
CANADA / JUDGMENT

R. v. Graham

2013 BCCA 75

COURT

British Columbia Court of Appeal

DECIDED

21 February 2013

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2013 BCCA 75 R. v. Graham

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Graham,

2013 BCCA 75

Date: 20130221

Docket: CA039514

Between:

Regina

Respondent

And

Richard Edgar Graham

Appellant

Before:

The Honourable Mr. Justice Chiasson

The Honourable Madam Justice Neilson

The Honourable Madam Justice Garson

On appeal from: Provincial Court of British Columbia, October 5, 2011

(R. v. Graham, Penticton Registry No. 40540-1)

Counsel for the Appellant:

N.L. Cobb

Counsel for the Respondent:

T.C. Gerhart

Place and Date of Hearing:

Vancouver, British Columbia

November 13, 2012

Place and Date of Judgment:

Vancouver, British Columbia

February 21, 2013

Written Reasons by:

The Honourable Madam Justice Neilson

Concurred in by:

The Honourable Mr. Justice Chiasson

The Honourable Madam Justice Garson

Reasons for Judgment of the Honourable Madam Justice Neilson:

- [1] Richard Edgar Graham appeals his conviction for possession of cocaine for the purpose of trafficking, imposed by a Provincial Court judge on October 5, 2011. He contends the trial judge erred by relying on inadmissible hearsay evidence, and by failing to appreciate that the Crown's circumstantial case gave rise to inferences that were inconsistent with guilt. He says this resulted in a conviction that was unreasonable and unsupported by the evidence. In response, the Crown maintains, first, that the conviction is supported by the evidentiary record and should be upheld. In the alternative, it says the trial judge incorrectly excluded evidence of a cell phone conversation implicating Mr. Graham in a drug purchase, and this Court should therefore direct a new trial rather than entering an acquittal.

Background

- [2] Just before 11 a.m. on June 2, 2010, in response to information received from a confidential source, three officers from the Penticton RCMP, Cpl. Myhre, Cst. Anderson, and Cst. Hearst, drove to the parking lot of a bar in Penticton that opened at 11 a.m. They parked and watched Mr. Graham drive into the parking lot alone in a blue minivan at 10:53 a.m. After observing him for about five minutes, during which he sat in the driver's seat of the van, they arrested him for possession of cocaine for the purpose of trafficking.

- [3] Cpl. Myhre searched the van, which he described as "quite messy". He seized a black leather vest from the front passenger seat, and found a single flap containing one gram of cocaine and \$60 in its pocket. There was no identification in the vest, and Cpl. Myhre did not determine its size. In a factory-made closed storage compartment, located in the rear side-panel on the passenger side, he located two baggies of cocaine weighing 13.2 grams, a digital scale, and paper flaps that matched the one found in the vest pocket. He also recovered a cell phone from an open storage compartment in the driver's door.
- [4] Cpl. Myhre retained the cell phone and, shortly after these events, it rang. He answered it and a female asked for "Rick", and then said she wanted to "trade a recently stolen bicycle for 1 gram of soft".
- [5] At trial, by agreement, the Crown filed a report from Cst. Burndred. This stated the cocaine seized had a street value of between \$1,136 and \$1,420 if sold by the gram. Cst. Burndred also opined that the amount of cocaine recovered, as well as the presence of the scale and cell phone, indicated Mr. Graham was trafficking. It was his view that a heavy user of cocaine would use one to five grams a day, and would consume the amount seized in three to seven days.
- [6] The Crown did not lead evidence as to the ownership of the van or the subscriber for the cell phone. Nor was there any forensic evidence that linked Mr. Graham to the items seized. Cpl. Myhre and Cst. Anderson testified that Mr. Graham had a son with the same name who had been involved in illegal drug activity, and had received a four-year custodial sentence in June 2009.

The Reasons of the Trial Judge

- [7] The trial judge recognized the case against Mr. Graham was circumstantial, and that the Crown had to prove he had both knowledge of and control over the cocaine found in the vehicle in order to establish he was in possession of the drug. She found the Crown had established possession, based on this analysis:
- [45] The evidence is that the police officers expected to find the accused at the location of the parking lot. The accused did arrive around the time he was expected.
- [46] The accused was the sole occupant of the vehicle in which the leather vest containing the paper flap with the cocaine was found. The leather vest was lying on the passenger seat close enough to be accessible to the accused. There was no one else in the vehicle. There was no evidence that anyone else had been in the vehicle or that the vest belonged to anyone else.
- [47] It would be speculation on no evidence to assume the vest belonged to anyone else.
- [48] There was no evidence as to who owned the van.

- [49] The accused was the sole occupant and had sole control and access of the vehicle and its contents.
- [50] On review of the whole of evidence, and given that there is no evidence to support any other reasonable inference, I find, beyond a reasonable doubt, the accused was in possession of the powdered substance found in the paper flap in the pocket of the vest located on the passenger seat, and the powdered substance located in baggies found in compartments on the passenger side of the van.
- [8] The trial judge then turned to the question of whether Mr. Graham possessed the cocaine for the purpose of trafficking, and considered whether the evidence of the cell phone call received by Cpl. Myhre should be admitted. While she mentioned *R. v. Williams*, 2009 BCCA 284, 246 C.C.C. (3d) 443, a decision of this Court that dealt with the admissibility of drug purchase calls, the only part of that decision to which she referred was this paragraph from *R. v. Parchment*, 2004 BCSC 1806, 67 W.C.B. (2d) 653, which was quoted at para. 9 of *Williams*:
- [11] Clearly these calls are admissible, having regard to the decisions of *R. v. Ly* (1997), 119 C.C.C. (3d) 479 (S.C.C.); *R. v. Nguyen* (2003), 180 C.C.C. (3d) 347 (B.C.C.A.); *R. v. Edwards* (1994), 91 C.C.C. (3d) 123 (Ont. C.A.); and *R. v. Ramsum* (2003), 329 A.R. 370 (Q.B.). These decisions establish that cell phone calls on seized cell phones are not hearsay, but are admissible as a principled exception to the hearsay rule. They are admissible to prove the nature of activities of the intended recipient. The calls, therefore, have been used as evidence of an accused's intention to traffic. Calls are admissible as circumstantial evidence of knowledge of the presence of drugs. Calls are admissible as a statement of intention of an accused to establish drug transactions and, further, to demonstrate the state of mind of an accused, including his knowledge of the presence of drugs.
- [9] After setting out this paragraph, the trial judge concluded that cell phone conversations such as the one under consideration can be found to be a principled exception to the hearsay rule. She then reviewed *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787, and found the principles enunciated in that decision led to a conclusion that the telephone conversation was "not admissible for the truth of the content nor for the circumstantial evidence" because no voir dire had been held to determine its admissibility.
- [10] The trial judge nevertheless decided the Crown had established Mr. Graham was in possession of the cocaine for the purpose of trafficking, and concluded:
- [63] Based on the whole of the evidence, [t]he accused was in possession of cocaine, the accused was in control and in possession of the other items seized from the van, including digital scales, numerous pieces of paper which was the same as the paper used for the flap containing cocaine, the amount of cocaine located in the van in the possession of the accused, the presence of a cellular telephone located in the door compartment right beside the accused, and considering the expert opinion of Constable Burndred, I find the accused was in possession of cocaine for the purpose of trafficking.

Issues on Appeal

[11] Mr. Graham raises two issues:

- 1) Did the trial judge err by referring to the confidential tip received by the RCMP?
- 2) Did the trial judge err in failing to consider other rational inferences besides guilt that were available on the evidence?

[12] Should Mr. Graham establish that these errors resulted in a conviction that was unreasonable and unsupported by the evidence, the Crown raises a third ground of appeal, arguing that the trial judge erred in ruling the cell phone conversation was inadmissible, and thus the appropriate result on appeal is an order for a new trial, rather than an acquittal.

Discussion

Did the trial judge err by referring to the confidential tip received by the RCMP?

[13] The trial judge referred to the confidential tip at the outset of her reasons, stating:

[3] On June 2, 2010, at 10:58 a.m., after receiving information from a confidential source that the accused would be engaged in selling Cocaine, Cpl. Myhre, Constable Anderson, and Constable Hearst of the RCMP, drove to the parking lot of a local Penticton nightclub by the name of Slack Alice's.

She referred to it again at para. 45 when she began her analysis of whether the Crown had established that Mr. Graham was in possession of the cocaine.

[14] Mr. Graham says the trial judge clearly erred in law by relying on the tip to strengthen the case against him. This evidence was inadmissible hearsay and irrelevant in the absence of a challenge to the lawfulness of his arrest.

[15] I agree. The police should not have testified about the confidential information that instigated the investigation, and the trial judge should not have referred to it in reaching her conclusions: *R. v. Jir*, 2010 BCCA 497 at para. 8, 264 C.C.C. (3d) 64.

[16] The Crown maintains the trial judge's reference to the tip was only part of the narrative, and it was inconsequential to her verdict, pointing out that she did not include the tip when she summarized the evidence supporting conviction at para. 63 of her reasons. It says this was a harmless error that attracts the curative proviso in s. 686(1)(b)(iii) of the Code, citing *R. v. Khan*, 2001 SCC 86 at para. 26, [2001] 3 S.C.R. 823, and *R. v. Feil*, 2012 BCCA 110 at paras. 69-70, 282 C.C.C. (3d) 289.

[17] It is difficult to assess what, if any, impact this error had on the trial judge's reasoning, but I find it unnecessary to decide this point as I am satisfied the remaining grounds conclusively determine this appeal.

Did the trial judge err in failing to consider other rational inferences besides guilt that were available on the evidence?

- [18] The primary issue at trial was whether the Crown had established that Mr. Graham was in possession of the cocaine in the van. It was common ground that the Controlled Drugs and Substances Act, S.C. 1996, c. 19, by adopting the definition of "possession" in s. 4(3) of the Criminal Code, required the Crown to prove Mr. Graham had both knowledge of, and some degree of control over, the illegal drug. Mr. Graham conceded his presence in the van established the necessary element of control. The question was whether he knew the cocaine was there.
- [19] The trial judge properly observed that the evidence going to this mental element of the crime was purely circumstantial. There was no direct evidence Mr. Graham had put the drugs in the van, or knew someone else had placed them there. Thus, the trial judge could only convict him if the Crown established beyond a reasonable doubt that guilt was the only reasonable inference to be drawn from the proven objective facts: *R. v. Ngo*, 2009 BCCA 301 at para. 53, 273 B.C.A.C. 174.
- [20] On appeal, Mr. Graham argues that in finding the Crown had met that burden, the trial judge ignored other reasonable inferences that were available on the evidentiary record. He says the only evidence linking him to the cocaine was his exclusive occupation of the van for the few minutes the police had him under surveillance. There was no other connection between him and the vehicle, the vest, or the concealed cocaine. Nor were there any suspicious circumstances that suggested he was at the parking lot to conduct drug transactions. Mr. Graham maintains there were clearly a number of other rational and innocent inferences that could be drawn from the proven facts. For example, he could have borrowed the van from its owner to run an errand, or to go to the bar when it opened at 11 a.m. Mr. Graham says the trial judge's failure to consider these alternatives led to a conviction that was unreasonable and unsupported by the evidence, and his appeal must be allowed pursuant to s. 686(1)(a)(i) of the Criminal Code.
- [21] The approach to be taken in considering this contention was discussed in *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, and summarized by Madam Justice Arbour in the companion case of *R. v. A.G.*, 2000 SCC 17 at para. 6, [2000] 1 S.C.R. 439:
- [6] ... embarking on the exercise mandated by s. 686(1)(a)(i) of the Criminal Code, the reviewing court must engage in a thorough re-examination of the evidence and bring to bear the weight of its judicial experience to decide whether, on all the evidence, the verdict was a reasonable one. Inevitably the verdict will be one that was open to the jury, in the sense that it was not an error of law for the trial judge to leave it to the jury for consideration. Moreover, it is not sufficient for the reviewing judge to simply take a different view of the evidence than the jury did. The appeal court, if it is to overturn the verdict, must articulate the basis upon which it concludes that the verdict is inconsistent with the requirements of a judicial appreciation of the evidence. This is what must now be done in this case.

- [22] This process of re-examination requires an assessment of the cumulative effect of all of the evidence, rather than a piecemeal analysis: Jir at para. 36.
- [23] Having reviewed the record before the trial judge, I am persuaded that she did fail to consider alternative inferences that arose on the evidence and that were favourable to Mr. Graham. As earlier noted, the case against him was entirely circumstantial, and the evidence connecting him to the van and its contents was limited. It is apparent that the trial judge, at paras. 46 to 48 and 50 of her reasons, recognized there was "no evidence" before her of some significant matters. Her observations in those paragraphs, however, as well as her ultimate finding of guilt, suggest that she may have taken the erroneous view that it was Mr. Graham's responsibility to provide evidence on these points. Instead, these gaps in the evidence favoured Mr. Graham, and provided a basis on which the trial judge could, and should, have drawn rational inferences that were inconsistent with guilt.
- [24] Ordinarily, this would result in an order setting aside Mr. Graham's conviction and entering an acquittal in its place. The Crown's alternative ground of appeal must be considered, however, before determining whether that is the proper result.

Did the trial judge err in finding the cell phone conversation was inadmissible?

- [25] The Crown raises this ground of appeal in accord with its right to raise issues that support the verdict below, or its position on the appropriate remedy: R. v. Harvey (2001), 57 O.R. (3d) 296 at para. 34, 160 C.C.C. (3d) 52 (C.A.), aff'd 2002 SCC 80, [2002] 4 S.C.R. 311; R. v. Keegstra, [1995] 2 S.C.R. 381 at para. 23, 98 C.C.C. (3d) 1. It maintains the trial judge erred in finding the cell phone conversation was tendered solely for the truth of its contents and was therefore inadmissible because a voir dire had not been held to determine reliability and necessity. If it succeeds on this point, it says the proper result is a direction for a new trial pursuant to s. 686(2)(b) of the Criminal Code.
- [26] It is necessary to first describe how this issue developed at trial. When the Crown sought to introduce the contents of the conversation through Cpl. Myhre this exchange took place:

MR. SMITH: I wonder, Your Honour, if the Crown could just tell you what the purpose of the phone call is because if the phone call did not involve Mr. Graham speaking to anybody, I think its admissibility will depend on the purpose for which the Crown is tendering it because it's obviously hearsay if he's not there. It's an out of court statement, out of court statements made without the accused being there, so if the Crown could first tell us what the purpose of tendering that evidence is, then I can consider what objections I may or may not have.

...

MR. LERFOLD: Your Honour, you'll see from the expected evidence from the phone call that both a name is mentioned as well as a request to purchase drugs. The purpose of admitting that or proposing the evidence be admitted is to rely on it for the purpose of showing both that Mr. Graham had knowledge of that phone, that it was in fact his phone, and that he had knowledge of the drugs that were found in the vehicle and that those drugs were held as possession for the purpose of trafficking.

I do have case law on this point -

MR SMITH: Oh that's okay, all I wanted to know at this point is what the purpose and I take it that what the Crown is telling me is the phone call is being tendered for the truth of its contents as well -

MR LERFOLD: It is and it is the Crown's position either in the case law shows that either that's being admitted as an exception to the hearsay rule, as our Court of Appeal has consistently upheld, or that it is - other cases the Court of Appeal has held that it's not in fact hearsay evidence but as well it's both hearsay evidence being admitted as an exception to the -- as an exception but as well is simply circumstantial evidence supporting the fact that that caller is calling in for the purpose stated by the caller.

MR. SMITH: Well sorry, I'm not understanding. I'll do it really slowly. Is the Crown tendering the phone call for the truth of its contents.

MR. LERFOLD: Yes.

MR. SMITH: Okay, that's all I need to know. That's fine.

[27] Cpl. Myhre then testified to the conversation, and was cross-examined on it.

[28] In final submissions, the Crown argued the defence appeared to have abandoned any objection to the admissibility of the conversation, and cited authorities to support its position that the contents of the call were admissible, either as an exception to the hearsay rule or as circumstantial evidence. Defence counsel argued the conversation was only relevant if it was true, and said it was inadmissible for the truth of its contents because the Crown had not asked for a voir dire to establish reliability and necessity, as mandated by Khelawon at para. 47. He stated:

Now the Crown is going to or has - was asked specifically, first of all, why they were tendering the statement of the phone call. And the reason that defence asked the Crown to clarify the purpose for which the statement was being admitted, and the reason that the Crown finally agreed and told Your Honour that they were putting that evidence forward was for the truth of its contents. Now we still have in this country an adversarial system, and the adversarial system that we have says that in a criminal case the accused is entitled to sit back and have the Crown comply with the rules of criminal procedure set down by the courts and also, but in particular by the Supreme Court of Canada.

- [29] In her decision, the trial judge framed the issue raised by these events as follows:
- [55] The accused objected to the evidence of Cpl. Myhre on the telephone call conversation being admitted for the purposes of the truth of the contents of the call as it was hearsay. The witness was stood down for submissions of counsel. The Crown did not call a voir dire when the witness was recalled.
- [56] The question is, once the accused indicates an objection to the evidence being brought in as part of the evidence of a trial, does the Crown have to call a voir dire and obtain a decision whether the evidence is admissible as an exception to the hearsay rule even for the purposes of considering the evidence only as circumstantial evidence which would be considered in determining whether the accused was trafficking in the cocaine?
- [30] As described earlier, the trial judge referred to Williams only to the extent of adopting a paragraph from Parchment that was quoted in that decision, and then relied on that quote to find that the cell phone conversation could be a principled exception to the hearsay rule, and a voir dire was therefore required to determine its reliability and necessity before it could be admitted. Since no voir dire had been held, she declined to admit the conversation.
- [31] On appeal, the Crown argues the record clearly shows the trial Crown did not characterize the cell phone conversation solely as hearsay, but also took the position it was admissible as circumstantial evidence of Mr. Graham's intent. It submits the trial judge erred by ignoring clear authority that supports this position, and by excluding the conversation.
- [32] In response, Mr. Graham contends the trial Crown made a critical decision to tender the conversation for the truth of its contents, the defence relied on that, and the Crown is bound by that position on appeal. He maintains defence counsel was not obliged to formally object to the admission of the conversation when it was led, but was instead entitled to let it go in and wait until final submissions to voice his objection. The trial judge then properly ruled the Crown's failure to hold a voir dire rendered the conversation inadmissible.
- [33] It is undisputed that if the Crown tendered the telephone conversation solely for the truth of its contents, it was inadmissible without a voir dire: *Khelawon* at para. 47. I am not persuaded, however, that the trial Crown restricted his position in this way, or that the defence reasonably understood this to be the case. The trial Crown was clear, both in the exchange during Cpl. Myhre's testimony and in his final submissions, that it was his position the conversation was also admissible as circumstantial evidence of a drug transaction. Defence counsel deflected the Crown's offer to deal with the authorities on this point when it first arose and, instead of formally objecting to the evidence, permitted Cpl. Myhre to testify to the conversation, cross-examined him on it, and then raised the issue of admissibility during his closing submissions, when both parties fully argued the law supporting their positions. I see no basis on which Mr. Graham may now argue the Crown is precluded from submitting that the conversation is admissible as circumstantial evidence.

- [34] As an aside, I view defence counsel's strategy at trial as unorthodox and unacceptable. While I agree with Mr. Cobb that defence counsel was not under any obligation to ask for a voir dire, his comments when the issue first arose fell short of a formal objection to the admissibility of this evidence, and it was inappropriate to allow the contentious evidence to go before the fact-finder and withhold his objection until the end of the trial: Jir at para. 9. One need only contemplate this scenario in a jury trial to recognize the difficulties it presents. The fact a trial is heard by a judge alone does not relax these principles.
- [35] Turning to the trial judge's characterization of the conversation as hearsay, the authorities in this country that address whether drug purchase calls are presumptively inadmissible hearsay are inconsistent. The issue has recently been argued before the Supreme Court of Canada and judgment reserved: *R. v. Baldree*, 2012 ONCA 138 at paras. 42 and 114, 109 O.R. (3d) 721, appealed as of right [2012] S.C.C.A. No. 136. In that case, the police seized a phone from the accused on his arrest, and an officer later took a call on it from a person seeking to buy "weed". The trial judge found the conversation was admissible as circumstantial evidence of drug trafficking and convicted Mr. Baldree. He appealed, and Justice Feldman, Justice Blair concurring, found the conversation was hearsay and was improperly admitted, relying on the decisions in *R. v. Wilson* (1996), 29 O.R. (3d) 97, 107 C.C.C. (3d) 86 (C.A.) and *R. v. Kearley*, [1992] 2 A.C. 228, [1992] 2 All E.R. 345 (HL). In dissent, Justice Watt reviewed the principles governing the admissibility of hearsay evidence, and emphasized the importance of discerning the purpose for which a statement is tendered. At para. 50, he observed a statement tendered to prove notice, knowledge, or motive is not hearsay. It was his view the drug purchase call was an implied assertion, offered not for the proof of its contents but to establish that its recipient was a drug supplier:
- [81] In this case, the prosecutor did not introduce the drug purchase call to prove the truth of its contents. A telephone call is evidence of conduct in words. The conduct is carried out by use of a telephone. The call was relevant to show the nature of the business carried by the appellant. The nature of that business was a material issue in the prosecution of the appellant. The caller wanted to buy drugs. The conduct of the buyer was an item of evidence, which, together with other items of evidence, may help to establish the nature of the appellant's business, the purpose for which he had various controlled substances in his possession.
- [36] The courts in this jurisdiction have generally shared Justice Watt's view, and characterized drug purchase calls as admissible circumstantial or original evidence that is not admitted for the truth of its contents, see for example *R. v. Cook* (1978), 10 B.C.L.R. 84 at 86, 46 C.C.C. (2d) 318 (C.A.); *R. v. Lees*, 2009 BCCA 240 at para. 21, 271 B.C.A.C. 186; Williams at para. 10; *R. v. Bjornson*, 2009 BCSC 1780 at para. 13.

[37] This view is also reflected in a somewhat different context in the decision of the Supreme Court of Canada in *R. v. Ly*, [1997] 3 S.C.R. 698, 119 C.C.C. (3d) 479. There, the telephone conversation took place between a police officer and the offender, who arranged to deliver drugs to the officer. The trial judge excluded the evidence because it was hearsay; the Alberta Court of Appeal disagreed and directed a new trial. Justice McLachlin delivered the Court's judgment dismissing the offender's further appeal, stating at 699:

We are all of the view that the appeal should be dismissed and the Court of Appeal's order for a new trial confirmed. The telephone conversation was admissible. It was a statement of intention, or a statement tendered to establish the alleged drug transaction, and hence not tendered for the truth of its contents. Accordingly, it was not hearsay. The telephone conversation is merely one of the circumstances which, combined with others, may suffice to establish that the appellant, when he appeared at the designated time and place, in possession of the drugs, did so for the purpose of trafficking. Any frailties in relation to the connection between the appellant and the telephone conversation go to weight and not admissibility.

[38] There has, however, been some inconsistency in this jurisdiction. In *R. v. Nguyen & Bui*, 2003 BCCA 556, 180 C.C.C. (3d) 347, Mr. Justice Mackenzie inferentially followed Cook and Ly, but concluded drug purchase calls were admissible on the basis of the principled exception to the hearsay rule:

[17] In my view, the conclusion that these telephone conversations are not hearsay rests on the circumstantial guarantee of their trustworthiness and therefore meets the requirements of necessity and reliability of the evidence which, of course, are also the basis for the principled exception to the hearsay rule enunciated by the Supreme Court of Canada in *R. v. Khan*, [1990] 2 S.C.R. 531.

[39] In *Parchment*, at para. 11, Madam Justice Stromberg-Stein took a similar approach, alluding to drug purchase calls as "not hearsay, but a principled exception to the hearsay rule." As set out at para. 8 of this decision, the trial judge relied on that statement to find the conversation in this case was hearsay, and inadmissible in the absence of a *voir dire*.

[40] In my respectful view, the analyses in *Nguyen* and *Parchment* represent a departure from the preponderance of authority in this province, which holds that drug purchase calls are admissible as circumstantial evidence of possession of the drugs. This is evident in paras. 9 and 10 of this Court's decision in *Williams*, which the trial judge appears to have neglected. There Lowry J.A., writing for the Court, stated:

[9] The appellant first contends the judge erred in admitting the evidence of the calls to the appellant's cellular telephone on the ground the evidence is hearsay. No objection was taken at trial but she maintains the officers' testimony concerning the calls is hearsay because it was offered for the truth of its contents. She relies on *R. v. Parchment*, 2004 BCSC 1806, to say the calls were not evidence of possession. But there, in similar circumstances, telephone calls were said to be admissible as evidence of an intention to traffic. The prosecution failed because of the limited weight that could be put on the evidence in that case. Madam Justice

Stromberg-Stein summarized the law as follows:

[11] Clearly these calls are admissible, having regard to the decisions of *R. v. Ly* (1997), 119 C.C.C. (3d) 479 (S.C.C.); *R. v. Nguyen* (2003), 180 C.C.C. (3d) 347 (B.C.C.A.); *R. v. Edwards* (1994), 91 C.C.C. (3d) 123 (Ont. C.A.); and *R. v. Ramsum* (2003), 329 A.R. 370 (Q.B.). These decisions establish that cell phone calls on seized cell phones are not hearsay, but are admissible as a principled exception to the hearsay rule. They are admissible to prove the nature of activities of the intended recipient. The calls, therefore, have been used as evidence of an accused's intention to traffic. Calls are admissible as circumstantial evidence of knowledge of the presence of drugs. Calls are admissible as a statement of intention of an accused to establish drug transactions and, further, to demonstrate the state of mind of an accused, including his knowledge of the presence of drugs.

[10] In my view, that statement of the law, save perhaps for the reference to cellular telephone calls being an exception to the hearsay rule, is one with which I respectfully agree. In particular, I agree such calls are admissible as circumstantial evidence of knowledge of the purpose of drugs, which is an element of possession. This is a complete answer to the appellant's contention and I would not accede to the first ground of appeal.

[Italics emphasis added.]

[41] Thus, this Court expressly disapproved that part of *Parchment* on which the trial judge relied to find the cell phone conversation was hearsay and inadmissible. I am satisfied she erred in law in excluding this conversation. It was properly admissible as circumstantial evidence without the necessity of a voir dire, and she should have considered it in determining whether the Crown had established Mr. Graham knew the cocaine was in the van.

[42] I have considered whether this Court may weigh this evidence in conducting the re-examination of the record mandated by *Biniaris* and *A.G.*, and have decided it cannot. The interpretation of some aspects of the telephone conversation is sufficiently contentious that this evidence should be explored at a new trial and weighed in conjunction with the evidence as a whole.

Conclusion

[43] I would accordingly allow the appeal, set aside Mr. Graham's conviction, and order a new trial.

"The Honourable Madam Justice Neilson"

I AGREE:

"The Honourable Mr. Justice Chiasson"

I AGREE:

"The Honourable Madam Justice Garson"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/CA/13/00/2013BCCA0075.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-graham-2013>

Prepared on 29 October 2026 · Esheria