

CANADA / JUDGMENT

R. v. Kennelly

2024 BCSC 1660

COURT

Supreme Court of British Columbia

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2024 BCSC 1660 R. v. Kennelly

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Kennelly,

2024 BCSC 1660

Date: 20240606

Docket: 42061

Registry: Courtenay

Rex

v.

James Cole Kennelly

Before: The Honourable Madam Justice V. Jackson

Oral Reasons for Judgment

Counsel for the Crown:

C. Gibson

Accused on his own behalf:

J. Kennelly

Place and Date(s) of Trial:

Courtenay, B.C.

October 12-13, 16-18, 2023

April 2-5 and May 14-16, 2024

Place and Date of Judgment:

Courtenay, B.C.

June 6, 2024

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THE COURT: These are my reasons for judgment with respect to this criminal trial. If a transcript is ordered I may make changes for style or grammar without changing the substance of my reasons.

INTRODUCTION

- [1] The accused, James Cole Kennelly, is charged with one count of possession of cocaine, a controlled substance, for the purpose of trafficking, contrary to s. 5(2) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19 [CDSA], as well as four counts of possessing non-restricted firearms without a licence or registration certificate. An additional count of possessing MDMA for the purpose of trafficking (count 2 on the Indictment) was stayed by the Crown part way through this trial, on April 2, 2024.
- [2] Mr. Kennelly entered pleas of not guilty to the charges.
- [3] The Crown called four witnesses. Cst. Carlson was the primary investigating officer. Cst. Coulter served as the exhibit officer for the investigation. Jennifer Halldorson is a civilian witness who conducted an examination of the data of a cellphone seized during the investigation. Cst. Babala provided expert opinion evidence in customs and practices of the cocaine drug trade in the Vancouver Island area of British Columbia leading up to the time of the alleged offences. The Crown also tendered a firearms report, authored by Cpl. Matthew Picard, as part of its case.
- [4] Mr. Kennelly elected to call evidence--a long-time family friend, Ms. Kelly Webber. As is his right, Mr. Kennelly did not testify.
- [5] Several facts were also admitted by Crown, at the request of Mr. Kennelly.

R. v. JORDAN CONSIDERATIONS

- [6] Although Mr. Kennelly had counsel prior to the commencement of the trial, he represented himself at trial.
- [7] A trial judge must provide a self-represented accused in a criminal case with sufficient assistance to ensure trial fairness: *R. v. Woolsey*, 2021 BCCA 253 at para. 48. I have done my best to provide Mr. Kennelly with sufficient assistance to ensure the fairness of this trial without becoming an advocate. In *Woolsey*, the Court of Appeal commented on the scope of that duty, which, in some cases may include raising Charter issues on the judge's own motion: para. 57.
- [8] Any person charged with an offence has the right to be tried within a reasonable time: Charter, s. 11(b). In *R. v. Jordan*, 2016 SCC 27, in an effort to protect that right, the SCC "instituted a hard cap after which proceedings must be judicially stayed, which can only be avoided by showing that certain events should not form part of that overall delay, or that they should be subtracted from because of their exceptional nature": *R. v. Kuntz-Angel*, 2020 BCSC 1777 at para. 131.

- [9] The presumptive Jordan ceiling for criminal cases being heard in the superior courts is 30 months: Jordan at para. 46. "If the total delay from the charge to the actual or anticipated end of trial (minus defence delay) exceeds the ceiling, then the delay is presumptively unreasonable": Jordan at para. 47 (emphasis in original). "To rebut this presumption, the Crown must establish the presence of exceptional circumstances" and "[i]f it cannot, the delay is unreasonable and a stay will follow": Jordan at para. 47.
- [10] The issue of unreasonable delay was not raised by Mr. Kennelly or the Crown. I did not raise it because my duty to assist a self-represented accused with Charter issues does not arise "on the mere scent or intimation of a possible Charter infringement" but rather "when it first becomes clear the evidence of a breach will be uncontradicted": Woolsey at paras. 57-58. In the context of an apparent s. 11(b) Charter breach, the judge should raise the issue when it becomes clear that the presumptive ceiling established in Jordan has been reached: Woolsey at para. 58.
- [11] I did not, on my own motion, reach that conclusion.

OVERARCHING LEGAL PRINCIPLES

Presumption of Innocence and the Burden of Proof

- [12] It is a fundamental principle of criminal law that an accused is presumed to be innocent, unless and until the Crown proves their guilt beyond a reasonable doubt. The presumption of innocence is only defeated if and when the Crown proves that an accused is guilty of the offence charged by proving every essential element of those offences beyond a reasonable doubt. This is a high threshold, and the burden rests solely on the Crown, from start to finish, and never shifts. In order for there to be a conviction, the Crown must establish that the evidence as a whole proves an accused's guilt beyond a reasonable doubt.
- [13] A reasonable doubt is not an imaginary, far-fetched, or frivolous doubt. It is not a doubt based on sympathy for, or prejudice against, anyone involved in the trial. It is a doubt based on reason and common sense, which logically arises from the evidence, or the lack of evidence. While a reasonable doubt does not require proof to an absolute certainty, or proof beyond any doubt, more is required than proof that the accused is "probably" guilty: R. v. Lifchus, [1997] 3 S.C.R. 320, 1997 CanLII 319 at para. 36. The Crown's onus to prove the guilt of an accused beyond a reasonable doubt "is inextricably linked to the presumption of innocence": Lifchus at para. 13.
- [14] Proof beyond a reasonable doubt does not apply to individual pieces of evidence; rather, it applies to the totality of the evidence: R. v. Morin, [1988] 2 S.C.R. 345, 1988 CanLII 8 at paras. 36-38, 40.
- [15] Although evidence must be assessed as a whole and cumulatively, "[t]he frailties of each aspect of the evidence do not gain strength when considered together": R. v. Dodd, 2015 ONCA 286 at para. 84.

The Relationship Between Circumstantial Evidence and the Requirement for Proof Beyond a Reasonable Doubt

- [16] Much of the evidence in this case is circumstantial.
- [17] The Crown can satisfy its onus to prove an accused's guilt beyond a reasonable doubt by relying on direct evidence or circumstantial evidence or both. Circumstantial evidence is "evidence that tends to prove a factual matter by proving other events or circumstances from which the occurrence of the matter at issue can be reasonably inferred": *R. v. Cinous*, 2002 SCC 29 at para. 89. Circumstantial evidence is "any item of evidence, testimonial or real, other than the testimony of an eyewitness to a material fact. It is any fact from which the trier of fact may infer the existence of a fact in issue": *Cinous* at para. 90 citing *R. v. Arcuri*, 2001 SCC 54 at para. 23. With circumstantial evidence, "there is, by definition, an inferential gap between the evidence and the matter to be established": *Cinous* at para. 90 citing *Arcuri* at para. 23. The danger that arises in the context of circumstantial evidence is that the trier of fact will bridge the gap in the evidence by jumping from the circumstantial evidence, to unwarranted conclusions: *R. v. Villaroman*, 2016 SCC 33 at para. 27.
- [18] Inferences must be reasonably and logically drawn from facts established by the evidence: *R. v. Fraser*, 2016 BCCA 89 at para. 73. Inferences which do not flow reasonably and logically from established facts are merely conjecture and speculation which must be avoided: *Fraser* at para. 73, citing *R. v. Morrissey*, 22 O.R. (3d) 514, 1995 CanLII 3498 (C.A.). However, inferences consistent with innocence do not have to arise from proven facts: *Villaroman* at para. 35. A theory alternative to guilt is not 'speculative' simply because there is no affirmative evidence supporting the theory. A 'theory alternative to guilt' can arise from a lack of evidence: *Villaroman* at para. 36. As Justice Fish observed in *R. v. Khela*, 2009 SCC 4 at para. 58, the defence does not have to "'prove' certain facts in order for the jury to draw an inference of innocence from them". To make this a requirement for finding alternative rational inferences would be to reverse the burden of proof. Ultimately, the Court must consider the "range of reasonable inferences that can be drawn" from the circumstantial evidence: *Villaroman* at para. 35. As in *Villaroman*, at para. 35, "[i]f there are reasonable inferences other than guilt, the Crown's evidence does not meet the standard of proof beyond a reasonable doubt" and the accused is entitled to be found not guilty. As noted by Justice Cromwell in *Villaroman* at para. 38, 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". An alternative inference other than guilt must be reasonable, not just possible: *Villaroman* at para. 42. While circumstantial evidence requires the Crown to negative reasonable possibilities consistent with the innocence of the accused in order to discharge its burden to prove guilt beyond a reasonable doubt, the Crown is not required to negate every possible conjecture, no matter how irrational or fanciful: *Villaroman* at paras. 37, 42.

- [19] In summary, if there are reasonable inferences other than guilt, that can be drawn from the circumstantial evidence or the absence of evidence, assessed logically and in light of human experience and common sense, then the Crown's evidence does not meet the standard of proof beyond a reasonable doubt: Villaroman at paras. 35-36, 38.

THE FACTS

- [20] The charges followed the execution of a search warrant that was issued on August 29, 2020 ("Warrant #1") on the basis of information from the former girlfriend of Mr. Kennelly, that she had been assaulted by Mr. Kennelly in his residence on August 25, 2020, and further information she provided on August 26, 2020, that Mr. Kennelly had drugs and firearms in his residence.
- [21] Warrant #1 authorized Cst. Carlson to enter "the residence situated at 1126 Piercy Avenue, Courtenay BC" to seize various things, including firearms and ammunition, surveillance cameras and hard drives, documents to prove residency, drugs and related drug paraphernalia, money, safes, and cellular phones.
- [22] The address of 1126 Piercy Avenue is located in a building situated between Piercy Avenue and McKenzie Avenue (the "Building"). One side of the Building faces Piercy Avenue. The other side of the Building faces McKenzie Avenue. The two sides have separate civic addresses. The Piercy side of the Building has an address of 1126 Piercy Avenue. The McKenzie side of the Building has an address of 1125 McKenzie Avenue. Each address is clearly marked. The Building has multiple entrances and (at least) two separate areas--the Piercy side and the McKenzie side. The Piercy side included an area that served a salon operated by the former girlfriend of Mr. Kennelly, who had been living in the Building until approximately three days earlier, when she reported Mr. Kennelly had assaulted her.
- [23] At times Cst. Carlson referred to the McKenzie part of the Building as the "back" and the Piercy side of the building as the "front". At times I do likewise in these reasons. Cst. Carlson was aware that Mr. Kennelly lived in the front and worked at a legal marijuana grow operation in the back and had access to come and go between them.
- [24] At about 7:10 p.m. on August 28, 2020, approximately seven police officers arrived at the Building. Cst. Carlson along with Cst. Coulter drove by the Piercy side and observed that the doors were closed, and that there were five vehicles parked in front. Police did not attempt to enter the Building to execute the warrant from any of the five doors on the Piercy side of the Building, at least three of which, if not all, were operative. Instead, Cst. Carlson drove around the back (to the McKenzie side), observed a door was "wide open", and the police entered the Building through 1125 McKenzie.

- [25] Cst. Carlson entered McKenzie through the middle door, with Cst. Coulter behind her. Police knocked but did not wait for a response and instead entered into the Building. The police walked through the McKenzie side of the Building and heard voices at the front of the Building. The police then walked through a powder room with two doors--one that leads to the living room of the front part of the Building and one that leads to the back side of the Building where the cannabis grow operation and a bedroom were located.
- [26] Police entered into the front part of the Building via the living room encountering several people (referred to by police as "found-ins"), the exact number unknown. The people appeared to be gathered for a dinner party. Cst. Carlson did not observe what the found-ins were doing as she was focussed on Mr. Kennelly, who, based on an audio recording of the police entry, had just come in from outside on the Piercy side of the Building where he was barbequing. The found-ins were cleared from the residence by 7:45 or 7:50 p.m.
- [27] Mr. Kennelly was advised of his Charter rights and cautioned and was to be removed from the scene to be taken to police cells where he would be permitted to call a lawyer. Cst. Carlson handed Mr. Kennelly over to another officer--Cst. Hemsworth--for that purpose. Cst. Hemsworth arrested and searched Mr. Kennelly. Cst. Carlson testified, and I find, she observed Cst. Hemsworth find several items during the search of Mr. Kennelly including a "black cellphone", which I will refer to in these reasons as the "Accused's Cellphone". No further description of the Accused's Cellphone was provided by Cst. Carlson. Cst. Carlson took those items from Cst. Hemsworth, placed them on a counter, and told Cst. Coulter they were required to be seized. Cst. Carlson testified, and I accept, that Cst. Coulter photographed them and seized them. Police continued with their search.
- [28] Although Cst. Carlson testified they did not search the McKenzie side, she acknowledged two things that are inconsistent with that evidence. First, that the police "cleared the area", which she described as going through the various rooms to look for people but not looking for items. Second, although she testified on direct that police did not seize anything from the McKenzie part of the Building, during cross-examination she conceded that in the McKenzie part of the Building police had found (and therefore had searched at least to some degree) and seized a Samsung Telus phone in the grow op area (the "Grow Op Samsung Phone"), as well as a surveillance camera from the back door of 1125 McKenzie.
- [29] During the search, police seized a number of items, as documented by Cst. Coulter. These items included the following:
- a) in a locked old school locker (the "School Locker"), the four firearms that align with Counts 3 through 6 on the Indictment. The keys for the School Locker were brought to Cst. Coulter by Cst. Carlson and Cst. Coulter testified he did not know where the keys had been found. Cst. Carlson testified these keys were found in a drawer in the living room area;

- b) in an area of the Building that was a decommissioned industrial cooler or fridge or freezer (the "Freezer Room"), there was a locked Sentry safe (the "Sentry Safe"), as well as unused dime bags typically used to package cocaine, which are miniscule zipper lock style bags, sometimes with emblems on one side, which can be bought at the dollar store or craft store, and other packaging items, as well as scales;
 - c) from inside the Sentry Safe, a bowl containing a substance later identified through Health Canada testing as cocaine;
 - d) also from the Sentry Safe, there was a dime bag--of the same type as the bag of unused dime bags on the work surface--containing cocaine, and \$1,285 in cash in fairly small denominations (\$5, \$10, \$20, and \$50 bills), and a digital scale which tested presumptively positive for cocaine residue.
- [30] In the Piercy area of the Building police also located various personal papers in the name of Mr. Kennelly as well as some hydro and gas bills in his name. Police also located personal papers of others. Some of the documents reflect there are various units within the Building, including subunits (E and G), and as I already mentioned, Mr. Kennelly's former girlfriend operated a salon in the Building.
- [31] In Cst. Carlson's report to Crown counsel, she noted five entries which are attributable to Cst. Coulter, which, at the request of Mr. Kennelly and the consent of the Crown, reasonably and fairly in my view, were read in to the trial record for the purposes of being used for the truth of their contents.
- [32] Based on those passages, I find that:
- a) the police made the surveillance camera equipment inoperable in the execution of the search warrant;
 - b) Mr. Kennelly's former girlfriend had the code to the Sentry Safe, and gave it to the police which was how they were able to open it at the detachment;
 - c) a person by the name of Deborah Finlay had been in the residence at the time the warrant was executed and was found to be in possession of a small pink and yellow rubber container which appeared to be a vessel to traffic drugs to users. However police allowed Ms. Finlay to leave the residence during their search;
 - d) Michael Stevenson was also a resident of the Building that was searched.
- [33] Based on the totality of the evidence I find Mr. Kennelly lived at Piercy Avenue. I also find that that at least one other person, Michael Stevenson, was also living in the Building on the date on which Warrant #1 was executed, and that Mr. Kennelly's former girlfriend had been living there until a couple of days before that date.

- [34] I heard no evidence that the School Locker or the Freezer Room were only accessible from a particular part of the Building. Based on the totality of the evidence, including the testimony of Cst. Carlson, the photos and the map prepared by Cst. Coulter, I find they were accessible from the entirety of the Building.
- [35] The police later gained access to the Sentry Safe back at the detachment and located the cocaine inside. The manner in which police gained this access, however, was clarified towards the end of the trial. Originally, during his direct examination, Cst. Coulter was asked the following question by Crown counsel: "I don't need you to tell me how you gained access to it, but did you access the safe without damaging it?" Cst. Coulter confirmed that he did. Later, as part of the defence's case and at Mr. Kennelly's request, Crown admitted as a fact that the police were able to open the Sentry Safe using a combination which had been given to them by Mr. Kennelly's former girlfriend.
- [36] On September 3, 2020, police obtained a warrant (Warrant #2) to search the electronic devices found in the Building during the execution of Warrant #1, including the Grow Op Samsung Cellphone.
- [37] Mr. Kennelly applied to have the evidence obtained in the execution of Warrant #1, including several firearms as well as Cocaine and MDMA (the charge relating to the MDMA now having been stayed), excluded on the basis that it was obtained in violation of his rights under s. 8 [to be free from unreasonable search and seizure] of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 [Charter]. He challenged the validity of Warrant #1 on the basis that material information about the Building was not disclosed in the ITO, and alleged the police further violated his s. 8 rights in their execution of Warrant #1.
- [38] In reasons for judgment given earlier in the proceeding, I found Mr. Kennelly had established a breach of his right to be free from unreasonable search and seizure protected by s. 8 of the Charter, on the basis that Warrant #1 was invalid because a specific description of the area of the multi-use Building police were seeking authority to search was required in the ITO and Warrant #1 failed to adequately describe the Building. Further, I held that the execution of Warrant #1 was unreasonable because entry was achieved by trespass through a warrantless search, and because police departed from the "knock and announce" approach without exigent circumstances that required them to do so. However, I declined to exclude the evidence as I concluded its admission would not bring the administration of justice into disrepute in the long term, with the exception of the Grow Op Samsung Phone, which I excluded.
- [39] Based on the evidence as a whole, including the expert opinion of Corporal Picard as set out in his report, I am satisfied beyond a reasonable doubt that the guns described in the Indictment:
- a) were seized from the Building;

- b) were seized on August 28, 2020; and
 - c) are non-restricted firearms as cumulatively defined in sections 2, 2.1, and 84 the Criminal Code, R.S.C. 1985, c. C-46 [Code].
- [40] I am also satisfied beyond a reasonable doubt that on August 28, 2020 Mr. Kennelly was not a holder of any licence, as cumulatively defined in ss. 2.1 and 84 of the Code, under which he was permitted to possess the non-restricted firearms.
- [41] Based on the evidence as a whole, including the certificates of analysis, I am also satisfied beyond a reasonable doubt that on August 28, 2020 white powdered substances were seized from the Building, and that those substances were cocaine, and that the cocaine weighed 0.6 grams (the cocaine in a dime bag found in the door of the Sentry Safe) and 13 grams (the cocaine in the white bowl in the Sentry Safe). For ease of reference only I will refer to the two cocaine substances found collectively as the "Cocaine".

ISSUES

- [42] The primary issues in this case are whether the Crown has proven beyond a reasonable doubt that Mr. Kennelly:
- a) was in possession of the non-restricted firearms;
 - b) was in possession of the Cocaine; and
 - c) was in possession of the Cocaine for the purposes of trafficking.

ANALYSIS

The legal framework governing possession

- [43] Mr. Kennelly is charged with offences under both the CDSA and the Code. The definition of possession is the same under both statutes because s. 2(1) of the CDSA adopts the definition of "possession" set out in s. 4(3) of the Code. Section 4(3) of the Code defines three forms of culpable possession: personal possession, constructive possession, and joint possession: *R. v. Morelli*, 2010 SCC 8 at para. 15. The Crown only relies on constructive possession in this case.
- [44] Constructive possession does not require proof of manual handling: *R. v. Fisher*, 2005 BCCA 444 at para. 24, cited with approval in *R. v. Wiwchar*, 2015 BCSC 973 at para. 41, *aff'd* 2017 BCCA 9. Nor does constructive possession require any proprietary interest in what is alleged to be possessed: *R. v. Arason*, 78 CCC (3d) 1, 1992 CanLII 1008 (B.C.C.A.) at para. 172. Knowledge and an element of control are essential elements for constructive possession, whether it is alleged against an accused as principal or as an aider or abettor: *Morelli* at para. 15; *Fisher* at para. 24. For a person to be in constructive possession they "need not have in fact exercised power over [that which is alleged to be possessed]; all that is required is an ability to exercise some power": *R. v. Webster*, 2008 BCCA 458 at para. 42, cited with

approval in Wiwchar at para. 45.

- [45] In Morelli at para 17, Fish J., writing for the majority of the Supreme Court of Canada held that "[c]onstructive possession is established where an accused did not have physical custody of the item in question, but did have it "in the actual possession or custody of another person" or "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"" (s. 4(3)(a) of the Code) and is "complete where the accused: (1) has knowledge of the character of the object, (2) knowingly puts or keeps the object in a particular place, whether or not that place belongs to him, and (3) intends to have the object in the particular place for his "use or benefit" or that of another person." The question is whether the inference of that knowledge and control is the only reasonable inference to be drawn from the evidence, or whether other reasonable inferences, in accordance with the comments of the Supreme Court of Canada in Villaroman, exist: R. v. Wellington, 2017 BCSC 2620 at para. 28.

Has the Crown proven beyond a reasonable doubt Mr. Kennelly had possession of the firearms and the cocaine?

- [46] Although the Crown argues the key issue in this case is whether Mr. Kennelly had an element of control over the firearms and the Cocaine, in my view it is appropriate to start with the issue of his knowledge.

The firearms

- [47] The Crown relies on the following evidence and facts to establish Mr. Kennelly's knowledge of the firearms:

- Mr. Kennelly was a resident of the Building;
- The presence of ammunition in the area around the School Locker.

- [48] The firearms were not in plain sight. The firearms were locked in the School Locker.

- [49] The School Locker is not a gun cabinet. From the outside there was no basis to believe it was being used to store firearms.

- [50] The Crown did not lead any forensic evidence, such as fingerprints or DNA, tying Mr. Kennelly to the firearms or the School Locker.

- [51] The actual gun locker in the Building was not listed in Warrant #1 as a target of the search, and was not searched. I infer police were told by Mr. Kennelly's former girlfriend that there were firearms in the School Locker, based on her knowledge they were there.

- [52] Crown admits Mr. Kennelly's former girlfriend had a firearms registration certificate ("FAR"). Ms. Webber testified she saw Mr. Kennelly's former girlfriend with more than one long firearm while she lived there.

- [53] The keys to the School Locker were not found on Mr. Kennelly. The evidence is that they were found in a drawer of a coffee table, in the living room of the Piercy side of the Building, to which all residents had access.
- [54] Clearly, Mr. Kennelly's former girlfriend had knowledge of those firearms. A reasonable inference alternative to Mr. Kennelly's guilt is that while Mr. Kennelly's former girlfriend had such knowledge, Mr. Kennelly did not and that those firearms were placed there by someone other than him without his knowledge.
- [55] I conclude the Crown has failed to prove beyond a reasonable doubt that Mr. Kennelly had knowledge of the firearms, and has therefore failed to prove Mr. Kennelly was in possession of them.

The Cocaine

- [56] The Crown relies on the following evidence and facts to establish Mr. Kennelly's knowledge of the Cocaine:
- a) Mr. Kennelly was a resident of the Building;
 - b) The presence of Mr. Kennelly's personal papers and documents in the Sentry Safe;
 - c) The door to the Freezer Room (where the Sentry Safe was located) was either open or not locked;
 - d) The presence of items consistent with drug trafficking in plain view close to the Sentry Safe; and
 - e) The Cellebrite Report of data taken from a Samsung phone and evidence consistent with cocaine drug trafficking up to the date of Warrant #1 being executed contained in that report.
- [57] The Crown referred me to the following cases relevant to the knowledge element of constructive possession. However, they are distinguishable from the facts of this case.
- [58] In *Wiwchar*, Justice Bowden concluded at para. 63 the Crown had established the accused's knowledge of the firearms based in part on the accused's fingerprint on a shopping bag containing ammunition that was concealed in the same ottoman as the firearms were concealed, and his and the co-accused's exclusive access to the apartment in which they were found, during a specific timeline the Court was able to infer. Based on all of those facts Justice Bowden was able to infer that either the accused had placed the shopping bag in the ottoman, or that he was present in the apartment when the co-accused did so and that, in either scenario, it is reasonable to infer the accused had knowledge of them: *Wiwchar* at para. 61.

- [59] In *Fisher*, the Court upheld a finding that the accused had knowledge of cocaine located in a kitchen drawer based on his nervous demeanour, the proximity of a scale to the cocaine which the accused had tried to hide in a drawer where the cocaine was found, the presence of a common cutting agent close to that drawer, drug trafficking paraphernalia in plain view, white powder in plain view on the countertop, and a large amount of unexplained cash in the accused's pocket (all at para. 36).
- [60] In *R. v. Curry*, 2016 BCSC 1423, Justice Holmes, as she then was, found the accused had knowledge of three types of drugs based on his residency and control of the unit but also based on the fact those drugs were in plain view (at paras. 62-93). Justice Holmes however did not find knowledge had been proven with respect to the crack cocaine hidden in a kitchen cupboard on the basis that it was not in plain view, other drug dealings were taking place in the suite, and therefore, there was a possible plausible inference someone else had hidden it without the accused's knowledge (at paras. 94-100).
- [61] The Cocaine was not in plain sight. The Cocaine was found in the locked Sentry Safe. The presence of Mr. Kennelly's documents in the Sentry Safe are sufficient for me to infer he had access to the Sentry Safe, at least at some point in the past. There is no evidence the combination to the Sentry Safe was changed and it would be speculation to conclude otherwise. However, the Sentry Safe was opened by police at the detachment using the combination given to them by Mr. Kennelly's former girlfriend, so she, who had been living at Piercy until three days earlier, also had the combination to the Sentry Safe. Unlike in *Wiwchar*, there is no evidence that assists me in determining either when the Cocaine was placed in the Sentry Safe, or when Mr. Kennelly had last accessed it, that could allow me to infer he had knowledge of the Sentry Safe's contents after the Cocaine had been placed inside.
- [62] Although manual handling is not required, it can provide evidence of knowledge. In this case there is no evidence that Mr. Kennelly's fingerprints or DNA on the bowl of cocaine or the dime bags.
- [63] The Crown also referred me to *Wellington*, in which Justice Betton rejected the accused's suggestion that a reasonable inference was that someone other than the accused had control over the safe found in the accused's bedroom closet and the smaller safe found inside the larger safe, both of which contained drugs (at para. 36). In that case, Betton J. concluded that while the accused's theory may have held traction if viewed in isolation, it was not plausible nor reasonable when considering the evidence as a whole: at paras. 36-37, 45. In part, Betton J.'s conclusion was based on his findings that the only other person with any connection to the safe (by way of the presence of their personal documents in it) had no connection to the residence (at paras. 32, 46). Justice Betton appears to have been satisfied the accused had knowledge of the contents of the safe, not only based on his personal documents being in the safe (at para. 46) and the accused's fingerprints being on a scoresheet book (at paras. 38-39), but also based on the accused being the sole person with an element of control over it.

- [64] That is not the case here. Mr. Kennelly's former girlfriend had an element of control over the Sentry Safe, given that she knew the combination.
- [65] The Crown also relies on the Cellebrite Report of a Samsung phone, and messages that reveal drug trafficking, to prove Mr. Kennelly had knowledge of the Cocaine. Even if I considered the Cellebrite Report, I would not find the only plausible inference to be that Mr. Kennelly had knowledge of the Cocaine in the Sentry Safe. However, I am not satisfied the Cellebrite Report was prepared using Mr. Kennelly's Cellphone and not the Grow Op Samsung Phone, which I ruled inadmissible.
- [66] As I have already outlined, Cst. Carlson testified and I find she observed Cst. Hemsworth find several items during the search of Mr. Kennelly including a "black cellphone", which I have referred to in these reasons as the "Accused's Cellphone". No further description of that phone was provided by Cst. Carlson. Cst. Carlson testified she took those items from the officer who had found them on Mr. Kennelly, placed them on a counter, and directed Cst. Coulter to them and told him they were required to be seized. Cst. Carlson testified, and I accept, that Cst. Coulter photographed them and seized them.
- [67] Cst. Coulter testified that Cst. Carlson had made him aware of a black AT & T cellphone, which he testified he photographed. He also testified, and I find, he seized a black Samsung cellphone which was damaged, had no SIM card, and no power (the "No SIM Samsung"), from on a computer desk near the Freezer Room to which he had been directed by another officer. Cst. Coulter also testified, and I find, he seized the Grow Op Samsung Phone. Jennifer Halldorson testified the cellphone used to prepare the Cellebrite Report had a SIM card.
- [68] Other than the No SIM Samsung, and the Grow Op Samsung Cellphone (which I ruled inadmissible), the officers did not testify that any other Samsung phones were seized during the course of the investigation. No photographs of any other Samsung phones were tendered in evidence. Although Warrant #2 lists three Samsung cellphones, one of which was used to prepare the Cellebrite Report, the state of the evidence does not allow me to have confidence the phone upon which the Cellebrite Report was based was not the Grow Op Samsung Phone.
- [69] Cst. Carlson gave internally inconsistent evidence about the Grow Op Samsung Phone. Initially she testified she did not know what had happened to the Grow Op Samsung Phone. She later testified it was given to another resident of the Building, Michael Stevenson, but only after it had been searched under the authority of Warrant #2.
- [70] Given that I am not satisfied the Cellebrite Report was prepared using Mr. Kennelly's Cellphone and not the Grow Op Samsung Phone, which I ruled inadmissible, I am not prepared to consider the Cellebrite Report as evidence upon which the Crown can establish knowledge of the Cocaine.

- [71] Considering the totality of the evidence, I conclude the Crown has failed to prove beyond a reasonable doubt that Mr. Kennelly had knowledge of the Cocaine, and has therefore failed to prove Mr. Kennelly was in possession of it on the date in question.
- [72] Given my conclusion that the Crown has failed to establish Mr. Kennelly possessed the Cocaine, I need not consider whether any such possession was for the purposes of trafficking.

CONDUCT OF THE PARTIES

- [73] This trial spanned many months.
- [74] Representing oneself in a criminal trial can be challenging and frustrating. I wish to acknowledge and thank Mr. Kennelly for the respect he showed to the Court throughout the trial.
- [75] The Crown, as a local minister of justice and an officer of the court, has considerable responsibility in ensuring trial fairness and in preserving the fairness of the criminal justice system for all parties, including the accused and the public: *R. v. Kahsai*, 2023 SCC 20 at para. 55. Where an accused is self-represented, those responsibilities can be more challenging to fulfil. I wish to acknowledge and thank Mr. Gibson for the assistance he provided to the Court, and to Mr. Kennelly, often, but not only, at the Court's request, during this trial.

CONCLUSION

- [76] Mr. Kennelly please stand if you are able.
- [77] Count 2 on the Indictment was stayed by the Crown on April 2, 2024.
- [78] I find you not guilty on counts 1, 3, 4, 5 and 6 of the Indictment.
- [79] You are free to go.
- "V. Jackson J."

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