

CANADA / JUDGMENT

R. v. Knauff

2023 BCCA 107

COURT

British Columbia Court of Appeal

DECIDED

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2023 BCCA 107 R. v. Knauff

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Knauff,

2023 BCCA 107

Date: 20230210

Docket: CA48311

Between:

Rex

Respondent

And

Elkena Michael Knauff

Appellant

Before:

The Honourable Justice Dickson

The Honourable Justice Marchand

The Honourable Justice Horsman

On appeal from: An order of the Supreme Court of British Columbia, dated June 5, 2020 (R. v. Aeichele, 2020 BCSC 2300, Penticton Docket 45595-2).

Oral Reasons for Judgment

Counsel for the Appellant:

E. Purtzki

Counsel for the Respondent:

C.W. Greenwood

S. Manery

Place and Date of Hearing:

Vancouver, British Columbia

January 31, 2023

Place and Date of Judgment:

Vancouver, British Columbia

February 10, 2023

Summary:

The appellant was convicted of three counts of possession for the purpose of trafficking. He challenges the conviction on the basis that the judge erred in his negative credibility assessment by repeatedly faulting him for failing to account adequately for the conduct of his co-accused and a stranger. Held: Appeal dismissed. Although the judge expressed the reasons for his negative credibility finding imperfectly, when his reasons are read as a whole in the context of the record it is apparent that he did not err in assessing the appellant's credibility.

DICKSON J.A.:

Introduction

- [1] The appellant, Elkena Knauff, and his co-accused, Cheryl Aeichele, were arrested in a parking lot in circumstances that bore the hallmarks of a dial-a-dope operation. At their joint trial on charges of possession of methamphetamine, cocaine and fentanyl for the purpose of trafficking, both accused testified and denied any knowledge of or control over the drugs found by police in the parked truck they occupied. Mr. Knauff also testified that moments before their arrest a stranger approached the open window on the passenger side of the truck and dropped a bag of cocaine in his lap that he put in his pants pocket, where police found it. The judge did not believe him. He concluded the accused were jointly engaged in selling drugs and convicted them both of three counts of possession for the purpose of trafficking under s. 5(2) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19.

- [2] Mr. Knauff appeals his convictions, contending the judge erred in his negative credibility assessment by repeatedly faulting him for failing to account adequately for the conduct of Ms. Aeichele and the stranger. In his submission, these errors tainted his credibility finding and but for having made them the judge might have reached a different conclusion. That being so, he says, we should allow the appeal and order a new trial.
- [3] In my view, the judge expressed the reasons for his negative credibility finding imperfectly. However, when his reasons are read as a whole in the context of the record, it is apparent that he did not err in assessing Mr. Knauff's credibility. For that reason and those that follow, I would dismiss the appeal.

Background

- [4] On September 20, 2017, police officers conducting surveillance of a Walmart parking lot in Penticton noticed two known drug-users behaving suspiciously. The two men, Messrs. Rai and Laforme, paced around the parking lot, watched vehicles as they arrived, and sat for a considerable period at picnic tables by a corner of the building. Eventually, they walked briskly toward a secluded area of the parking lot, where Mr. Rai approached the driver's side door of a parked Ford Explorer and Mr. Laforme approached the passenger side. Believing that a drug transaction was unfolding, the officers pulled their police car forward, got out, and approached the truck, apparently startling Messrs. Rai and Laforme, who walked away until they were told to stop.
- [5] Ms. Aeichele was the driver of the Explorer. Mr. Knauff was her passenger. The officers spoke with the parties and, observing nothing of note, advised them they were free to go, at which point Messrs. Rai and Laforme left the scene. However, as Ms. Aeichele backed up the Explorer one of the officers saw a small baggie containing a white rock-like substance on the ground below the area where the passenger side window had been located. At that point, they arrested Ms. Aeichele and Mr. Knauff, and searched the Explorer and both accused.
- [6] In the Explorer, the officers found methamphetamine, cocaine and fentanyl, together with cash, walkie-talkies and numerous items commonly associated with drug trafficking. The drugs and drug-related items were found in the driver's doorjamb, a brown purse from the centre console area, and a small safe disguised as a dictionary underneath the centre console armrest. While searching Mr. Knauff, an officer also found \$515 in cash and a cell phone inside a wallet, and four individual bags of powder cocaine inside a larger bag in his front pant pocket.

At Trial

- [7] Following a voir dire concerning alleged Charter violations, the judge admitted the drugs and drug-related exhibits into evidence. Thereafter, an officer gave expert opinion evidence on dial-a-dope operations and both accused testified for the defence.

- [8] Ms. Aeichele testified that she had borrowed the Explorer from a friend to do errands on the day in question. Among other things, she stated, she picked up Mr. Knauff to drive him home and stopped at the Walmart on the way to do some shopping. She said that once she parked in the closest spot she could find, the next thing she knew two men, one of whom she recognized (Mr. Rai), approached the Explorer to say hi, and, within seconds, the police arrived. She denied that the brown purse containing drugs belonged to her and denied delivering, possessing or being aware of any drugs located in the truck.
- [9] Mr. Knauff testified that Ms. Aeichele was giving him a ride home when she stopped at the Walmart to buy something. He stated that when they pulled into the parking lot two men he did not know walked up to the Explorer and one approached his open window to speak with him. At that point, he testified, the other man exclaimed "oh shit, police", and the man on his side of the truck dropped a baggie containing "some foreign substance" into his lap through the open window. Although he did not know what was in the baggie, he said, he was scared and he automatically tried to hide it by putting it into his front pocket. Mr. Knauff denied seeing or otherwise knowing that there were drugs in the truck.
- [10] Crown counsel challenged several aspects of Mr. Knauff's account on cross-examination. For example, after Mr. Knauff confirmed that Ms. Aeichele drove past several empty parking spots, they had this exchange about the area where she chose to park:

Q: Yeah, she -- did you say something, did you say "Why are we parking here if you want to go to Walmart? Why would we drive past the main entrance, drive up the side of the building past a whole bunch of empty parking spots and park about as far away as we could from the entrance?" Did you ask her what was going on?

A: No, I didn't -- I wasn't -- I didn't think anything of it.

Q: You didn't think anything of it? Here you are wanting a ride home, aren't you?

A: Correct.

Q: And she says "I need to make a quick stop at Walmart" and all of a sudden this is no quick stop at all. For some reason you park unnecessarily far away from the entrance to the Walmart, and you said nothing, you say you thought nothing of it?

A: I was on my cellphone at the time reading text messages -

Q: Well, wouldn't you agree with me, Mr. Knauff, it's a bit unusual if you're going to Walmart to park about as far away from the entrance as you can when there's parking lots a lot closer to the entrance? Would you agree with me that's pretty unusual?

A: It's not -- I guess it's not the most common spot.

Q: But it is an out of the way spot, isn't it? It's not like -- it's not like the main parking lot is. There's not a lot of people over there on that north side of Walmart, is there?

A: Maybe it's easier to find your vehicle afterwards going -- after going in to shop

[11] Crown counsel also cross-examined Mr. Knauff about whether he thought it was unusual for a stranger to walk up to his side of the Explorer and drop a bag containing a white substance into his lap:

Q: Okay. Just so I understand, so they come up to the truck together. One of them recognizes Ms. Aeichele, and the other one has no idea presumably who's in the passenger seat of the truck, doesn't stay with his friend, he walks around to your side of the truck. Doesn't that strike you as a little unusual, someone you don't even know just walking up to the passenger side of the truck?

A: Yes, that was unusual.

Q: Okay. And you have no idea why this person that you don't know would walk up to this truck that has been parked in this rather -- well, if I could call this, but secluded spot on the north side of Walmart, you have no idea why this person would walk up to the passenger side?

A: No.

Q: All right. So he says something like "Hello", and then the other guy - the other one, the guy at the passenger [sic] side, everybody hears him say "Shit, police"? Is that - is that what you under -

A: Yes.

Q: -- you recall?

A: Yes.

Q: All right. And the guy who's just standing at the passenger window all of a sudden chucks a bag in your lap?

A: Yes, he did. True story.

Q: This guy you don't know?

A: Yes. I didn't recognize him. I have never met him before, so [inaudible/overlapping speakers] --

Q: But he decided that he needed to get rid of this bag, presumably, is that -- that's your impression?

A: Yes.

Q: All right. Because it flew into your lap after the other one said "Shit, police"?

A: Yes.

[12] In closing submissions, Crown counsel argued that the judge should find Mr. Knauff's account was a "fanciful implausible story" and he was not credible. For that reason, he urged the judge to reject Mr. Knauff's testimony:

And then we hear from Mr. Knauff, who tells this story of this other drug user, Mr. Laforme, who comes with Mr. Rai and goes to his side of the truck. Who does that? Who just walks up to a vehicle and just says "Hello," through the window and then throws a bag of cocaine into the lap of a person they don't even know? I mean, if Mr. Laforme actually possessed that cocaine and was surprised that the police showed up -- about the last thing I think anybody would do is throw the cocaine into the lap of a total stranger, who would presumably, if you don't know that person, open up the door, go running out and saying, "This idiot just threw this in my lap." Who would do that? Again, a fanciful implausible story, one that has no relationship to normal human existence.

[13] For his part, defence counsel argued that the Crown had failed to prove Mr. Knauff had knowledge or control of the drugs and drug-related items found in the Explorer. In addition, he submitted, the judge should acquit because Mr. Knauff's testimony about Mr. Laforme dropping the bag of drugs into his lap was credible in the circumstances and there were reasonable inferences other than guilt available.

Trial Reasons

[14] The judge began his reasons by summarizing the charges, his voir dire findings, and the evidence from the voir dire that he admitted. Then he outlined the evidence presented at trial by the Crown and the defence. After reviewing the salient legal principles on possession of drugs for the purposes of trafficking, he turned to the assessment of Ms. Aeichele and Mr. Knauff's credibility and application of the well-known test articulated in *R. v. W.(D.)*, [1991] 1 S.C.R. 742. In doing so, he dealt with the evidence of each accused in turn.

[15] In assessing Ms. Aeichele's credibility, the judge asked whether her evidence made rational sense in the manner described in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.), namely, whether it was in "harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions": at 357. He concluded that it did not. In addition, he stated, he found her demeanour in the witness box was argumentative, fidgety and unnecessarily interruptive and her account was unbelievable. In the result, he rejected Ms. Aeichele's evidence as untrue.

[16] The judge reached the same conclusion regarding Mr. Knauff's evidence. In dealing with Mr. Knauff's credibility, this is what he said:

[63] Respecting Mr. Knauff, I likewise did not believe much of his evidence. It too was pure fancy. I watched him closely while he testified and noted him to fidget, constantly move back and forth in his seat, placed his hands on his face, scratching his cheek and hair, and appeared nervous. He also talked extremely quickly (as Mr. Patterson put it, "like a runaway train") to the point of having to be asked to slow down a few times. While I appreciate that many witnesses are nervous testifying in court, Mr. Knauff did not exude any confidence that he was telling the truth. He had difficulty answering questions that he did not seem to expect.

For example, when asked to explain why Ms. Aeichele would not have parked closer to the entrance to Walmart when she told him she was making a quick stop and parked unnecessarily far away in a more private area, his response was that perhaps it was because the Explorer would be easier to find. When asked why a complete stranger would walk up to the passenger door when his companion, who he understood knew Ms. Aeichele from Grade 9 some 20 years earlier, was on the driver side, he stated he had no idea. He also could not explain why this complete stranger would drop a baggie containing four smaller baggies of a white substance into his lap. Neither could he explain how the same dime bag packaging found underneath the Explorer was found in the Dictionary Safe and between the driver's door and the driver's seat.

- [64] In redirect, in an attempt to explain why Ms. Aeichele may have parked the Explorer where she did, he suggested there was an entrance to Walmart on the north side near where Ms. Aeichele parked. He later recanted that evidence when confronted by Crown.
- [65] Mr. Patterson asserts that the baggie of drugs found in Mr. Knauff's pants pocket is explained by Mr. Laforme dumping it in his lap when the Officers arrived, Mr. Knauff panicking and quickly stuffing the bag in his pocket in case the Officers did not believe him. He says Mr. Knauff intended on disposing of the baggie afterwards. He argues that this is a case of "innocent possession", as that phrase is used in the line of authorities referred to in various cases such as *R. v. Chalk*, 2007 ONCA 815 at para. 23 to 25.
- [66] For Mr. Knauff to have the benefit of these cases, I first have to accept his evidence. I do not. The totality of his evidence was utterly implausible, irrational, and defied credulity. Simply put, it was made up and it is totally rejected.
- [17] Having rejected the evidence of both accused, the judge turned to the final step of the W.(D.) analysis and asked whether, on the whole of the evidence, he was left with a reasonable doubt as to their guilt. He was not:
- [78] Even without [the expert witness'] testimony, the evidence against both accused is overwhelming. I am satisfied beyond a reasonable doubt that Ms. Aeichele and Mr. Knauff were jointly in possession of the Drugs, as that term is legally defined, for the purpose of trafficking. There is no doubt that they were jointly engaged in a classic dial-a-dope operation that was interrupted by the Officers when Ms. Aeichele and Mr. Knauff were in the midst of selling illicit drugs to Messrs. Rai and Laforme. There is no other rational or plausible explanation, and to come to any other conclusion on the evidence would defy common sense, logic, and reality.
- [18] In the result, the judge convicted Ms. Aeichele and Mr. Knauff on all three counts.

On Appeal

- [19] Mr. Knauff contends that the judge committed the same legal error three separate times in assessing his evidence. In particular, he says, the judge erroneously found that his evidence was not credible because he was unable to explain: (i) "why Ms. Aeichele would not have parked closer to the entrance to Walmart"; (ii) "why a complete stranger would walk up to the passenger door"; and (iii) "why this complete stranger would drop a baggie containing four smaller baggies of a white substance into his lap". However, Mr. Knauff argues, as a matter of law and fact, he could not fairly be expected to explain Ms. Aeichele and Mr. Laforme's conduct, and the judge should not have faulted him for failing to do so. In his submission, what he thought about why others behaved as they did was irrelevant, called for speculation, and lacked any probative value. Therefore, he says, the judge erred by taking it into account in assessing his credibility.
- [20] In support of his submission, Mr. Knauff focuses on para. 63 of the reasons for judgment. There, he notes, after describing his demeanour in the witness box, the judge stated that he "did not exude any confidence that he was telling the truth" and that "[h]e had difficulty answering questions that he did not seem to expect". Then he listed the three alleged deficits in Mr. Knauff's evidence associated with his failure to explain the conduct of others as examples of his perceived difficulty in answering questions, namely, his responses to questions about why Ms. Aeichele did not park closer to the Walmart entrance, why Mr. Laforme walked up to the passenger door of the Explorer, and why Mr. Laforme dropped the baggie of cocaine into his lap.
- [21] According to Mr. Knauff, the judge's words in para. 63 reveal that he reached his negative credibility finding based on an erroneous path of reasoning focused on the three listed alleged deficits in his evidence, which, viewed fairly and appropriately, were not true deficits. They also reveal that his erroneous reasoning concerning the alleged deficits was central to his rejection of Mr. Knauff's evidence. Citing *R. v. Pastro*, 2021 BCCA 149, he emphasizes the fact that appellate review must be based on the reasoning path reflected in a trial judge's reasons, and not on reasons in support of the result that might have been, but were not, given. While he goes on to concede that a credibility assessment is generally entitled to appellate deference and that it may well have been open to the judge to assess his credibility negatively, he says it was not open to him to do so in the manner described in para. 63.
- [22] Citing *R. v. J.M.H.*, 2011 SCC 45 and *R. v. A.M.*, 2014 ONCA 769, Mr. Knauff also says that he was entitled to have his evidence assessed on correct legal principles. In his submission, because it was not and because the evidence against him, while arguably strong, was not overwhelming, a new trial is required.

Analysis

- [23] As Justice Marchand stated in *R. v. Kruk*, 2022 BCCA 18, trial reasons are intended to explain what a judge decided and why the judge made the decision. On appeal, the issue is whether reasons disclose a reversible error: *Kruk* at para. 34. In making that determination, this Court reads trial reasons functionally and contextually, as a whole, and in the context of the record and the live issues. The standard is not perfection. Even if trial reasons do not explain the "what" and the "why" of a decision, where legally sound answers to those question are clear from the record, no reviewable error will be found: *R. v. G.F.*, 2021 SCC 20 at paras. 68-70; *Pastro* at para. 53.
- [24] In my view, the judge did not express himself with perfect clarity or accuracy in para. 63 of his reasons. For example, he mischaracterized Crown counsel's questions concerning Ms. Aeichele's choice of parking spot, and he misdescribed inherently implausible aspects of Mr. Knauff's account as examples of his difficulty in answering questions rather than as patent untruths. However, reading the judge's reasons as a whole and in the context of the record, I see no error in his credibility finding that Mr. Knauff's evidence was "utterly implausible, irrational" and his rejection of that evidence as incredible and "made up". Nor do I see error in the path of reasoning that he followed when conducting his credibility assessment.
- [25] In reaching this conclusion, I note that the judge was alive to the well-known test for assessing credibility articulated in *Faryna v. Chorny*, which he quoted directly when analysing Ms. Aeichele's evidence. I also reject Mr. Knauff's submission that he was unreasonably expected to explain Ms. Aeichele and Mr. Laforme's conduct, and unfairly faulted for failing to do so. Rather, as I read his reasons, the judge assessed Mr. Knauff's credibility by considering the plausibility of his account in the overall context of the evidence and asked himself whether anything Mr. Knauff said could justify belief in his account or raise a reasonable doubt. Based on that assessment, he accepted the Crown's submission that Mr. Knauff's account was fanciful and utterly unbelievable. As is clear from authorities such as *R. v. Mero*, 2020 BCCA 331, *R. v. Ali*, 2009 BCCA 464 and *R. v. Burns*, 2012 BCCA 483, a trial judge does not err by conducting a credibility analysis in this way.

Conclusion

- [26] For these reasons, I would dismiss the appeal.
- [27] MARCHAND J.A.: I agree.
- [28] HORSMAN J.A.: I agree.
- [29] DICKSON J.A.: The appeal is dismissed.

"The Honourable Justice Dickson"

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