

CANADA / JUDGMENT

R. v. Hollaman

2023 BCSC 1612

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 1612 R. v. Hollaman

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Hollaman,

2023 BCSC 1612

Date: 20230705

Docket: 91727A

Registry: Kelowna

Rex

v.

Kyle Hollaman

Before: The Honourable Mr. Justice Wilson

Oral Reasons for Judgment

Counsel for the Crown:

F. Lépine

Counsel for the Accused:

E. Holzman

Place and Date of Trial/Hearing:

Kelowna, B.C.

March 3, May 11,

and June 14, 2023

Place and Date of Judgment:

Kelowna, B.C.

July 5, 2023

- [1] THE COURT: Mr. Hollaman is charged with five counts on the indictment:
- a) possession of Diacetylmorphine (heroin) and fentanyl for the purposes of trafficking;
 - b) possession of fentanyl for the purposes of trafficking;
 - c) possession of cocaine for the purposes of trafficking;
 - d) possession of methamphetamine for the purposes of trafficking; and
 - e) possession of a prohibited weapon, being a taser, without a licence.

Background

- [2] The background of the matter is as follows. After conducting surveillance of the residence located at 505 Valley Road in Kelowna, the police obtained a search warrant. The accused was known to be a resident of the property.
- [3] Constable Lukash was one of the police officers who executed the search warrant and the only officer called to testify at the trial.
- [4] When she entered the home, she noticed there were some double doors that the officers who had preceded her had not yet opened. She went in and encountered two males in the bedroom. She then saw two other males on the balcony. She quickly searched them and took control of them.
- [5] Another officer announced for anyone else to come out and identify themselves. At that point, Mr. Hollaman came out of the ensuite bathroom. Constable Lukash then dealt with Mr. Hollaman. She told him he was detained for possession for the purposes of trafficking. He appeared anxious and was sweating. He said that he was sorry about the state of the bathroom and said that he needed to defecate. She did not allow him to go back into the bathroom. She placed him in handcuffs and escorted him from the bedroom and left him with other officers.
- [6] Constable Lukash was then taken through various photographs taken during the search. A lanyard located on an ottoman had a key attached. The people she encountered upon arrival in the master bedroom were a Mr. Lipsack, Mr. Robinson, Mr. Fletcher, and Mr. Grant. She did not ask any of them whether the addresses on their identification were current.
- [7] The police found the following items in the master bedroom:
- a) 20.2 grams of methamphetamine under the ottoman;

- b) 1.3 grams of methamphetamine on a dresser.
- [8] The ensuite bathroom contained a sink cabinet. The following items were found in the sink cabinet:
- a) 284 fentanyl pills in the top drawer;
 - b) 8.1 grams of cocaine in another drawer;
 - c) 2.1 grams of cocaine on the countertop;
 - d) a safe in the sink cabinet;
 - e) a taser with cartridges; and
 - f) two mixing bowls containing white residue.
- [9] A search of the safe located in the sink cabinet revealed the following:
- a) 7.5 grams of fentanyl and heroin;
 - b) 15.6 grams of cocaine;
 - c) 13.1 grams of crack cocaine;
 - d) 27.8 grams of methamphetamine; and
 - e) \$8,000 cash.
- [10] The police also found other items in the master bedroom. The items included a notebook containing handwriting that used words commonly used as jargon in the drug trade, such as "pants", "side", "window", "Pepsi", "hard", and "soft". The notebook also contained what appeared to be notes relating to the work of a flooring or tiling contractor. Business cards for the accused's business were found on top of the safe in the sink cabinet. There was an invoice and other documents bearing the accused's business name found in the master bedroom.
- [11] A search of the bedroom also revealed a tenancy agreement which was located under the ottoman. The tenancy agreement was in the names of the accused and Mr. Kevyn Kirbyson. The tenancy agreement was incomplete, as the signature page was missing.
- [12] Two digital scales with white residue were found on a shelf above the desk in the master bedroom. A lanyard with a key was found on top of the ottoman. Constable Lukash put the key on the counter by the sink in the ensuite bathroom. The key was capable of unlocking the safe located in the sink cabinet.
- [13] Hundreds of credit cards, access cards, and pieces of identification in the names of persons other than the accused were also located in a box on the floor of the master bedroom.

Crown's Evidence

- [14] The Crown's case at trial consisted of the evidence of Constable Lukash, together with 46 admissions (the "Admissions"). The Admissions, in addition to the fruits of the search, included an acknowledgment that the quantities, value, and variety of the various controlled substances found in the master bedroom are consistent only with the possession of those drugs for the purposes of trafficking.
- [15] The issue in this trial is whether the Crown has proven beyond a reasonable doubt that the accused was in possession of the drugs and the taser. Possession is defined in the Criminal Code at s. 4(3) as follows:
- (3) For the purposes of this Act,
 - (a) a person has anything in possession when he has it in his personal possession or knowingly
 - (i) has it in the actual possession or custody of another person, or
 - (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.
- [16] This definition is incorporated into the Controlled Drugs and Substances Act by s. 2(1).
- [17] The Crown alleges that the accused was in constructive possession of the drugs and taser, because they were found in his residence. In order to establish constructive possession, the Crown must prove that the accused knew of and had control of the drugs, and that knowledge and control co-existed at one point in time. Knowledge and control may be established by circumstantial evidence, direct evidence, or a combination of both: *R. v. Nazarek*, 2017 BCSC 1909 at paragraph 17.
- [18] This case relies on circumstantial evidence because no drugs were found on Mr. Hollaman's person at the time of his arrest.

Accused's Evidence

- [19] The accused testified in his own defence. Mr. Hollaman is 36 years of age and has lived in Kelowna for about six years. I will summarize his evidence.
- [20] Mr. Hollaman is a self-employed tile and flooring contractor operating under the name Pristine Tile and Flooring. In 2018, he was making about \$50,000 per year from that business and denied supplementing his income by selling drugs. He denied that any of the drugs, the notes in the notebook, or the drug paraphernalia were his. He did not live in the master bedroom, but rather in another bedroom located in the basement of the home. The other tenant identified in the tenancy agreement, Kevyn Kirbyson, occupied the master suite. Mr.

Kirbyson's girlfriend, called Telena, did not live there, but was often there.

- [21] Mr. Kevin Grant also lived at 505 Valley Road, as did a man by the name of Justin and his girlfriend.
- [22] Mr. Christopher Swerhun was also often at the residence. Mr. Swerhun would sometimes stay there and sleep on a mattress in the living room. He also, on occasion, observed Mr. Swerhun cooking crack cocaine in the kitchen. The accused saw Mr. Swerhun in every room in the house at different times. He was a frequent visitor and Mr. Hollaman saw Mr. Swerhun handle drugs.
- [23] Mr. Hollaman described having met Mr. Kirbyson prior to renting at Valley Road. Mr. Hollaman and Mr. Kirbyson were also roommates at a previous residence on Belaire Avenue for a month or so before they moved to 505 Valley Road.
- [24] Just prior to the arrest and going into the ensuite bathroom, Mr. Hollaman had smoked marihuana with Mr. Fletcher and had smoked methamphetamine with Mike Robinson. Mr. Fletcher and Mr. Robinson supplied the drugs he consumed. He denied that any of the notebook entries are in his handwriting. I will note that some of the notes in the book appear to be the sorts of notes that a flooring contractor might have made. For instance, references to mosaic tiles and a cabinet company. Mr. Hollaman was not aware of Mr. Kirbyson's occupation.
- [25] A number of Mr. Hollaman's business cards were located on top of the safe in the ensuite bathroom where a lot of the drugs were found, but Mr. Hollaman cannot explain how the cards got there. Similarly, there were a couple of invoices, one to Mr. Hollaman and one for Mr. Hollaman, found in the bedroom. He did not know how those got there either.
- [26] In cross-examination, Mr. Hollaman said that he had met Mr. Kirbyson through friends and lived with him for about a month-and-a-half at the Belaire property, prior to the two of them moving to Valley Road. He sublet Mr. Kirbyson a room at Belaire, although they only remained there for another six weeks or so. He knew nothing of Mr. Kirbyson's affairs, notwithstanding that the setup at Belaire was such that each would have had free access to the whole home.
- [27] Mr. Kirbyson was his co-tenant at the Valley Road property. Mr. Kirbyson found the property and then the two of them went to look at it. The landlord provided the tenancy agreement but all of the handwriting is Mr. Hollaman's, not only his own name, but Mr. Kirbyson's name as well. There is no phone number for Mr. Kirbyson, because he does not know if Mr. Kirbyson had a phone.
- [28] It was suggested on cross-examination, but denied by Mr. Hollaman, that Mr. Kirbyson was never a tenant and that Mr. Hollaman simply used the name of a person he knew to be homeless for the very purpose of being able to lead this kind of evidence.

- [29] Mr. Hollaman was asked about the living arrangements. The rent was \$2500 per month and Mr. Hollaman's share was \$800, plus his share of the utilities. The other roommates made up the rest of the rent. The other subtenants did not sign any documents. Mr. Hollaman said the utilities were split seven ways. The occupants were Mr. Hollaman, his girlfriend, Mr. Kirbyson, his girlfriend Telenia, Justin and his girlfriend, and Mr. Grant.
- [30] Mr. Grant was one of the men encountered by Constable Lukash in the master bedroom during the execution of the search warrant. The only utility bill in Mr. Hollaman's name was the Shaw cable bill. Although the three girlfriends, or at least Mr. Hollaman's girlfriend, were only there three or four nights per week, the utilities were split into sevenths.
- [31] Mr. Hollaman did not know anything about the Independent Soldier paraphernalia found in the master bedroom, and did not know that Mr. Kirbyson was a member of the Independent Soldiers gang. He knew that the Independent Soldiers were involved in drugs, but he never asked Mr. Kirbyson what it was all about.
- [32] Mr. Hollaman preferred the downstairs master bedroom because there was no air conditioning in the home and he preferred to stay where it was cooler. Although Mr. Hollaman's bedroom was downstairs, there was no bathroom downstairs and therefore he had to come up the stairs to use the bathroom.
- [33] Mr. Hollaman agreed that he kept his private business records in his bedroom and agreed that he would not expect others would go into his bedroom. However, it was agreed that Mr. Kirbyson's bedroom would be used for consuming drugs, and it was acceptable for anyone to use the room for that purpose, even if Mr. Kirbyson was not there.
- [34] At the time the search warrant was executed, Mr. Hollaman was in the bathroom. He said he was sitting on the toilet when he heard the police come in. He heard the police ask if there was anyone else there, but he did not respond. He said he wiped himself before coming out of the bathroom. He then flushed the toilet and said the fan was sufficiently loud that the police would not necessarily have heard that he had flushed.
- [35] He was taken to the documents that were found in the closet of the master bedroom. These included three documents from 2015 when Mr. Hollaman was living in Hope: an invoice from Canyon Auto, a receipt from Nuway Pawn Broker, and an insurance document from Manitoba Public Insurance. He could not explain why those documents were located in Mr. Kirbyson's closet.
- [36] There was also an invoice from Mr. Hollaman's business. The document refers to the Belaire address and Mr. Hollaman explained that this was his address at the time. The addressee of the invoice is a numbered company which happens to be the landlord at 505 Valley Road. The invoice itself has handwritten changes, and again Mr. Hollaman was not able to explain why that document would be found in Mr. Kirbyson's bedroom. This document was not located in the closet, but elsewhere in the master bedroom.

- [37] Finally, Mr. Hollaman could not explain why there were five of his business cards located on the safe in the master bedroom, and he was not aware that there was a safe in the room. It was put to him that there were drugs on the counter in the ensuite bathroom.
- [38] He denied that it was his writing in the notebook. He agreed that the first couple of pages in the diary are consistent with notes that might be taken by someone who did tiling work, but he did not know what Mr. Kirbyson did for work because he had never asked him.
- [39] When Mr. Hollaman returned home from the police station following his arrest, Mr. Kirbyson was not there. He saw Mr. Kirbyson again less than a week later, although he could not say precisely when. He has no idea where Mr. Kirbyson is now. He did not keep track of Mr. Kirbyson, nor did he keep track of Mr. Grant, both of whom would have been able to corroborate his evidence about the master bedroom being Mr. Kirbyson's room.

Crown's rebuttal witnesses

- [40] The Crown sought leave and was granted permission to call two rebuttal witnesses. The rebuttal witnesses were focused solely on Mr. Kirbyson's whereabouts.
- [41] Constable Walton testified to an interaction with Mr. Kirbyson on November 28, 2018, approximately three weeks before the accused's arrest. He was part of the Special Enforcement Team for the Kelowna RCMP and had been asked to assist at a motel where various people were staying. He saw a man that he later identified as Mr. Kirbyson ride a bicycle to a local store and back again. The police then entered the room and asked the three people to vacate the room. There was one male, Mr. Kirbyson, and two females present. He saw the three people pack various items of clothing and toiletries into multiple bags and then depart. He identified Mr. Kirbyson, who provided identification. Mr. Kirbyson and the two females were cooperative and left without incident. Constable Walton later became aware, through a photograph at the RCMP detachment, that Mr. Kirbyson had died of an overdose.
- [42] The other rebuttal witness was Constable Lange. Constable Lange was a member of the Downtown Enforcement Unit, which involves patrolling the downtown core of Kelowna, including high crime areas and areas where people who routinely live on the street are in shelters. He was familiar with a number of people who were experiencing homelessness, which included Mr. Kirbyson. He knew that Mr. Kirbyson held no fixed address, frequented shelters, and lived on the street. Mr. Kirbyson had a high-risk lifestyle and substance abuse issues.
- [43] On December 20, 2018, at 5:54 a.m., Constable Lange attended outside the Friendship Centre at 442 Leon Avenue in Kelowna, an area known to be frequented by people who are homeless. Constable Lange had no specific recollection of the events of December 20, but had prepared a narrative hard copy report some five lines in length at 7:12 a.m. The note indicates that security for the Friendship Centre had asked two people who were camping in front of the Friendship Centre to leave, but they had not done so. Constable Lange was

familiar with both people who were asked to leave, Mr. Kirbyson and another. Both packed up and left upon request.

Legal Framework

- [44] Because the accused testified, my analysis must be guided by the principles set out in *R. v. W. (D.)*, [1991] 1 S.C.R. 742. That is:
- a) if I believe the accused, I must acquit him of the charges;
 - b) if I do not believe the accused's evidence, but his evidence nonetheless raises a reasonable doubt as to his guilt, I must acquit;
 - c) if I do not believe the accused and his evidence does not raise a reasonable doubt, I must nonetheless be satisfied beyond a reasonable doubt that the evidence that I do accept establishes the accused's guilt.
- [45] The Crown's case depends on circumstantial evidence, because the accused was neither seen with drugs on his person nor physically engaging in drug trafficking. The Crown argues that it can be inferred from all of the circumstances that the accused was in possession of the drugs; that is, he had knowledge of the drugs in the master bedroom, the ensuite, and the safe, and the weapon in the ensuite, and that he had control over both the drugs and the weapon.

Discussion

- [46] I will begin my assessment of the evidence in terms of the credibility of the evidence of the accused.
- [47] An assessment of credibility generally involves a number of considerations. Some of the factors to be considered when assessing credibility were summarized in *Bradshaw v. Stenner* at 2010 BCSC 1398, affirmed 2012 BCCA 296, and leave to the Supreme Court of Canada refused. At paragraph 186, the Court said:
- [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides . . . The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally . . . Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the . . .

- [48] In *R. v. Roth*, 2020 BCCA 240, the Court of Appeal confirmed that the trier of fact may rely on human experience, but advises caution when doing so. At paragraph 65:
- [65] Moreover, although judges are entitled to rely on their human experience in assessing the plausibility of a witness's testimony, they must avoid speculative reasoning that invokes "common sense" assumptions not grounded in the evidence . . .
- [49] Here, the police conducted a search of both the master bedroom, including the closet, together with the ensuite and the safe. None of the evidence revealed any connection to Mr. Kirbyson, with the sole exception of the tenancy agreement. The accused completed the tenancy agreement, which was unsigned. That is, the accused agreed during his cross-examination that it was he who filled in Mr. Kirbyson's name on the tenancy agreement. The accused was unable to explain why the signature page from the tenancy agreement was missing.
- [50] Although the admissions include that the tenancy agreement was authentic, this admission only serves as confirmation that the document was a true copy of the original. As a result of the admission, it was not necessary to call the landlord to testify. It does not prove that Mr. Kirbyson actually lived there.
- [51] Other documents found in the master bedroom also contained only the accused's name. These include the pawn shop receipt, an insurance letter, and an invoice from the accused's company to a third party. The accused's business cards were located on the safe.
- [52] Mr. Hollaman testified that he and Mr. Kirbyson had been tenants together at a property on Belaire for a period of six weeks or so before moving to Valley Road together. However, the accused had no idea what Mr. Kirbyson did for a living, even though they had lived together for close to six months. The notebook found in the master bedroom, which is consistent with drug trafficking, also contains notes consistent with the business of a flooring contractor. The accused is a flooring contractor. While there are lots of flooring contractors about Kelowna, it might be considered surprising that two people working in the same industry would be roommates for close to six months in two homes without knowing that they shared the same occupation.
- [53] In short, the only evidence that would corroborate the accused's evidence that Mr. Kirbyson was a tenant of the home at all and the occupant of the master bedroom is the incomplete tenancy agreement and the accused agreed that he was the person who wrote Mr. Kirbyson's name onto that tenancy agreement.
- [54] Mr. Hollaman has no explanation for why his documents were found in the master bedroom if it were Mr. Kirbyson's, and although it is possible that Mr. Kirbyson picked up papers belonging to the accused and put them in the master bedroom, it is not obvious why these documents would have been left about the home since they predated the search warrant by some three years. In other words, it is unlikely that the documents would have arrived in the mail during the time the two men lived together at Valley Road or even at Belaire.

- [55] It is also telling that there were no documents of Mr. Kirbyson's anywhere to be found in or about the master bedroom or ensuite bathroom, which would be unusual if it were his bedroom. While an inadvertent misplacing of documents is always possible, which might explain why a document or two of Mr. Hollaman's might be found in the bedroom of another person, such an explanation is much less likely to be so when none of the alleged occupant's documents were found there.
- [56] Moreover, if the master bedroom and its contents were Mr. Kirbyson's, it would seem unlikely that even if he permitted people to use his bedroom for drug parties, it would seem unlikely that he would then leave his entire drug supply, together with \$8,000 in cash, readily accessible. Regardless of whether the safe was locked or not, the key to open the safe was found on the ottoman when the police arrived and, as indicated before, although there were four men present prior to the accused coming out of the bathroom, none of those men were Mr. Kirbyson.
- [57] Allowing groups of drug users unfettered access to his valuable drug supply and cash would seem unusual.
- [58] In determining whether the accused's evidence that Mr. Kirbyson was his roommate and lived in the master bedroom, I am also mindful of the evidence of Constable Lange, who saw Mr. Kirbyson and another camped outside the Friendship Centre on Leon Avenue at 5:54 a.m. on the morning of December 20, less than 12 hours after the police arrested the accused. Less significant, although not completely irrelevant, was that Mr. Kirbyson was seen removing belongings from a motel room three weeks earlier.
- [59] According to the accused, he saw Mr. Kirbyson a few days before and a few days after his arrest, but it would seem unlikely and contrary to common sense that Mr. Kirbyson would be camping on Leon Avenue at 5:54 a.m. in December if he were the habitual occupier of a master bedroom with an ensuite bathroom in a residence in Glenmore.
- [60] In the circumstances, and for all the reasons I have just explained, and when viewed as a whole, I reject the accused's evidence that Mr. Kirbyson resided at 505 Valley Road and I reject the accused's evidence that Mr. Kirbyson was the occupant of the master bedroom. Nor do I find that the accused's evidence raises a reasonable doubt.
- [61] In *R. v. J.H.S.*, 2008 SCC 30, Justice Binnie said the following with respect to the second part of the W.(D.) test:
- [11] As to the second question, some jurors may wonder how, if they believe none of the evidence of the accused, such rejected evidence may nevertheless of itself raise a reasonable doubt. Of course, some elements of the evidence of an accused may raise a reasonable doubt, even though the bulk of it is rejected. Equally, the jury may simply conclude that they do not know whether to believe the accused's testimony or not. In either circumstance the accused is entitled to an acquittal.

[Emphasis in original]

- [62] The court does not engage in an analysis of whether the accused's version of events could reasonably be true at the second stage of the W.(D.) test if the evidence is disbelieved. In *R. v. L.G.*, 2009 ONCA 895, Justice Gouge summarized the law as follows:
- [8] This court has repeatedly said that a trial judge errs in using the "could reasonably be true" test at the second step in the W.(D.) analysis. That is equally true of its equivalents "might reasonably be true" and "can reasonably be true" . . .
- [9] There are good reasons why this test must not be used. It is different from the proper approach to step two set out in *W. (D.)* (namely, whether, even if the accused's evidence is disbelieved, the trial judge is left in reasonable doubt by it) in several respects. First, it arguably risks reversing the burden of proof and undermining the presumption of innocence . . .
- [10] Second, it asks more of the accused's evidence than step two requires. It invites an objective assessment of the accused's evidence against the standard of what could reasonably be true, rather than simply assessing that evidence to see if it leaves the trier with a reasonable doubt.
- [63] As Justice L'Heureux-Dubé said in *D.O.L.*, where an account of events might reasonably be true is simply one factor to consider in determining whether or not to accept the evidence.
- [64] Evidence that is rejected as untruthful cannot itself give rise to a reasonable doubt. In some cases, the court may reject portions of the accused's evidence but accept other aspects that may raise a reasonable doubt. In others, the accused's evidence may not persuade the trier of fact, but may nonetheless leave reasonable doubt as to the accused's guilt. However, if the accused's evidence is rejected because it is considered to be untruthful or a fabrication, that evidence cannot be the basis for reasonable doubt.
- [65] In this case, I have rejected the accused's evidence that Kevyn Kirbyson was a tenant of the property at 505 Valley Road, and it follows that I also reject his evidence that Mr. Kirbyson was the occupant of the master bedroom. The only thread of connection between Mr. Kirbyson and the residence was an incomplete tenancy agreement document on which the accused had written Mr. Kirbyson's name. It follows that I conclude that the accused's evidence does not raise a reasonable doubt.
- [66] I turn now to the third stage of W.(D.), which is whether the Crown has proven the accused's guilt beyond a reasonable doubt based on the evidence that I do accept. Put another way, has the Crown proven beyond a reasonable doubt that the accused had knowledge and control of the drugs and weapon, based solely on the evidence of Constable Lukash and the admissions.
- [67] The Supreme Court of Canada in *R. v. Villaroman*, 2016 SCC 33, cautions against hasty inferences:

- [30] It follows that in a case in which proof of one or more elements of the offence depends exclusively or largely on circumstantial evidence, it will generally be helpful to the jury to be cautioned about too readily drawing inferences of guilt. No particular language is required. Telling the jury that an inference of guilt drawn from circumstantial evidence should be the only reasonable inference that such evidence permits will often be a succinct and accurate way of helping the jury to guard against the risk of "filling in the blanks" by too quickly overlooking reasonable alternative inferences. . . .
- [68] The Court in Villaroman went on to summarize the law and confirmed that it is no longer the law that conclusions alternative to guilt of the accused must be based on proven facts, and said the law is now as follows at paragraph 35:
- [35] . . . The issue with respect to circumstantial evidence is the range of reasonable inferences that can be drawn from it. If there are reasonable inferences other than guilt, the Crown's evidence does not meet the standard of proof beyond a reasonable doubt.
- [69] On a practical level, it may be difficult for a trier of fact to determine whether an inference other than guilt is reasonable or to distinguish a plausible theory inconsistent with the inference of an accused's guilt from a scenario that amounts to nothing more than speculation.
- [70] The Supreme Court in Villaroman provided useful guidance for the trier of fact at paragraphs 36 and on:
- [36] I agree with the respondent's position that a reasonable doubt, or theory alternative to guilt, is not rendered "speculative" by the mere fact that it arises from a lack of evidence. As stated by this Court in Lifchus, a reasonable doubt "is a doubt based on reason and common sense which must be logically based upon the evidence or lack of evidence" . . . (emphasis added). A certain gap in the evidence may result in inferences other than guilt. But those inferences must be reasonable given the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense.
- [37] When assessing circumstantial evidence, the trier of fact should consider "other plausible theor[ies]" and "other reasonable possibilities" which are inconsistent with guilt . . . I agree with the appellant that the Crown thus may need to negative these reasonable possibilities, but certainly does not need to "negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused" . . . "Other plausible theories" or "other reasonable possibilities" must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation.

[Emphasis added]

- [71] Circumstantial evidence does not have to totally exclude every other conceivable inference: Villaroman at paragraph 42. Put another way, an alternative interpretation of the circumstances must not only be feasible, but must be reasonable when assessing all of the evidence viewed as a whole.
- [72] The accused argues that different considerations may apply with regards to the various items seized, and in particular with regard to the contents of the safe. Admission 26 states the following:

Keys

- 26) A key which opened the safe was located attached to a lanyard on top of the ottoman in bedroom #1.
- [73] Bedroom Number 1 in the admissions is what I have referred to in these reasons as the master bedroom.
- [74] The accused points to the evidence of Constable Lukash, which was that she located the lanyard on the ottoman and placed it on the counter in the ensuite bathroom. However, she did nothing further with the key. As such, there was no evidence at trial that the key on the lanyard that was found in the master bedroom was actually used to unlock the safe. The accused argues that whether the safe was locked or unlocked is significant. He argues that the wording of Admission 26 does not say the safe was locked and that the police used the key to open it, but rather simply says that the key was capable of unlocking the safe.
- [75] The accused cannot be found to have knowledge and control of the contents of the residence, including the safe, simply because he was the only actual tenant under the lease or tenancy agreement; more is required. The accused refers to the decision of *R. v. Choudhury*, 2021 ONCA 560, where the accused had access to the one room in the house where the drugs were found. The room also contained a safe and, although the accused had a key for the safe on him at the time of the arrest, the safe was unlocked when the police searched the room. The only known tenant of the home was a female. The Ontario Court of Appeal concluded that the trial judge had conflated access to the room with knowledge and control of the contents of the safe, finding that knowledge and control could not be inferred because the safe was unlocked. The accused argues that *Choudhury* is similar to this case, because there is no evidence the safe was locked.
- [76] I accept that there are two possible interpretations of Admission 26: either the key that was on the lanyard was used by the police to open the safe during the search, or that the key was merely capable of opening the safe.
- [77] However, Admission 10 states the following:
- 10) 7.5 g of fentanyl and heroin were in a locked safe in the sink cabinet [the "safe"] . . .

[78] As such, it has been agreed and acknowledged by the accused in Admission 10 that certain of the drugs seized were located in a safe that was locked. There is no suggestion in any of the evidence of a second safe. To the extent that another case might be viewed as factually analogous and could be of assistance in any particular case, Choudhury is distinguishable on its facts and therefore is of no help to the accused here.

[79] The discovery of personal documents in a location is an indication of occupation and control. In *R. v. Emes*, 157 C.C.C. (3d) 124 at paragraph 8, the Ontario Court of Appeal upheld the trial judge's decision and quoted with approval the following passage from the trial decision:

Personal papers are, as a general rule, maintained in a location to which a person has access and control. When documents such as income tax forms, invoices, cancelled cheques, leases, insurance papers and the like are located in a residential premise it is surely a fair inference that the person identified in the documents is an occupant with a significant measure of control. This is a matter of logic and common sense. While the existence of the papers at the location in question could be as a result of the documents being stolen, or simply stored there, or abandoned, such explanations do not, in my view, accord with the factual probabilities of the circumstances here.

[80] The question is whether the presence of personal documents in Mr. Hollaman's name is the only reasonable inference to draw in this case.

[81] In *R. v. Godelia*, 2021 ONSC 7464, the defence called a witness who testified that he shared a room where the drugs were found with the accused and the drugs were his. The accused's personal documents and a parking ticket were found in the room and the court had to decide whether the accused's guilt was the only reasonable inference to be drawn. The court concluded that the accused's documents, some of which were dated, could simply have been stored in a closet and that it was plausible that the drugs belonged to the witness who testified.

[82] The dated nature of the documents in *Godelia* was a factor in the judge's consideration of an alternative theory that the documents had been stored there some time ago. However, inferences must be drawn from the surrounding circumstances. In this case, the age of the documents found in the master bedroom would tend to work against the accused. Here three of the accused's documents were addressed to him with an address in Hope and dated over three years prior. The accused had only lived at 505 Valley Road for less than six months and therefore he most likely would have brought those documents with him from a previous residence. It seems unlikely that they would be inadvertently bundled up with other documents by someone else.

[83] Moreover, other than the accused's evidence that I have already rejected, there is no evidence of anyone else occupying the master bedroom, unlike in *Godelia*. While other people obviously were in the room on occasion, as evidenced by the group of people encountered by police, there is no evidence that anyone else occupied it along with the

accused. Although there was minimal evidence consistent with the presence of a female, this evidence went no further than some feminine products on the bathroom sill and a purse. There was no evidence to suggest that a female lived in the master bedroom. During his evidence, Mr. Hollaman said his girlfriend would visit, but she did not live there.

- [84] The police found a notebook in the master bedroom and, as I said before, the notes indicate that a single person was likely involved in both the flooring industry and the drug trade. The accused is in the flooring business, operating under his business name of Pristine Tile and Flooring.
- [85] According to the accused, he was sitting on the toilet when the police arrived and wiped himself before going into the bedroom. Constable Lukash testified that Mr. Hollaman asked to return to the bathroom because he needed to defecate. Mr. Hollaman denied saying this to Constable Lukash during his evidence, but his version was not put to Constable Lukash during her cross-examination. Indeed, Constable Lukash's evidence on this point was identical both during her evidence in the trial and during a prior voir dire.
- [86] It is relevant also that drugs were found in plain view on the sink counter in the bathroom to which the accused wished to return. A score sheet was found in one of the drawers in the cabinet, and the taser and ammunition were found elsewhere in the same cabinet.
- [87] I do not consider the absence of fingerprint evidence from the buttons on the safe to be significant. The accused was in the bathroom where the safe was located when the police entered the bedroom. The safe could be opened with the key found on the lanyard on the ottoman, and therefore the safe could be opened without use of the buttons. Several of the accused's business cards were sitting on top of the safe.
- [88] When the evidence is reviewed as a whole, there is no inference that can be drawn, other than the accused was the sole occupant of the master bedroom and that he had knowledge and control of its contents, which includes the drugs and the taser.
- [89] I conclude that the Crown has proven beyond a reasonable doubt that the accused was in possession and control of all of the drugs found in the bedroom and in the washroom, including the drugs in the safe. I also conclude that the accused was in possession and control of the taser that was located in the sink cabinet.
- [90] I therefore find the accused guilty of each of the counts on the indictment.
- [91] That concludes my decision.

"Wilson J."

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