janif say he intended to start a fire, he gave no weight to that threat until it was carried into action. I accept his evidence that he did not actively assist in setting the fire, and I accept his evidence that he felt powerless to leave the scene.
- [78] Weighing in favour of Mr. El Amine's defence is the lack of any motive for Mr. El Amine to knowingly become involved in this arson. He had no interest in the enterprise and nothing to gain and everything to lose from involvement in the crime.
- [79] After considering all of the evidence, I cannot find that Mr. El Amine engaged in any act to facilitate the commission of the offence or any act which would tend to prevent or hinder interference with accomplishment of the criminal act.
- [80] I therefore acquit him of the charge of arson.

Analysis of the Mischief Charge

- [81] Crown says the basic elements of the offence of public mischief have been proven and that Mr. El Amine's evidence of the nature and extent of the threats should be rejected. For reasons set out above, I accept the evidence of Mr. El Amine that he was threatened by Mr. Janif and that he gave a false statement to Constable Hunter because of that threat.

- [82] I am not convinced, however, that a reasonable person in Mr. El Amine's position would have concluded that there was no safe avenue of escape from those threats at the time and place when the misleading statement was made. The decisions in Hibbert and Ruzic recognize that the defence of duress rests on the fact that there must be a component of moral voluntariness to any criminal activity. That should be borne in mind in addressing both the availability and the extent of the defence of duress.
- [83] Determining whether a real choice is available to an accused facing a threat amounts to deciding whether the commission of the crime was in fact voluntary. In asking that question, I must demand of Mr. El Amine that he conduct himself in a manner consistent with the rights and obligations described in para. 62 of Ruzic:

The common law of duress, as restated by this Court in Hibbert recognizes that an accused in a situation of duress does not only enjoy rights, but also has obligations towards others and society. As a fellow human being, the accused remains subject to a basic duty to adjust his or her conduct to the importance and nature of the threat. The law includes a requirement of proportionality between the threat and the criminal act to be executed, measured on the objective-subjective standard of the reasonable person similarly situated. The accused should be expected to demonstrate some fortitude and to put up a normal resistance to the threat. The threat must be to the personal integrity of the person. In addition, it must deprive the accused of any safe avenue of escape in the eyes of a reasonable person, similarly situated.

- [84] In the case at bar, I attribute some weight to the following evidence: I find there was an opportunity for the accused to tell Constable Hunter the truth without the extent of his disclosure being brought to the attention of Farhaz Janif. The threat was not immediate. It might not have been known to Farhaz for some time if Mr. El Amine had told the truth to the police. There was some time to protect those threatened. There was a prospect that Farhaz would be arrested. There was no way for Farhaz to determine what Mr. El Amine said to the police at the moment it was said and for some time thereafter.
- [85] Even if convinced not to name Farhaz, there was little force for Mr. El Amine to tell such a detailed story. He might have feigned an inability to remember events or, as suggested in argument, simply to describe a mishap with a gas engine.
- [86] Mr. El Amine disclosed the truth on May 6, 2008, without any assurance of protection. He appears to have done so with little persuasion. It is true that he did so with the benefit of time and upon reflection. He says certain people under threat had moved, but he was still living in a house owned by the Hanif family and was still in contact with Farhaz. The potential threat had not disappeared. He appears simply to have reconsidered the options open to him.

- [87] Mr. El Amine's decision to state the truth in May 2008 occurred after the investigating officer had described the general obligation of the police to protect people, but in the absence of any discussion of special measures to protect Mr. El Amine or his family, and in the absence of any discussion of the specific threats made by Mr. Janif.
- [88] That decision was made after Mr. El Amine had been charged with arson. The apparent fact that the charge played some role in motivating Mr. El Amine to reveal the truth is some evidence that the misleading story was not told solely as the result of the duress executed by Mr. Janif. The fact that Mr. El Amine was able to overcome the fear of threats when his own liberty was in jeopardy is some evidence that telling the lie was not the only choice open to him earlier when he was interviewed by Constable Hunter.
- [89] I find on the evidence that there was a safe means of escape available to Mr. El Amine and that on January 29, 2008, he committed public mischief by making the false claim to the RCMP that he had been assaulted and burned by persons unknown to him.

Judgment

- [90] For these reasons, I find the accused not guilty of Count 1 of the indictment, the charge of intentionally damaging by fire the building at 1330 East 66th Avenue in Vancouver on January 28, 2008.
- [91] I find the accused guilty of the offence charged on Count 2 of the indictment, public mischief, in relation to the statement he made to the police officers on January 29, 2008, contrary to s. 140 of the Criminal Code.

"P. Willcock J."

The Honourable Mr. Justice P. Willcock

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