

CANADA / JUDGMENT

R. v. Mero

2020 BCCA 331

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 331 R. v. Mero

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Mero,

2020 BCCA 331

Date: 20201126

Docket: CA46205

Between:

Regina

Respondent

And

Robert Michael Mero

Appellant

Before:

The Honourable Chief Justice Bauman

The Honourable Mr. Justice Harris

The Honourable Mr. Justice Butler

On appeal from: An order of the Supreme Court of British Columbia, dated

October 19, 2018 (conviction) (R. v. Mero, 2018 BCSC 2007,

Prince George Docket 43816).

Counsel for the Appellant:

K. Merrigan

N.J. Preovolos

Counsel for the Respondent:

E. Laurie

Place and Date of Hearing:

Vancouver, British Columbia

September 10, 2020

Place and Date of Judgment:

Vancouver, British Columbia

November 26, 2020

Written Reasons by:

The Honourable Mr. Justice Harris

Concurred in by:

The Honourable Chief Justice Bauman

The Honourable Mr. Justice Butler

Summary:

The appellant challenges his conviction for possession of heroin for the purpose of trafficking and possession of a loaded restricted firearm. Held: Appeal dismissed. The judge did not err by: a) finding that the search warrant for the appellant's residence was properly issued; b) reversing the burden of proof and misapprehending evidence; c) admitting and relying on the KGB statement of a Crown witness; and d) not excluding evidence discovered as a result of the search warrant under s. 24(2) of the Charter. The judge's finding that the search warrant was properly issued was reasonable and supported by the evidence. Accordingly, there was no basis to exclude the fruits of the search under s. 24(2). He was alive to the guidance set out in *R. v. W.(D.)* and did not reverse the burden of proof or misapprehend evidence. Any use he made of the KGB statement of a Crown witness was permissible.

Reasons for Judgment of the Honourable Mr. Justice Harris:

Introduction

- [1] Mr. Mero appeals his conviction for possession of heroin for the purpose of trafficking and possession of a loaded restricted firearm. The key factual issue at trial was his knowledge and control of the heroin and the firearm located in his residence when it was searched. He was convicted by a judge sitting alone. Mr. Mero contends the trial judge erred:
1. in finding that the search warrant for his residence was properly issued;
 2. by reversing the burden of proof, misapprehending evidence, and misapplying the guidance in *R. v. W.(D.)*, [1991] 1 S.C.R. 742;
 3. in admitting and relying on the KGB statement of a Crown witness; and
 4. in not excluding the evidence discovered as a result of the search warrant under s. 24(2) of the Charter.
- [2] For the reasons that follow, I would dismiss the appeal.

Background

- [3] While executing a search warrant, the police found heroin and a firearm under the cushions of a couch in Mr. Mero's residence. The search also located ammunition for the firearm and a bulletproof vest in his residence.
- [4] At trial, Mr. Mero applied to exclude the evidence, alleging that the search warrant was invalid and ought not to have been issued. He argued that the Information to Obtain ("ITO") did not make full, fair and frank disclosure of material facts to permit its issuance in accordance with the Garofoli test: see *R. v. Garofoli*, [1990] 2 S.C.R. 1421. He said that the issuing justice was deprived of information, and was misled about the circumstances underlying the information provided to the police about an alleged loaded firearm in his home.
- [5] It will be convenient to provide further details of the basis of this argument in considering the merits of the argument on appeal. Suffice to say that the ITO was, in large measure, based on a so-called KGB statement provided by a Ms. Ptaszynski who informed the police that she had inadvertently found the firearm in the couch when in the residence.
- [6] After a voir dire, the judge admitted the evidence. He found that the ITO was based primarily on the KGB statement and Ms. Ptaszynski's personal observations and dealings with the loaded firearm while in Mr. Mero's residence, including conversations with him about the firearm. The judge concluded that any information not disclosed was immaterial, merely background, and the ITO was not misleading. The hearsay in the ITO was clearly identifiable and certain information was clearly described as suspicion and not asserted to be a known fact. Furthermore, the investigating Constable's failure to confirm the identity of Ms. Ptaszynski, who gave the KGB statement, was not fatal. Accordingly, the warrant was properly issued and the evidence was admitted at trial.

- [7] The trial involved six police witnesses, photographs, admissions and, as part of the Crown case, the evidence of Ms. Ptaszynski. Ms. Ptaszynski recanted the evidence she had given in her KGB statement about finding a gun, saying she had lied. The statement was nonetheless admitted at trial as an exhibit. The alleged use the judge made of that statement forms a ground of appeal.
- [8] Mr. Mero testified in his own defence. He denied knowledge of the handgun, the heroin or the ammunition. He proffered an innocent explanation of the presence of the bulletproof vest and other evidence alleged to be consistent with drug dealing.
- [9] In short, the judge did not believe Mr. Mero. The judge was satisfied that the Crown had proven Mr. Mero's guilt beyond a reasonable doubt, and convicted him. Mr. Mero contends that the judge did not apply W.(D.) properly, and reversed the burden of proof. I will return to the judge's reasoning in connection with this ground of appeal.

Analysis

Did the trial judge err by finding that the search warrant was valid and properly issued?

- [10] Mr. Mero's contention on this ground of appeal is principally that the ITO was misleading because it failed to disclose material information. Had all of the information been provided, he argues, the search warrant could not have properly been issued. I will first summarize the ITO and the circumstances leading to it to provide context for Mr. Mero's argument.
- [11] The chronology begins with a telephone call made by a Mr. Malcolm to the police, in which he said that he felt threatened by Mr. Mero, who had a gun. Cst. Charron invited Mr. Malcolm to come to the police station to give a statement. Mr. Malcolm showed up about 2.5 hours later, accompanied by Ms. Ptaszynski, who he described as his girlfriend. The police first took a statement from Ms. Ptaszynski, but when it was Mr. Malcolm's turn he had changed his mind and refused to give one.
- [12] The police applied for a search warrant based on an ITO principally supported by the KGB statement given by Ms. Ptaszynski under solemn declaration. The statement was video and audio recorded. The potential criminal consequences of giving a false statement were clearly explained to and acknowledged by Ms. Ptaszynski.
- [13] Ms. Ptaszynski described being with Mr. Malcolm at Mr. Mero's home twice, about three weeks apart. The first visit was for Mr. Malcolm to collect heroin and, at Mr. Mero's request, a handgun. The suggestion at trial was that Mr. Mero was worried about a drug delivery gone wrong and wanted the drugs and gun gone from his premises. On that visit, Ms. Ptaszynski saw Mr. Mero retrieve an object wrapped in a towel from his backyard, which Mr. Mero said was the gun to be moved. Later, Mr. Mero changed his mind saying that he would rather have the gun for his own protection.

- [14] The second visit happened about three days before Ms. Ptaszynski gave her statement. She said she and Mr. Malcolm hung out with Mr. Mero and his girlfriend, smoking heroin. As she sat on the couch, Ms. Ptaszynski attempted to retrieve a toy from between its cushions but pulled out instead a silver and black gun. Mr. Mero confirmed that it was loaded.
- [15] Ms. Ptaszynski explained that she and Mr. Malcolm were concerned about their safety because Mr. Malcolm had failed to carry out Mr. Mero's instructions to meet someone who was bringing 12 ounces of heroin into Prince George. The person with the heroin was arrested and, as a result, Mr. Mero owed \$30,000 for the loss of the drugs, which he blamed on Mr. Malcolm. Ms. Ptaszynski stated that she learned about this incident from Mr. Malcolm "last night". She also relayed information that Mr. Mero was a member of a notorious gang. These statements were hearsay.
- [16] Cst. Connell gave Ms. Ptaszynski a ride after she provided the statement. On the way, Ms. Ptaszynski pointed out Mr. Mero's residence at an address consistent with police records.
- [17] The ITO also included other information or suspicions provided by the police about Mr. Mero's criminal activity in the drug trade and possession of a firearm.
- [18] The evidence on the voir dire revealed what Mr. Mero characterizes as undisclosed facts in the ITO in his attack on the search warrant. He summarizes those undisclosed facts as follows:
- Mr. Malcolm spoke to Cst. Charron by telephone before attending at the Prince George RCMP Detachment.
 - Mr. Malcolm did not initially want to provide his name during the telephone call.
 - Mr. Malcolm did not mention any other witnesses or complainants during the telephone call.
 - Cst. Charron did not verify Ms. Ptaszynski's identity by reviewing proper identification.
 - Cst. Charron was relying on Ms. Ptaszynski's and Mr. Malcolm's truthfulness to be sure of Ms. Ptaszynski's identity.
 - Mr. Malcolm had an extensive criminal record on which the last entry was a conviction for attempted obstruction of justice in 2012 for which he received a jail sentence of 511 days.
 - Cst. Charron did not have any idea where to find Ms. Ptaszynski and Mr. Malcolm after they left the Prince George RCMP Detachment.
 - No police database or police intelligence available to Cst. Charron indicated that Mr. Mero was a member of the "Red Scorpions" gang as alleged by Ms. Ptaszynski.
 - Cst. Charron had no evidence that Mr. Mero was associated to an individual named Chet Bradley or 15 ounces of crack cocaine seized from Mr. Bradley on December 13, 2015; however, Cst. Charron assumed that the seizure from Mr. Bradley was the seizure of 12 ounces of heroin alleged by Ms. Ptaszynski and the cause of an alleged drug debt of Mr. Mero.

- [19] The parties agree on the Garofoli test the judge had to apply in reviewing the validity of the search warrant. Mr. Mero does not suggest that the judge misapprehended the test or the evidence. He argues the judge misapplied the test.
- [20] The test is whether the material filed in support of the warrant, as amplified on review, provides some basis on which the issuing justice could have granted the warrant: *Garofoli* at 1452. The question is whether there was at least some evidence that might reasonably be believed capable of supporting the issuance of the warrant: *R. v. Araujo*, 2000 SCC 65 at paras. 51-52. A reviewing judge must assess the totality of the evidence against a standard of "reasonable probability": *R. v. Debot*, [1989] 2 S.C.R. 1140 at 1166.
- [21] An affiant for a search warrant has an obligation to provide full, fair and frank disclosure of material facts: *Araujo* at para. 46. Material facts are those that bear on the merits or substance of the application in the sense that they would affect the decision making process: *R. v. Montgomery*, 2016 BCCA 379 at para. 98.
- [22] A sub-facial challenge to a search warrant turns on what the affiant knew or ought to have known at the time he or she made the affidavit: *R. v. Sipes*, 2009 BCSC 612 at para. 41, endorsed in *World Bank Group v. Wallace*, 2016 SCC 15 at para. 121. If the affiant knew or should have known that the evidence was false, inaccurate or misleading, that evidence should be excised from the ITO. If additional material evidence existed that the affiant knew or should have known about and included in the ITO in order to make full, fair and frank disclosure, then that evidence supplements the ITO. The question then is whether, as supplemented or modified, the ITO could nevertheless have been lawfully issued: *Sipes* at para. 41.
- [23] At this point, it may be useful to reiterate that the material time against which to assess what an affiant knew or ought to have known is when the ITO is sworn or affirmed. In this case, the affiant could not reasonably have known that at trial Ms. Ptaszynski would recant the evidence in her KGB statement of having seen and held the gun. Accordingly, her recantation of that evidence is irrelevant to the issuance of the search warrant.
- [24] Mr. Mero's argument before us is substantially the same as the one he made to the judge. The judge rejected it. He reviewed the video of Ms. Ptaszynski's KGB statement and assessed her credibility in giving it. He reached two critical conclusions. First, the ITO was based primarily on Ms. Ptaszynski's KGB statement including her firsthand observations of discovering a gun on her second visit to Mr. Mero's home and Mr. Mero's comment to her that it was loaded. Second, her statement contained sufficient indicia of reliability to establish a reasonable probability that evidence would be found at the residence. As he noted, Ms. Ptaszynski appeared calm, rational, intelligent and thoughtful in the way she answered questions and told her story. She did not embellish her evidence of what she saw on either occasion, including on the crucial issue of whether she observed a gun. Moreover, she identified Mr. Mero's home, which appeared consistent with Mr. Mero's address based on police records.

- [25] The trial judge did not accept that the criticisms aimed at the ITO were sufficient to render the search warrant invalid. He concluded that Ms. Ptaszynski's hearsay explanation of the concerns she and Mr. Malcolm had for their safety was background information, including the information about the loss of drugs and Mr. Mero's alleged gang membership. The aspects of the ITO which were hearsay would be clear to a reader, though they were not directly identified.
- [26] The judge did not accept that the ITO unfairly portrayed Mr. Mero as a drug dealing gang member given his criminal record, which included two convictions for possession for the purposes of trafficking in 2005, and police files from 2008 and 2015 describing circumstances which contributed to police suspicion that Mr. Mero was involved with drugs and guns. The judge recognized that the suggestion that Mr. Mero was associated with the drugs seized from Mr. Bradley might be wrong, but noted the claim in the ITO was asserted merely as a suspicion, not a fact.
- [27] Finally, the judge was not prepared to accept that Cst. Charron's failure to confirm Ms. Ptaszynski's identity, while a troubling oversight, was sufficient to undermine her statement's reliability. Nor did he consider that the failure to set out Mr. Malcolm's criminal record was fatal to the issuance of the warrant. As he observed, the ITO clearly described Mr. Malcolm as a person involved in the drug trade and accordingly of "somewhat nefarious reliability."
- [28] In short, the judge concluded that the alleged omissions were not material, and did not undermine the reliability of the ITO. They were peripheral to the critical question of whether Ms. Ptaszynski's observations were sufficiently reliable to ground a reasonable probability that she had seen a gun at Mr. Mero's home and that one would be found there. In respect of that critical issue, the judge found that the ITO was free from error and embellishment and was not drafted with the intention of being, nor was it in effect, misleading.
- [29] Mr. Mero, on appeal, does not argue that the judge misapprehended the evidence, nor does he suggest that the judge misunderstood the test. Rather, he contends that the judge was simply wrong in his assessment of whether the search warrant could have been issued if it had contained the information that Mr. Mero said it should have included.
- [30] With respect, I do not share that view. Quite apart from the question of the degree of deference that this Court is required to show to the issuing judge's views (see *R. v. Bissky*, 2018 SKCA 102 at paras. 10-15), I find myself in substantial agreement with the judge's analysis. The critical question was whether there was enough sufficiently reliable evidence in the ITO to support the proper issuance of the warrant. That evidence overwhelmingly came from Ms. Ptaszynski's KGB statement. At the core of that statement is a recitation of her personal observations on her first visit of seeing something that in the circumstances she took to be a gun and, on the second, of her discovery of a gun. I do not think that the judge was wrong in his conclusion that the KGB statement contained sufficient indicia of

reliability to support the issuance of the search warrant. I too have watched Ms. Ptaszynski give her KGB statement and agree with the judge's assessment of it. Her evidence was further corroborated by her correct identification of Mr. Mero's residence.

- [31] In my opinion, additional information about Mr. Malcolm, the exclusion of hearsay, or eliminating other information from the ITO would not have affected whether a search warrant could have issued. Even if the affiant might have reasonably entertained more skepticism about Ms. Ptaszynski's reliability and the possibility that she might be playing a part in setting up Mr. Mero, it still seems to me that her KGB statement, together with other reported information and suspicions, readily passed the threshold to lay a foundation justifying the issuance of the search warrant. I would not accede to this ground of appeal. Accordingly, it will not be necessary to consider Mr. Mero's final ground of appeal.

Did the judge misapply the test in W.(D.) and reverse the burden of proof?

- [32] As a result of the judge's voir dire ruling, the fruits of the search warrant were admitted as evidence. This evidence included a loaded .380 calibre handgun found inside a bag under the cushions of the couch in the living room together with 40 additional rounds of .380 calibre ammunition. Approximately 21.5 grams of heroin were found in a sock under the cushions of the same couch, and 1.5 grams of heroin were found in and around the home. Also found in the living room were prescription medication in Mr. Mero's name, drug use paraphernalia, two wallets containing the respective identification of Mr. Mero and his wife Nessia Mero, and two booklets containing handwritten notations with names and corresponding amounts, which were suspected to be "score sheets" used by drug dealers to keep track of client debts.
- [33] In the kitchen, the police located a bulletproof vest draped over the back of a chair, and a full box of fifty rounds of .380 calibre ammunition in a kitchen drawer. This ammunition was compatible with the handgun. Another box of ammunition was also located on a shelf inside a bedroom closet. This ammunition was not compatible with the handgun.
- [34] The Crown called Ms. Ptaszynski. She testified after having been arrested in Edmonton on a material witness warrant. While much of her evidence was consistent with her KGB statement, she denied that she had seen a gun while at Mr. Mero's home. She said she lied because she was told to do so by Mr. Malcolm, who coached her about the gun and the drug deal gone bad. She claimed to have been high when she gave the statement.
- [35] Mr. Mero gave evidence. He denied knowledge of the handgun and the heroin. He claimed he had never owned or possessed a gun apart from a long gun for skeet shooting. He denied knowing there was ammunition in the kitchen drawer and bedroom closet. When asked, he said he could offer no explanation for the ammunition in the kitchen drawer. He said he bought the bulletproof vest in 2014 after receiving a warning from the RCMP that his life was in danger pursuant to the police's "duty to warn". He never used it, left it in a closet, and had never seen it in the kitchen.

- [36] Mr. Mero denied knowledge of the heroin in the couch. He did not know how it got there, or who it belonged to. He agreed that it was possible there were small amounts of heroin in the house that were his. He did not know how much heroin he had that day. He agreed he used drugs, and while he had sold them in the past, he had not done so for a couple of years.
- [37] Mr. Mero explained that the "score sheets" did not record drug transactions, but kept track of players' money in an online poker game, even though the online poker system displays each player's chips on the screen.
- [38] He described Mr. Malcolm as an associate, not a close friend. They had met a few times. He said he invited Mr. Malcolm and Ms. Ptaszynski to his house for Christmas dinner in 2015. That was the only time Ms. Ptaszynski was in his home. Mr. Malcolm also came over a couple more times, on January 5 and 7. On January 7, Mr. Malcolm came over at 4:00 p.m. to smoke heroin. He was there for a few hours. He denied having a fight with Mr. Malcolm that day over a drug deal gone bad, or holding any grudge against Mr. Malcolm.
- [39] The judge, in his reasons for judgment, undertook a thorough review of the evidence. He instructed himself on the principles set out in W.(D.). He analysed Mr. Mero's evidence, which he disbelieved and found did not raise a reasonable doubt. He identified what he described as "inconsistencies or bizarre explanations" in Mr. Mero's "generally evasive testimony."
- [40] The judge went on to examine whether the Crown had proven its case beyond a reasonable doubt. He concluded that he could not put any weight on Ms. Ptaszynski's evidence because she was a "proven liar". He then assessed the circumstantial evidence, including the presence of the handgun and the ammunition, the presence of commercial quantities of heroin, the bulletproof vest and the score sheets with names and numbers consistent with the drug trade. Based on these factors, the trial judge concluded that the Crown had proven beyond a reasonable doubt that Mr. Mero had knowledge and control of the handgun and heroin.
- [41] On appeal, Mr. Mero highlights some wording from the reasons for judgment. He says:
- In suggesting that Mr. Mero "does not point necessarily to a reason for Mr. Malcolm leaving the drugs or placing the drugs and the gun in his home" and that the "only explanation proffered is that there was a drug deal that had gone bad," the trial judge committed multiple errors. He reversed the burden of proof, misapprehended evidence, and misapplied W.D. Individually any of those errors is sufficient to quash Mr. Mero's convictions.
- [42] Mr. Mero argues that he was under no obligation to explain why the gun and drugs were in his residence. Even so, there was, he contends, circumstantial evidence capable of grounding innocent explanations for the presence of heroin and the gun. This included the messy state of the house, numerous visitors coming and going who used the couch and the fact that other individuals, apart from Mr. Malcolm, were hostile to him. Finally, he criticizes this comment from the judge:

- [22] I turn to the gun. The shells in the photographs show the same calibre of gun shells found in the organized drawer in the kitchen consistent with the casing and shells found in the Puma bag with the gun. In order to believe [that Mr. Mero did not know about or own the pistol], I would have to believe that a mysterious person who placed this gun also placed similar shells in the kitchen.
- [43] Mr. Mero contends that it is not necessary to believe that the same person was responsible for placing ammunition compatible with the gun in the kitchen, and hiding the gun and more ammunition under the couch cushion. He submits that the judge erred by failing to consider whether the totality of the evidence gave rise to a reasonable doubt, either under the W.(D.) test or as a matter of reasonable inferences of innocence capable of arising on the circumstantial evidence: see *R. v. Villaroman*, 2016 SCC 33.
- [44] In my opinion, Mr. Mero's criticisms of the judge are misplaced. They do not properly engage with the judge's reasoning read as a whole. In substance, they amount to an attempt to reargue the judge's factual findings and inferences.
- [45] The only issue at trial was whether the Crown had proven beyond a reasonable doubt Mr. Mero's knowledge and control of the heroin and the firearm. The judge acknowledged and structured his analysis around the principles in W.(D.). Namely, he began by examining Mr. Mero's evidence, asking whether he believed it and, if not, whether it raised a reasonable doubt. I do not accept that the judge imposed any obligation on Mr. Mero to explain matters in a way that reversed the burden of proof. Rather, he assessed Mr. Mero's credibility by analysing the plausibility of his evidence and the live issues it raised. He found Mr. Mero to be an incredible witness who made his evidence up on the fly and offered bizarre or inconsistent explanations of the facts. In doing so, I think the judge did no more than ask whether anything Mr. Mero said could, in the circumstances, justify the judge in believing him, or allow him to find a reasonable doubt. He concluded Mr. Mero's evidence did neither. That conclusion is entitled to deference.
- [46] In reaching his conclusion on that question, the judge responded to the live issues arising out of the items found in Mr. Mero's home, and what Mr. Mero had to say about them. These matters included the presence of the ammunition in the kitchen, the bulletproof vest and the score sheets. The judge had to assess whether Mr. Mero could be believed when he said he did not know how the gun and heroin could have been in the house without his knowledge. Alternatively, the judge had to determine whether Mr. Mero's explanations raised a reasonable doubt. As I have said, I do not read the judgment as imposing an obligation on Mr. Mero to give an innocent explanation of their presence. But the judge had to consider those explanations and decide what to make of them. The judge did no more.
- [47] The judge then turned to consider whether the Crown had proven the case beyond a reasonable doubt. He began by assessing Ms. Ptaszynski's evidence. He decided that Ms. Ptaszynski was an admitted perjurer. As he was entitled to, he decided that he could place no weight on her evidence.

- [48] The last step in the judge's analysis was to assess the circumstantial evidence to determine whether it could support any reasonable inferences inconsistent with guilt. For this Court, the issue is whether the trier of fact, acting judicially, could reasonably have been satisfied that the accused's guilt was the only reasonable conclusion available on the totality of the evidence: Villaroman at para. 55. It is for the trier of fact to decide if any proposed alternative way of looking at the case is reasonable enough to raise a doubt. The trier of fact's assessment can be set aside only where it is unreasonable: Villaroman at paras. 56, 71.
- [49] The judge began his analysis and assessed the circumstantial evidence thus:
- [39] What is one left with? There was a gun, a restricted firearm, loaded, found in the couch cushions of the home of Mr. Mero. There were drugs, approximately \$5,500 worth of heroin, an amount sufficient for trafficking, found in a sock in a similar circumstance under the couch cushions in Mr. Mero's home. There is an admission that this amount of drugs and the general paraphernalia surrounding the drugs and the home are sufficient for trafficking, the paraphernalia being score sheets, a number of cellphones, and this is all set out in the admitted expert evidence.
- [40] I am also left with a box of shells which are a match for shells found with the gun, the photographic evidence is clear, found in an organized drawer in an otherwise disorganized kitchen. I am left with the noted scoresheets, names and numbers, consistent with use in the drug trade to keep track of drug sales, indebtedness, and these are found readily apparent in the home. There are numerous cellphones located in the home, again explainable generally but consistent with those employed in the drug trade.
- [41] There is a bulletproof vest said to be regularly resident in the back of a closet, found in plain view, accessible, hanging off the back of a kitchen chair.
- [50] The judge then explored possible inferences inconsistent with guilt. For example, he considered a potential theory that arose out of Ms. Ptaszynski's evidence that she made up the story about finding a gun. He rejected that suggestion as an inference capable of raising a reasonable doubt because he concluded it would make no sense for Mr. Malcolm to plant a valuable gun and \$5,500 of heroin in order to settle a financial dispute. That finding was open to the judge on the evidence. It is entitled to deference on appeal.
- [51] He also considered other possibilities, noting, as I read it, the absence of any believable explanations for the presence of the evidence (which simply restates the conclusions arising from his rejection of Mr. Mero's evidence earlier) and the lack of any reasonable inferences of innocence arising from the evidence. In analysing this aspect of the case, the judge rejected the suggestion that some unknown person had put the incriminating evidence in the house without Mr. Mero's knowledge.

[52] The judge evidently found the suggestion that someone else could have placed the drugs, the gun, and both sets of ammunition in Mr. Mero's residence without his knowledge unbelievable in light of the body of evidence. He also rejected the possibility that more than one person might have been responsible for the collection of incriminating evidence discovered in Mr. Mero's home. This is a conclusion the judge is entitled to draw. I see no basis on which this Court can interfere with the judge's conclusions.

[53] I would not acceded to this ground of appeal.

Did the judge err in his use of the KGB statement?

[54] The KGB statement was admitted as an exhibit at trial. At worst, it was admitted prematurely. It was admitted without a voir dire to determine its admissibility. Mr. Mero says the judge erroneously relied on the statement as if it was admitted for the truth of its contents.

[55] With respect, I do not think it is necessary to engage in a discussion about whether the statement was properly admissible for the truth of its contents. Mr. Mero concedes that the judge was entitled to refer to inconsistencies between it and Ms. Ptaszynski's trial evidence in assessing her credibility. I do not think the judge used the KGB statement for any other purpose. It was open to the judge to find that Ms. Ptaszynski was not a credible witness and to reject her evidence in its entirety. This is what he did.

[56] I would not accede to this ground of appeal.

Disposition

I would dismiss the appeal.

"The Honourable Mr. Justice Harris"

I agree:

"The Honourable Chief Justice Bauman"

I agree:

"The Honourable Mr. Justice Butler"

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