

CANADA / JUDGMENT

R. v. Mearow

2023 BCCA 370

COURT

British Columbia Court of Appeal

DECIDED

27 September 2023

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2023 BCCA 370 R. v. Mearow

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Mearow,

2023 BCCA 370

Date: 20230927

Docket: CA48491

Between:

Rex

Respondent

And

Marcus Richard Mearow

Appellant

Before:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Butler

The Honourable Justice Marchand

On appeal from: An order of the Provincial Court of British Columbia, dated
June 1, 2022 (conviction) (R. v. Mearow, Fort St. John Docket 35091-1).

Oral Reasons for Judgment

Counsel for the Appellant:

S. Catona

Counsel for the Respondent:

E. Laurie

Place and Date of Hearing:

Vancouver, British Columbia

September 27, 2023

Place and Date of Judgment:

Vancouver, British Columbia

September 27, 2023

Summary:

The appellant was convicted of possession for the purposes of trafficking. He submits that the judge erred in law by failing to consider whether his testimony, viewed in the context of the evidence as a whole, raised a reasonable doubt under the second branch of the W.(D.) test. Held: appeal dismissed. On reading the reasons for judgment as a whole, it is clear the judge did not lose sight of his task. Ultimately, after considering the totality of the evidence, he was satisfied beyond a reasonable doubt of the appellant's guilt.

- [1] MARCHAND J.A.: On July 3, 2021, Marcus Richard Mearow was arrested in Fort St. John for breaching a release order. The arresting officer searched Mr. Mearow and found him in possession of \$165 in cash. He was taken to the local police detachment where subsequent searches revealed him to be in possession of three small bags containing various amounts of cocaine or crack cocaine.
- [2] "Bag One" contained powder cocaine mixed with phenacetin and caffeine. "Bag Two" contained nine smaller baggies of powder cocaine. "Bag Three" contained 13 smaller baggies of crack cocaine. Bag One and each of the 22 smaller baggies contained relatively small amounts of cocaine or crack cocaine (between 0.23 and 0.72 grams) typically associated with street level trafficking.
- [3] Mr. Mearow was charged with one count of possessing cocaine for the purpose of trafficking. At trial, he admitted the facts surrounding his arrest and the subsequent searches, including that he was in possession of the cocaine. The main issue was whether he possessed the cocaine for personal use or for the purpose of trafficking.
- [4] In addition to formal written admissions filed under s. 655 of the Criminal Code, the Crown relied on the expert evidence of an RCMP drug investigator, Corporal Charron. Mr. Mearow testified in his own defence.

[5] In oral reasons for judgment, the judge cited the well-known test in *R. v. W.(D.)*, [1991] 1 S.C.R. 742. More specifically, after summarizing the background, the judge set out the *W.(D.)* formula as follows:

[10] The case of *W.(D.)* outlines a test that must be followed when the credibility or reliability of an accused is at question and the test is as follows:

-first, if I believe the evidence of the accused, I must obviously acquit the accused;

-second, if I do not believe the testimony of the accused but I am nonetheless left in a reasonable doubt by it, then I must acquit the accused;

-third, even if I am not left in doubt by the evidence of the accused, I must still ask myself whether, on the basis of the evidence which I do accept, I am convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[6] On the first two branches of the test, the judge did not believe key aspects of Mr. Mearow's evidence regarding his intent and it did not leave the judge with a reasonable doubt. On the third branch of the test, the judge was satisfied that the only reasonable inference to be drawn from the evidence as a whole was that Mr. Mearow possessed the cocaine for the purpose of trafficking. He, therefore, found Mr. Mearow guilty as charged.

[7] Mr. Mearow appeals his conviction. He raises a single ground of appeal. He submits that the judge erred in law by failing to consider whether his testimony, viewed in the context of the evidence as a whole, raised a reasonable doubt under the second branch of the *W.(D.)* test. He says the judge concluded that Mr. Mearow's evidence on its own did not raise a reasonable doubt and that certain circumstantial evidence inconsistent with trafficking on its own did not raise a reasonable doubt. But he says the judge fell into error by not considering whether the combined effect of Mr. Mearow's evidence and the circumstantial evidence inconsistent with trafficking raised a reasonable doubt.

[8] In *W.(D.)*, Justice Cory, for the majority, provided a model instruction for juries grappling with credibility issues. At 757-758, he held:

In a case where credibility is important, the trial judge must instruct the jury that the rule of reasonable doubt applies to that issue. The trial judge should instruct the jury that they need not firmly believe or disbelieve any witness or set of witnesses. Specifically, the trial judge is required to instruct the jury that they must acquit the accused in two situations. First, if they believe the accused. Second, if they do not believe the accused's evidence but still have a reasonable doubt as to his guilt after considering the accused's evidence in the context of the evidence as a whole. See *R. v. Challice* (1979), 45 C.C.C. (2d) 546 (Ont. C.A.), approved in *R. v. Morin*, *supra*, at p. 357.

Ideally, appropriate instructions on the issue of credibility should be given, not only during the main charge, but on any recharge. A trial judge might well instruct the jury on the question of credibility along these lines:

First, if you believe the evidence of the accused, obviously you must acquit.

Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[Emphasis added.]

- [9] Though aimed at providing instructions to juries, the W.(D.) formula also applies to trial judges sitting without juries. It reminds triers of fact that "reaching a verdict is not simply a question of choosing between the Crown's and the accused's evidence." Rather, the question is always whether, on the whole of the evidence, the Crown has proven the guilt of the accused beyond a reasonable doubt: *R. v. Kaplan*, 2019 BCCA 356 at paras. 59-60, 62 and the cases cited there.
- [10] Mr. Mearow rests his appeal largely on the concurring reasons of Justice Rowles in *R. v. Kim*, 2004 BCCA 635 and the summary conviction appeal decision in *R. v. Bougraine*, 2021 BCSC 1489. In my respectful view, neither is of assistance to Mr. Mearow.
- [11] In *Kim*, this Court set aside the appellant's conviction for sexually assaulting a child and ordered a new trial. The majority reasoned that the judge had misapprehended material parts of the evidence that played an essential part in the reasoning process that led to conviction: at paras. 36-38. In concurring reasons, Justice Rowles held that the trial judge had failed to consider the appellant's evidence in the context of the evidence as a whole to determine whether the Crown had proven its case beyond a reasonable doubt. She explained:
- [27] In my respectful view, an examination of the trial judge's reasons supports the appellant's submissions that the trial judge did not have regard for the principles underpinning the instructions in *R. v. W.(D.)*, *supra*. The trial judge approached the issue of credibility by comparing the two key witnesses and preferring the complainant's evidence, without specifically disbelieving the appellant's testimony. While the trial judge appears to have specifically accepted some critical portions of the appellant's testimony, she characterized his evidence as "unreliable". Regardless of whether the trial judge rejected or disbelieved the appellant's denial of any sexual impropriety with the complainant, the appellant was entitled to have his evidence considered in the context of the evidence as a whole on the issue of whether the case against him was proved beyond reasonable doubt. In my respectful view, the trial judge's approach, together with her misapprehension of the appellant's evidence, denied him this opportunity.

[Emphasis added.]

- [12] In Bougraine, the issue at trial was identification. The trial judge rejected the appellant's evidence, accepted the complainant's evidence and "accordingly" convicted the appellant. The summary conviction appeal judge found that the trial judge had not considered or applied either the second or third branches of the W.(D.) test. More specifically, she found that the trial judge failed to consider: (1) whether the appellant's evidence raised a reasonable doubt in the context of the evidence as a whole; and (2) whether the evidence as a whole established the appellant's guilt beyond a reasonable doubt: at paras. 52, 70. The summary conviction appeal judge set aside the appellant's conviction and ordered a new trial.
- [13] Here, the judge rejected Mr. Mearow's evidence that all of the cocaine was for his personal use because his testimony was inconsistent, evasive and selective on material points. With respect to the first branch of the W.(D.) test, the judge was "unable to say that [he] believe[d] Mr. Mearow." With respect to the second branch of the test, the judge did not expressly state that he considered Mr. Mearow's evidence in the context of the evidence as a whole. He simply said that "[f]or the same reasons [as expressed regarding the first branch]", Mr. Mearow's evidence did not raise a reasonable doubt. But, unlike Kim and Bougraine, the judge went further.
- [14] After rejecting Mr. Mearow's evidence and finding that it did not leave him with a reasonable doubt, the judge correctly articulated that his task was to determine whether the Crown had proven the case against Mr. Mearow beyond a reasonable doubt:
- [32] While the evidence of the accused does not satisfy either of the first two prongs of the W.(D.) test, the burden of proof still rests with the Crown and the Crown must still establish, on the totality of the evidence, that the accused is guilty beyond a reasonable doubt. Therefore, I will next move to examining the remainder of the evidence, which is the Crown's expert evidence and the admissions that were tendered.
- [Emphasis added.]
- [15] The judge then set his mind to considering Mr. Mearow's evidence in light of the Crown's evidence, specifically including those elements of the Crown's case that were consistent with Mr. Mearow's evidence to determine whether the Crown had met its burden. He framed his task as follows:
- [38] Having accepted Corporal Charron's expert opinions on these matters, I will now move to analyzing the other aspects of the Crown's evidence to ultimately determine whether the evidence is reasonably consistent with Mr. Mearow possessing the drugs for his own personal use or whether the evidence as a whole can be shown to prove beyond a reasonable doubt that Mr. Mearow was possessing cocaine for the purpose of trafficking.
- [39] The Crown asks the court to consider the admissions made by Mr. Mearow in conjunction with the assistance it finds in Corporal Charron's expert opinions about how street-level drug-trafficking in Fort St. John is typically conducted to reach the inference that Mr.

Mearow possessed the drugs for the purpose of trafficking. In doing so, even though Mr. Mearow's evidence by itself was insufficient to be believed or to raise a reasonable doubt on the first two prongs of the W.(D.) test, I will once again consider Mr. Mearow's evidence as part of the third prong of the W.(D.) test to determine whether it raises any reasonable inferences as to his intent that would provide a reasonable alternative to the inference of intent for the purpose of trafficking that the Crown asks the court to draw from the evidence.

[Emphasis added.]

- [16] The judge recognized that the evidence regarding Mr. Mearow's intent was circumstantial. As such, he cited the decision of the Supreme Court of Canada in *R. v. Villaroman*, 2016 SCC 33 for the proposition that "circumstantial evidence must be examined as a whole to determine whether the only reasonable inference that the circumstantial evidence supports is a finding that the accused is guilty beyond a reasonable doubt."
- [17] The judge then outlined the key facts that tended to support an inference that Mr. Mearow possessed the cocaine for the purpose of trafficking, namely:
- the overall amount of cocaine possessed;
 - the quantities into which the cocaine was packaged;
 - the type of packaging used; and
 - the presence of both crack cocaine and powder cocaine.
- [18] The judge next considered whether there was an alternate explanation or extrinsic evidence that would negate that inference. He found that neither was the case. First, he rejected Mr. Mearow's explanation that his possession was for personal use. Second, he found that various indicia of trafficking that were missing in Mr. Mearow's case (like a cell phone, score sheets, a scale and a weapon) were only "typical" and were not required to be present in every case.
- [19] The judge's reasons therefore make clear that he did consider whether, in the context of the evidence as a whole, Mr. Mearow's evidence left him with a reasonable doubt. It did not.
- [20] The judge could have expressed himself better. For example, he could have said that after considering Mr. Mearow's evidence in light of the evidence as a whole, including the circumstantial evidence that was consistent with Mr. Mearow's testimony, he was satisfied the Crown had proven Mr. Mearow's guilt beyond a reasonable doubt. But, particular words were not required. All that was required was for the judge to be satisfied, on the totality of the evidence (including Mr. Mearow's evidence), that the Crown had proven its case to the required standard. On my reading of the reasons for judgment as a whole, it is clear the judge did not lose sight of his task. Ultimately, after considering the totality of the evidence, he was satisfied beyond a reasonable doubt of Mr. Mearow's guilt.

[21] For these reasons, I would dismiss the appeal.

[22] NEWBURY J.A.: I agree.

[23] BUTLER J.A.: I agree.

[24] NEWBURY J.A.: The appeal is dismissed.

"The Honourable Justice Marchand"

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