

CANADA / JUDGMENT

R. v. Holtby

2023 BCSC 1173

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Supreme Court of British Columbia

DECIDED

23 May 2023

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2023 BCSC 1173 R. v. Holtby

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Holtby,

2023 BCSC 1173

Date: 20230523

Docket: 182691-2

Registry: Victoria

Between:

Rex

v.

Orion Alexander Holtby

Before: The Honourable Justice Branch

Oral Reasons for Judgment

Counsel for His Majesty the King in Right of British Columbia:

S. Simpson

Counsel for the Accused:

C. Sutton

Place and Date of Trial:

Victoria, B.C.

May 8-11, 2023

Place and Date of Judgment:

Victoria, B.C.

May 23, 2023

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I. INTRODUCTION

- [1] Theft of physical property is relatively easy to describe. One person owns an object. Another takes that object without permission. That is theft.
- [2] But what if the relevant property is a series of digital 1s and 0s, protected by multiple levels of passwords and protocols? When and how is such property stolen? That is one of the issues in this challenging matter involving the alleged theft of cryptocurrency.

II. THE INDICTMENT

- [3] It is alleged that on April 6, 2021, the accused:

Did by deceit, falsehood or other fraudulent means defraud Joelle Salila Oman, of cryptocurrency, of a value in excess of five thousand dollars (\$5,000.00), contrary to Section 380(1) (a) of the Criminal Code.

Committed theft of cryptocurrency, the property of Joelle Salila Oman, of a value in excess of five thousand dollars (\$5,000.00), contrary to Section 334(a) of the Criminal Code.

By a false pretense did obtain cryptocurrency, of a value in excess of five thousand dollars (\$5,000.00), from Joelle Salila Oman, contrary to Section 362(2)(a) of the Criminal Code.

III. FACTUAL BACKGROUND

- [4] I note that the accused did not testify. As such, the version of the facts below is largely derived from the testimony of Joelle Oman, the complainant. I caution that there are certain issues with her credibility and reliability, which I review further below.
- [5] Ms. Oman and the accused met on Salt Spring Island when she was 13 years old and the accused was 18. When Ms. Oman was 15, they began dating for about 1.5 years. After their relationship ended, the accused moved away from Salt Spring Island. However, the two continued to bump into each other periodically. Before the key interactions in 2021 described below, they had last seen each other in person in Parksville, BC in about 2017.
- [6] In March 2021, Ms. Oman says that the accused reconnected with her over Facebook. I note that the accused argues that the Crown has not adequately established that he was, in fact, the other party to these communications.
- [7] According to Ms. Oman, the parties started communicating regularly over Facebook, through text messages, and by telephone. She says that she recognized the accused's voice when they spoke. They discussed things that she says only the two of them would know. Examples included his family and the death of certain friends of theirs. Other indications that the person Ms. Oman was communicating with was the accused included the fact that the Facebook account bore his name and picture, his email address included his name, and the accused sent her a picture of himself in bed with no shirt on, which she recognized. Ms. Oman was also able to perform a courtroom identification of the accused.
- [8] There is documentary evidence of ongoing calls and texts between Ms. Oman and the person she believed was the accused beginning March 17, 2021.
- [9] Ms. Oman advised that the accused told her that he had been in an accident and had become hooked on painkillers and heroin as a result. He lost access to his daughters. He went into treatment hoping that getting his life together would justify granting him renewed contact with his daughters. Ms. Oman said that she would help. At some point in their discussions, she even offered to get engaged to make his family life appear more stable. She was vague about whether she was open to an actual marriage. She denied that they were in a romantic relationship but did allow that she was open to that type of relationship developing over time. She denied saying they were soulmates, even though she clearly stated this was the

case at the preliminary inquiry. She offered a tortured explanation for this inconsistency that defied understanding.

- [10] When she renewed contact with the accused, Ms. Oman held some cryptocurrency. In terms of the source of funds used for this investment, she had previously sold her house in Port Alberni. After buying a car, she was left with about \$113,000. Based on the experience of her friend, Michele Oliviero, she decided to invest in cryptocurrency. She trusted Mr. Oliviero, so she gave him a bank draft with funds to invest on her behalf. Mr. Oliviero deposited same into his bank account. From there, the funds went into a Newton account, through which he was able to purchase cryptocurrency coins on her behalf. Mr. Oliviero periodically verbally reported to her about the performance of her various coins.
- [11] In one of their early oral conversations, Ms. Oman told the accused that she had invested in cryptocurrency. In particular, she had purchased ADA coins from a platform called Cardano, as well as XRP coins from another platform. She also held smaller numbers of other coins. The accused told her that he had also invested in cryptocurrency. He claimed to have \$1 million worth of his own coins.
- [12] The accused told Ms. Oman about his plans to start a transitional treatment facility. Ms. Oman raised the prospect of them going into business together. The accused expressed interest, so they started making plans, although they never met in person. Ms. Oman planned to invest some of her cryptocurrency in this new venture. The accused indicated that he had the funds to invest as well, although they were tied up with his sister as a result of the fact that he was in treatment. Nonetheless, he was prepared to be the primary investor. His daughter was also going to be involved in the business. Ms. Oman spoke with his daughter on at least one occasion. Ms. Oman and the accused also started planning to live together in Victoria. They began looking at houses.
- [13] During this period, Ms. Oman was feeling a bit of distrust in relation to Mr. Oliviero's management of her cryptocurrency. Mr. Oliviero was being somewhat evasive in her view. She wanted to have her coins in her own account. Given that she felt close to the accused by this point, and he seemed to know a great deal about cryptocurrency, she asked him to help her set up a Binance cryptocurrency account in her name, into which she could move her coins. She wanted the accused's help because she personally did not know much about cryptocurrency and wanted it done properly. At the time, she trusted the accused more than Mr. Oliviero.
- [14] Ms. Oman began the transfer process by asking Mr. Oliviero for a list of her coins, which he provided via email on March 23, 2021. She then asked the accused to prepare a valuation of her coins, which he provided via email on March 24, 2021. His total valuation was \$92,206.70, including \$48,070 in Cardano ADA coins and \$35,700 in XRP coins.
- [15] The accused and Ms. Oman spoke on the phone to set up a new Gmail account, which she understood was necessary to, in turn, create a Binance account into which her coins could be transferred. After initially denying this was the case, she eventually acknowledged in

cross-examination that the accused did send her the password for this new Gmail account. However, she claims she was never given the information necessary to access the Binance account. There is no evidence that she ever contacted the Binance company directly to confirm that there was no way for her to access any account.

[16] On March 24, 2021, Ms. Oman received a new email from the address o**@gmail.com, stating:

Joelle, good morning I hope you slept well. I have finished speaking with Binance and have everything ready to go. I have also just bought another 50k of Cardano and 50k of XRP for you, it can come out of profits later. Below is the information he needs;

Binance Pay Account # [number redacted]

(this number is all he needs, he may also need my name Orion Holtby and phone number [number redacted]).

I am also including the QR code below he could also use that. He can pay n any of the coins I have confirmed that. Just let me know when done, I am in meetings until 4. Can you go look at a house on Saturday or Sunday up island?

[QR Code] paraphanaelia

Love you,

Orion

[17] There was a Facebook message, allegedly from the accused, which seems to have also been sent on March 24, 2021, stating:

I promise I'll help you get it after but get him to send what he offers first.. Trust me you don't want him to screw you

Send him the info in the email to transfer to the new account.

[Audio call that occurred on March 24, 2021, 4:01pm]

Hey darling send me a picture of the front of your drivers license and the back of it.

[18] Ms. Oman sent the accused the requested information.

[19] On March 25, 2021, the accused sent Ms. Oman a picture of the accused's former girlfriend, as well as the candid selfie of himself in bed.

[20] Arrangements were then made to transfer her coins to her new account. On March 31, 2021, the accused allegedly provided Mr. Oliviero with the details necessary to transfer the coins by way of an email from the new Gmail account that he and Ms. Oman had created. The email set out the complex alphanumeric deposit addresses necessary for the transfer of the various types of coins. In the period of April 2-6, 2021, Mr. Oliviero transferred the ADA and XRP coins as directed over several transactions. Mr. Oliviero received emails from the new

Gmail account confirming receipt. On April 5, 2021, Mr. Oliviero received a receipt confirming delivery of \$7,762.26 in XRP coins.

- [21] When Ms. Oman went to log in to her new Gmail account, she found that she could not. As noted above, she initially suggested that this was a password problem, but after considering the matter further, and looking into her communications with greater care, she agreed that she was provided with the password. Her actual difficulty was that the Gmail account required telephone confirmation, and the telephone used for this second layer of authentication was the accused's. A screenshot of Google's verification request was put into evidence, although it was undated. The verification page did say that if she did not have the device used to set up the Gmail account, she could "Try another way." When asked about this alternative, she was unable to directly confirm that she attempted same. Rather, she said, "I'm sure I tried everything." However, she also could not remember what happened when she clicked on the "Try another way" button.
- [22] When she could not access her Gmail account, Ms. Oman started to become concerned. She instructed Mr. Oliviero to stop transferring any more coins. She then texted the accused, stating:

Michele keeps calling I don't know what to say??!

Why aren't you picking up your phone? You're acting really shady

Why is the email you created set up with your phone#?

- [23] Ms. Oman received the following response:

Sorry I got in bug [sic] shit today and I'm on phone restrictions I'm waiting for staff to leave at 11 to call you. I only have one day restriction but I'll call tonight they should leave at 11

Email is setup with my phone because I set it up for u on my phone we will transfer it to your phone when I call.. Sorry been a shitty day I almost got kicked out

Listen I know it does not look good but it is fine. I have some really serious things happening, that I have to deal with. I have no choice love, I have to take care of this I am almost done. I want you to know I am not using and everything is fine. I get that it's very hard for you to believe that everything will be ok but it will. Please have a little bit more trust and faith, I am almost done. Please wait and know everything is better than ok, XRP is 2.23 ada is 1.85+ doge is at .18 I bought a ton of them at .06 so every thing is good please try not to worry. I can't call you until tomorrow and I know how lame that sounds but please be patient 1 more day. I miss you like crazy too love, and you are very important to me, trust that. I love you and miss you also, I'll call u tomorrow before lunch

- [24] There is no date on this text exchange, but Ms. Oman testified that it was sent soon after she discovered that she could not get into her Gmail account.

- [25] Mr. Oliviero also testified at trial. While generally supportive of the Ms. Oman's account, there were points of departure. In particular, he said that Ms. Oman actually had full access to the account in which he held her coins, including the necessary passwords. This control included the power to sell the coins herself. When she instructed him to make the transfer, he made sure she understood that such a transaction could not be unwound. He testified that Ms. Oman told him that she did have control of her new account.
- [26] Given her inability to get into her accounts, by the end of April, Ms. Oman reported to the police that the accused had stolen her coins.
- [27] In early May, the accused contacted Ms. Oman asking that she pick him up at the ferry terminal. She said she was prepared to do so but that he should contact her again once the ferry docked. The accused never did call back.
- [28] Ms. Oman testified that the lost Cardano ADA coins that she had purchased for 45 cents went up to \$3 by September 2021. She had not planned to sell these coins until they hit \$7, however.

IV. LEGAL PRINCIPLES

A. Reasonable Doubt

- [29] Justice Kent summarized the fundamental principles applicable to all criminal matters in *R. v. Rochemont*, 2017 BCSC 930:

Reasonable Doubt and the Presumption of Innocence

- [99] It is a fundamental principle of Canadian criminal law that any person charged with an offence is presumed to be innocent until proven guilty and convicted in a court of law. First articulated in the common law, this principle is also prescribed by s. 6(1) of the Criminal Code, and is now enshrined in s. 11(d) of the Canadian Charter of Rights and Freedoms.
- [100] In a criminal case, the obligation is upon the Crown to prove all elements of an offence beyond a reasonable doubt, and only then can a court convict. The burden remains on the Crown throughout. Where a reasonable doubt exists respecting any of the constituent elements of the offence charged, the accused must be acquitted of that offence.
- [101] Reasonable doubt means a doubt that is based upon reason and common sense. Such doubt must be logically connected to the evidence or absence of evidence. It must not be based on sympathy or prejudice. The Crown is not required to prove all elements of an offence to an absolute certainty ... as this would be an impossibly high standard. However, the reasonable doubt standard falls much closer to absolute certainty than to the standard of proof used in civil cases, i.e., the balance of probabilities. Indeed, in a criminal case if the court can only find that the accused probably committed the offence, the accused must be acquitted.

[Emphasis in original.]

- [30] The Supreme Court of Canada's analysis in *R v. Villaroman*, 2016 SCC 33 is material to the present fact pattern in terms of the need to consider all other reasonable scenarios short of guilt:
- [35] At one time, it was said that in circumstantial cases, "conclusions alternative to the guilt of the accused must be rational conclusions based on inferences drawn from proven facts". However, that view is no longer accepted. In assessing circumstantial evidence, inferences consistent with innocence do not have to arise from proven facts. Requiring proven facts to support explanations other than guilt wrongly puts an obligation on an accused to prove facts and is contrary to the rule that whether there is a reasonable doubt is assessed by considering all of the evidence. 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.
- [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": para. 30 (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.
- [38] Of course, the line between a "plausible theory" and "speculation" is not always easy to draw. But the basic question is whether the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty.

[Citations omitted.]

B. Elements of the Offences

[31] The actus reus of theft under s. 322 of the Criminal Code requires the taking or conversion of anything owned by another. In *R v. Scallen*, 1974 CanLII 1543 (B.C.C.A.) at para. 113, it was held that "anything" does not necessarily need to be something tangible or material. To come within the term, it need only be of a nature such that it can be the subject of a proprietary right. The accused did not argue that cryptocurrency would not so qualify.

[32] The mens rea for theft requires that a person take or convert something "fraudulently and without colour of right". Fraudulent intent requires deceit or an intention to deceive, and the lack of any "proprietary or possessory" claim to the monies: *R. v. Beale*, 2010 ONSC 5547 at para. 5.

[33] In summary, in order to convict the accused for theft under s. 322 of the Criminal Code, the Crown must show the following elements beyond a reasonable doubt:

- a) that the accused is the person who actually committed the offence;
- b) that the offence occurred at the time and place set out in the indictment;
- c) that the value of the property exceeded \$5,000;
- d) that the accused took the property;
- e) that the property was owned by Ms. Oman when the accused took it;
- f) that the accused took the property fraudulently and without colour of right; and
- g) that the accused intended to deprive Ms. Oman of her property when he took it.

See Canadian Criminal Jury Instructions, (Vancouver: The Continuing Legal Education Society of British Columbia, 2022 Update) at §109.1 - §109.7.

[34] For fraud under s. 380, the first three requirements are generally the same, with the balance as follows:

- a) that the accused used deceit, falsehood, or other fraudulent means;
- b) that the means which the accused used defrauded Ms. Oman of her coins; and
- c) that the accused intended to defraud Ms. Oman.

See Canadian Criminal Jury Instructions, (Vancouver: The Continuing Legal Education Society of British Columbia, 2022 Update) at §89.1 - §89.19.

[35] The mens rea of fraud is established by proof of subjective knowledge of the prohibited act, and that this act could result in a deprivation, including putting the victim's pecuniary interest at risk: *R. v. Thérout*, [1993] 2 S.C.R. 5. In the words of Justice McLachlin (as she then was), "the proper focus in determining the mens rea of fraud is to ask whether the accused intentionally committed the prohibited acts. The personal feeling of the accused

about the morality or honesty of the act or its consequences is no more relevant to the analysis than is the accused's awareness that the particular acts undertaken constitute a criminal offence." para. 24.

[36] For the false pretences offence under s. 362, the first three elements are again largely the same, although this section uses the verb "obtains" rather than "takes". The balance of the elements are as follows:

- a) That the accused made a false representation;
- b) That the accused knew that the representation was false when he made it;
- c) That the victim parted with her property in whole or in part because of the false representation;
- d) That the accused intended to defraud when he made the false representation;
- e) That the accused obtained the property or caused the property to be delivered to another person.

See Canadian Criminal Jury Instructions, (Vancouver: The Continuing Legal Education Society of British Columbia, 2022 Update) at §87.1 - §87.12.

[37] "Obtains" does not mean that the goods must wholly or entirely pass to the accused. The passing of possession and a property interest is sufficient for conviction: *R. v. Hemingway*, [1955] S.C.R. 712 at paras. 29-31.

C. Credibility and Reliability

[38] The accused takes the position that Ms. Oman has such serious credibility and reliability difficulties that her evidence cannot be relied upon.

[39] The tools available to help make a credibility assessment are summarized in *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296:

[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 (*Raymond v. Bosanquet (Township)* (1919), 1919 CanLII 11 (SCC), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). 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 time (*Faryna* at para. 356).

[40] Reliability, on the other hand, concerns the accuracy of the witness' testimony and involves concepts such as the ability to accurately observe, recall, and recount the events at issue. A credible witness may still be unreliable: *Celones v. Chandra*, 2023 BCSC 38 at para. 112.

D. Identification

[41] As noted, the accused argues that the Crown has not established that he was the individual with whom Ms. Oman was communicating.

[42] Identity of an accused person as the culprit is always a required element to be proven for a given offence. As with all essential elements, it must be proven on a standard of beyond a reasonable doubt: *R. v. Evaglok*, 2010 NWTCA 12 at para 21.

[43] The judge must have evidence that "could logically and reasonably draw the inference" of identity: *R. v. Thompson*, 2015 NSCA 51 at para. 75. Identity can be proven by way of several methods, none of which are necessarily determinative.

[44] Section 6.1 of the Canada Evidence Act, R.S.C. 1985, c. C-5 permits any witness to "give evidence as to the identity of an accused whom the witness is able to identify visually or in any other sensory manner."

[45] Determining identity in the internet age can be challenging. Nonetheless, it may be possible to identify the person behind a particular computer account by considering the information provided in the account, as well as the content of the communications: *R. v. Harris*, 2010 PESC 32 at para. 16.

[46] In this case, Ms. Oman's voice identification is a key element of the Crown's case. While a non-expert may give testimony identifying a voice, several factors determine the weight that should be given to such an identification:

1. Is there direct or circumstantial evidence that the speaker is, in fact, the appellant?
2. Are the events following the conversations in which the appellant was identified consistent with the speaker being the appellant?
3. Is there some peculiarity or distinctiveness to the appellant's voice that would make it more readily identifiable? Are there "internal patterns" or patterns of speech, distinctly associated with the appellant?
4. Did the speaker disclose facts known by the appellant or, more compellingly, known only to the appellant?
5. Are the "context and timing" of the conversation consistent with the theory that the speaker is the appellant? Or, on the other side of the coin, was the identity of the speaker tainted by the witness's expectation that he would be the appellant?
6. Are there distinctive or distinguishing features of the voice?

7. Did the party to the communication identify him or herself?
8. Did the party to the communication provide information that would allow the listener to identify him or her?
9. Was there evidence of physical surveillance at the same time as the private communication to allow the speaker to be identified?
10. Did the witness hear the voices under the same conditions, or was the emotional state different in each situation?
11. What is the length of time during which the witness was able to hear the voice?
12. Was there any reason for the witness to focus on the voices?
13. What was the condition of the witness when he or she heard the voices, alert or groggy?
14. What was the length of time between the times the witness heard the voices?
15. Were there any contradictions in the description given by the witness - did the witness testify that the accused spoke with an accent when he or she did not?
16. Did anything compromise the identification process - was the witness assisted in identifying the voice, or was the witness' opinion tainted by the expectation that the voice was that of the accused?
17. Is the witness' opinion contradicted?

See *R. v. Williams*, [1995] O.J. No. 1012, 1995 CanLII 695 (O.N.C.A.); *R. v. Chan*, 2001 BCSC 1180 at para. 31; *R. v. Saddleback*, 2013 ABCA 250 at para. 25; *R. v. Pinch*, 2011 ONSC 5484 at paras. 67-80.

[47] The Crown "need not prove voice identification beyond a reasonable doubt. The evidence of voice identification is simply an individual item of evidence going to the identity of the accused and, accordingly, the standard of proof is by a preponderance of evidence": *Chan*, at para. 26.

[48] Similar to eye-witness identification, given that voice identification suffers from the frailty that the witness may misidentify the accused, it should be treated with extreme caution: *Chan* at para. 22. In *R. v. Patrick*, 2020 BCCA 259, the court summarized the situation with respect to voice identification evidence stating:

[49] To be sure, greater weight may be given to voice identification evidence where the witness is previously familiar with the voice: see *Adam* at para. 139. This is much the same as attaching more weight to visual identification by a witness who is familiar with and recognizes the person, as discussed in *R. v. Field*, 2018 BCCA 253 at para. 42. However, even taking into account the distinction between identification evidence of a stranger and identification evidence by someone who recognizes the accused based on prior familiarity, the latter of which may be entitled to more weight, there is still a risk that the witness could be mistaken. Careful scrutiny of the evidence is required.

- [50] The judge found the complainant to be credible and honest. Indeed, she did not embellish and was very forthright as to what she could not see. Her evidence identifying the appellant only appeared confident when she said that she recognized his voice.
- [51] The problem here is that there was no detail in the voice recognition evidence to reveal, for example, if the appellant said one word or several sentences, whether he said something during the assault itself to place him there, and whether he had a similar or dissimilar voice and cadence as other men at the house that night. As noted, the judge misapprehended that the appellant spoke while in the course of sexually assaulting the complainant; there was no evidence to this effect.
- [52] In my view, voice recognition in this context, without further details, made for a fragile basis to ground a conviction.

V. ANALYSIS

A. Credibility and Reliability

- [49] I begin by addressing Ms. Oman's reliability and credibility. In short, I have concerns, although I find that these are generally best described as reliability rather than credibility concerns. The basis for these concerns is derived from the following evidence:
- a) Ms. Oman tended to cycle through various verb choices in her testimony, such that it became almost impossible to determine what she actually remembered and what was a re-creation or an assumption. She would vary between "I assume I did X", "I believe I did X", "I think I did X," or "I did X", sometimes within her response to a single question.
 - b) Her disclosure that she was prepared to get engaged with the accused, and possibly even enter into a marriage, in order to help him in his custody battle, creates a concern that she is prepared to say whatever is necessary in order to benefit her or someone else she cares for, even within a judicial proceeding. As she put it, she "did not mind playing the role of wife" to help get the accused's daughters back. The fact that she also appeared to be largely oblivious to the impact of this declaration only magnified the court's concerns.
 - c) Ms. Oman's tortured effort to negate the concession made at the preliminary inquiry that she viewed her relationship with the accused as one of "soulmates" also created a red flag.
 - d) Ms. Oman's inability to understand and process instructions was clear even within the context of the trial itself. The Court instructed her not to discuss her evidence with other witnesses over the evening during her cross-examination, but she did so. The Court instructed her to collect all correspondence with Mr. Oliviero before the completion of her cross-examination, yet she seemed to forget that instruction by the next morning.
 - e) Her evidence was inconsistent with that of Mr. Oliviero on certain points, and I find that Mr. Oliviero was a credible and reliable witness.

[50] In sum, I find that Ms. Oman's evidence raises both reliability and credibility concerns. She was careless with her evidence. She was clearly filling in gaps in her recollection, which may or may not have been accurate.

[51] Given these various difficulties:

- a) Where her evidence conflicts with that of Mr. Oliviero, I prefer his evidence. In particular, this increases the weight I must place upon his statement that Ms. Oman told him that she did have access to her new cryptocurrency account.
- b) More generally, I give her evidence a reduced weight unless it is corroborated by Mr. Oliviero or the documents.

B. Identification

[52] Identification is an element of each of the offences. The preliminary issue is whether the accused was the individual with whom Ms. Oman was communicating with via Facebook, text, and phone.

[53] I find that identification has been established beyond a reasonable doubt through the combined weight of the following evidence, evidence which is largely independent of Ms. Oman's reliability or credibility concerns:

- a) The voice identification: Ms. Oman has known the accused for many years, including 1.5 years in a dating relationship. They had spoken several times after the accused became an adult. Although it has been many years since they dated, they have kept in touch over the years, thereby refreshing Ms. Oman's ability to identify the accused's voice. Further, the parties had met in person as recently as 2017. The calls from which Ms. Oman's identification was made were not short. Rather, based on the documents, some were at least 17 minutes long. Maintaining a false identity over such long and repeated conversations would be extremely difficult. Ms. Oman said that they discussed things that no one else would know about, including the death of certain mutual friends. She was not shaken on her voice identification in cross-examination.
- b) The identification details embedded in the social media and telephone accounts: The Facebook account used the accused's quite unique name and picture. The relevant email address also embedded the accused's name. The accused called Ms. Oman from a phone number noted in the texts and messages.
- c) The delivery of the picture of the accused: The nature of the candid photograph sent to Ms. Oman is quite intimate, casual, but of low quality. It is not the type of flattering picture a third-party hacker might be expected to be able to find on curated social media sites.
- d) The tone of the communications: The tone is quite friendly and familiar, not the type of stilted language one often sees in phishing or hacking attempts.

- e) The likelihood that the communications were from a third-party hacker is reduced by the fact that it was Ms. Oman that first raised her need for help with her cryptocurrency with the accused. As such, there seems not to have been any nefarious intent from the outset, which one would expect from a hacker.
 - f) The likelihood that the communications were from an unidentified third-party hacker is also reduced by the fact that the individual continued to communicate with Ms. Oman after the transfer of her coins. A third-party hacker who already had the victim's coins would have little reason to continue to maintain any ruse.
- [54] While I accept that Ms. Oman had serious reliability and credibility concerns, little of the evidence I have relied upon above for identification purposes is dependent upon her reliability or credibility. I find that the accused was the person with whom she was interacting.

C. Taking or Obtaining

- [55] The mere fact that the accused was the person "at the other end of the line", does not mean that a crime has been committed. Each of the offences requires that the accused took or converted property for his use or the use of another.
- [56] Although I believe it is likely, I have a reasonable doubt as to whether the accused has taken the coins from Ms. Oman. This concern is based on the following:
- a) It does not appear that the taking of Ms. Oman's coins could have been the accused's objective from the outset of the renewal of their relationship, as it was Ms. Oman who asked the accused for help with her cryptocurrency, not the other way around.
 - b) Little about the accused's communications suggests he was planning to steal Ms. Oman's coins. At best, the evidence suggests a lack of communication from the accused, particularly at the end of their communications when Ms. Oman was seeking further account details. However, there may be other explanations for this lack of communication. Even on Ms. Oman's own evidence, the accused was in treatment for addiction, which could explain a communication breakdown.
 - c) Ms. Oman was clearly unsophisticated in terms of managing cryptocurrency. When she first invested, she relied on Mr. Oliviero to purchase and manage her coins. When she wanted to move her coins, she relied on the accused to set up the new accounts to facilitate the transfer. She then relied on Mr. Oliviero to effect that transfer. In particular, there was little indication that Ms. Oman understood the niceties of (1) opening an account to hold cryptocurrency, (2) the steps required to transfer coins, or (3) how to access any new account once the coins were transferred.

- d) Although I accept that, based on the documents, her coins were transferred into a new account using details provided by the accused, I am left with a reasonable doubt as to whether the accused has taken those coins into his control. Another plausible scenario on the evidence is that the coins continue to sit in the newly created account, but that Ms. Oman simply either:
- i. does not understand how to access the account, or
 - ii. has lost the information necessary to access the account.

Put another way, based on the evidence at trial, it is at least plausible that the coins are simply sitting orphaned in the account, held in Ms. Oman's name, and that the accused has respected that ownership by leaving the coins in place.

- e) The plausibility of this scenario is enhanced by the fact that Ms. Oman initially claimed that she did not have the password for the new Gmail account, but then was later forced to concede that she did have the password. What other passwords or instructions may she have forgotten or misplaced if she failed to recall such an important detail?
- f) Uncertainty is also created by Ms. Oman's approach to the documents. Although she purported to provide relevant information to the police when she made her complaint, documents continued to dribble out from Ms. Oman's possession even over the course of the trial. She seemed to misapprehend the importance of providing relevant documentation, even after being instructed by the Court in this regard. Might there be other documents in which there was information that would assist her in accessing her coins? I believe it is unlikely, but it is not beyond doubt.
- g) If accessing her new Gmail account was the first step to gaining access to her coins, I have a real doubt as to whether Ms. Oman did in fact attempt any of the other verification methods offered by Google. She claimed that she was "sure" she had, but she had no current memory of what she did, and she could not explain what the other options were. This is one area where her credibility and reliability problems reduce the weight of her evidence.
- h) There is no evidence that Ms. Oman ever contacted Google directly to confirm if there was some way she could still access her account.
- i) If accessing the Binance account was the second necessary step to gain access to her coins, I have some doubt whether Ms. Oman actually lacks access to this account. On March 24, the accused provided the Binance account numbers. There is no evidence that Ms. Oman contacted Binance to confirm that there is no way for her to access the account.

- j) The documentary evidence only takes the case against the accused so far and, in my view, not far enough. Basically, the way things are left on the documentary record is with the coins being transferred and then the accused apologizing for being slow in providing Ms. Oman with telephone access to the Gmail account. However, none of this evidence necessarily puts the coins into the accused's control or possession or out of Ms. Oman's control or possession.
- k) While the Court may have some general awareness of press reports detailing the problem of orphaned cryptocurrency, as well as the difficulties tracing or recovering lost cryptocurrency, this information has not (yet) reached a level where the Court can properly take judicial notice of what is necessary in order to gain control or trace possession of cryptocurrency. I acknowledge that the virtual nature of cryptocurrency may make proof of the (block) chain of possession more challenging for authorities. But this technological challenge does not allow the Court to lower the burden of proof resting upon the Crown. Authorities will need to adjust to these new realities and find ways to show the court whose hands the cryptocurrency has migrated to. Expert evidence may well be necessary, particularly at this early stage of cryptocurrency's integration into our basic legal principles. The unique evidentiary challenges created by this new type of property may require legislative change. But in terms of resolving the issues before me on this trial, I simply do not have enough evidence to establish that the plaintiff lacks an avenue for control of her coins or that the accused has taken control over her coins.
- l) While the last communication regarding the ferry pickup assists the Crown in terms of supporting the identification of the accused, that same interaction does not support a finding that there was a taking of any property. Why would someone who had just stolen tens of thousands of dollars worth of cryptocurrency contact their victim for a ride from the ferry? This evidence fits better with a scenario in which there was simply a communication breakdown that may or may not have been subsequently remedied.
- [57] Although it may be sufficient that the accused has created a risk for the economic interests of a victim, these concerns collectively cause me to have at least some reasonable doubt about whether such a risk actually exists.
- [58] Although a civil case, the decision in *MiningSky Technology Ltd. v. Zhang*, 2021 BCSC 198 illustrates the uncertainty (or doubt) inherent in analyzing the ownership and control of cryptocurrency. The plaintiff company alleged that one of its employees had stolen cryptocurrency. The case was dismissed. The court was presented with vastly more information about the fundamentals of cryptocurrency than was made available to the Court in the present case. Nonetheless, the case still failed given the uncertainty about the current electronic location of the allegedly stolen coins:
- [147] I agree with the plaintiff that the defendant probably had the means and opportunity to transfer the cryptocurrency out of the control of MiningSky, to his own benefit, or to withhold necessary information needed by others to do it. However, I am also satisfied that

at least some persons at MiningSky had the means and opportunity to do so too once the information and devices they had in their possession were properly used. On that point, I conclude that the defendant, before he left the company, may well have provided MiningSky with the necessary information to retrieve the cryptocurrency, as he said he did. To put it another way, MiningSky has not shown, on a balance of probabilities, that he did not.

[148] I accept that the outstanding commission owed to the defendant might have provided him with a motive to steal the cryptocurrency, but a similar motive could also be attributed to other employees of MiningSky who had access to the necessary information and who wanted to take advantage of MiningSky's poor internal controls.

[149] As I noted at the outset, MiningSky's case against Zetong Zhang is circumstantial in nature. To make out its case, MiningSky must satisfy the Court, on a balance of probabilities, that it should draw the inference the defendant took the cryptocurrency in question. I conclude that MiningSky has failed to meet this burden of proof.

[150] Similarly, MiningSky has not met its burden in showing that the defendant took and subsequently withheld information or devices necessary to access the company's cryptocurrency.

[59] My finding is that the Crown has not established beyond a reasonable doubt that there was a "taking" similarly drives the result in relation to the other two alleged offences. Specifically:

- a) I have a reasonable doubt as to whether the accused did deprive Ms. Oman of her property; and
- b) I have a reasonable doubt as to whether Ms. Oman did part with her coins because of a false representation by the accused.

D. Valuation

[60] Although not necessary to resolve given my conclusion on the taking issue, I would have found that there was sufficient evidence as to the value of the property to support a finding that the \$5,000 level was exceeded. This evidence included:

- a) Ms. Oman's own statement about the amount she put into cryptocurrency from the sale of her house;
- b) Ms. Oman's evidence as to the allocation of her coins across the various currencies;
- c) Mr. Oliviero's evidence as to the number of coins held by him for Ms. Oman;
- d) The accused's own admission against interest in his email valuing Ms. Oman's coins; and
- e) Mr. Oliviero's receipt for Ms. Oman's XRP coins.

VI. CONCLUSION

- [61] Mr. Holtby, please stand. Were this a civil matter, I would most likely have found you liable to the plaintiff. However, this is a criminal matter with a far more demanding burden. Given the evidence before me, I am left with a reasonable doubt as to your guilt on all three counts, and hence I must find you not guilty.
- [62] That said, although I do not make this a formal order or direction, to the extent that you may still be in a position to help Ms. Oman access her coins, I encourage you to consider doing so after taking appropriate advice from your counsel. Any such assistance would be a way to honour the affection I sense you once had for each other.

"The Honourable Mr. Justice Branch"

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Prepared on 29 October 2026 · Esheria