

CANADA / JUDGMENT

R. v. Nelson

2020 BCCA 204

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 204 R. v. Nelson

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Nelson,

2020 BCCA 204

Date: 20200717

Docket: CA46139

Between:

Regina

Respondent

And

Chad Lloyd Nelson

Appellant

Before:

The Honourable Mr. Justice Willcock

The Honourable Madam Justice Griffin

The Honourable Mr. Justice Abrioux

On appeal from: An order of the Supreme Court of British Columbia, dated
March 13, 2019 (R. v. Nelson, 2019 BCSC 2089, Courtenay Docket 41484).

Counsel for the Appellant

(via videoconference):

S.J. Runyon

Counsel for the Respondent

(via videoconference):

L. Pearce

Place and Date of Hearing:

Vancouver, British Columbia

June 11, 2020

Place and Date of Judgment:

Vancouver, British Columbia

July 17, 2020

Written Reasons by:

The Honourable Madam Justice Griffin

Concurred in by:

The Honourable Mr. Justice Willcock

The Honourable Mr. Justice Abrioux

Summary:

Following the serious crash of a stolen vehicle containing various illicit items, the appellant was found to be the driver who left the scene after the crash, leaving a passenger trapped in the vehicle. He appeals his convictions for various offences related to dangerous driving of a stolen vehicle causing bodily harm, leaving the accident scene, and possession of stolen property, break-in instruments, and weapons. He argues that the judge did not properly approach the evidence of two witnesses, the alleged passenger and her male friend, with the appropriate caution in accord with the principles in *Vetrovec v. The Queen*, [1982] 1 S.C.R. 811. Held: Appeal allowed with respect to the count of possession of break-in instruments; appeal on other counts dismissed. The judge was aware of the need to exercise caution with respect to the evidence of the other person in the vehicle, and did so, but there was ample confirmatory evidence that the female occupant was the passenger. The judge did not err in accepting her evidence that the appellant was the driver, which was also consistent with independent evidence. The judge was aware of the arguments that the passenger's male friend might have a bias to testify in support of her version of events, and did not err in finding this witness credible and accepting his evidence. While the judge made some errors in his approach to the evidence, these were minor and the evidence was otherwise overwhelmingly in support of the verdict, with one exception. The one exception is with respect to the count of possession of break-in instruments. On this count the

judge did not provide sufficient reasons for conviction, and this conviction is therefore set aside.

Reasons for Judgment of the Honourable Madam Justice Griffin:

Introduction

- [1] On the rainy night of September 14, 2018, at around 10:30 p.m., someone drove a stolen vehicle at a high speed off the highway near Black Creek, British Columbia. The vehicle, a Nissan Pathfinder, crossed over the centre line to the opposite side of the road, crashed into a cement sign post, launched approximately 15 feet into the air and then flipped and landed on the passenger side in a ditch.
- [2] A couple in another vehicle were travelling the same highway and saw the accident. They quickly pulled over. The passenger in that car, William Wasyliw, ran to help the occupants of the vehicle. Climbing on the elevated driver's side of the vehicle, he opened the door and a man hoisted himself out.
- [3] Katrina Gonzales was in the passenger front seat, tangled in the seat belt and moaning in pain.
- [4] The man who was in the vehicle left the scene of the crash.
- [5] A man was seen running away from the accident site along the highway. He was followed by an off-duty firefighter, Christopher Chambers. Two other firefighters, Christopher Murray and Martyn Thomas, soon joined in, following the man. The man went into the bushes on the side of the road, and they tried to talk him out to see if he needed treatment. The man said he "screwed up" and he wanted to get to the hospital to see his girlfriend. He asked the firefighters how his girlfriend was doing, to which Deputy Chief Murray responded that he did not know. Eventually, he came out of the bushes and the firefighters followed him. The man went into the house of someone he knew, Antonio Martins, on Schulz Road. Deputy Chief Murray knew Mr. Martins, who let the man into his house and shut the door on the firefighters. The man disappeared by the time police arrived, leaving through a back window.
- [6] Back at the accident site, neither Ms. Gonzales nor Mr. Wasyliw could get her seat belt undone. As Mr. Wasyliw could not see the seat belt release, he pulled on the seat belt to ease the tension around Ms. Gonzales' body. Mr. Wasyliw's wife looked in their car for a knife to cut the seat belt to no avail. When emergency responders arrived, the seat belt was cut, and Ms. Gonzales was removed from the vehicle and taken to the hospital.
- [7] The next day, the friend with whom Ms. Gonzales was living at the time, Luis Vieira, came to visit her in the hospital.
- [8] The vehicle had been stolen a day or two before the accident, on the night of September 12 or the morning of September 13, 2018.

- [9] The police found stolen property in the vehicle, including a mountain bike that was stolen on the evening of September 13 or the morning of September 14, 2018. It had a value of about \$5,000. Also inside the vehicle were break-in instruments, a loaded shotgun and a cross-bow. Affixed to the vehicle was a stolen licence plate.
- [10] The key issue at trial was whether the appellant, Chad Nelson, was the driver.
- [11] Ms. Gonzales testified that Mr. Nelson was the driver.
- [12] The defence theory was that Ms. Gonzales was the driver and tried to blame Mr. Nelson to exculpate herself. Although she was vigorously cross-examined on this theory, Ms. Gonzales adamantly denied it.
- [13] Mr. Vieira testified that he saw Mr. Nelson driving the vehicle earlier in the day on September 14, 2018, and that Ms. Gonzales left the home with Mr. Nelson that evening. He also testified that Mr. Nelson had earlier shown him the weapons in the vehicle and offered to sell a bike to Mr. Vieira for \$2,000 to \$3,000, which was too steep a price for Mr. Vieira. Mr. Vieira also saw some clothes and tools in the vehicle. Mr. Vieira identified Mr. Nelson in court and in a photo line-up.
- [14] The firefighters, Deputy Chief Murray, Mr. Chambers and Mr. Thomas, described characteristics of the man they followed after the accident that were consistent with Mr. Nelson's appearance. In addition, Mr. Thomas identified Mr. Nelson from a photo line-up and in court as the person they followed. Mr. Martins knew Mr. Nelson and also identified him in court.
- [15] In reasons indexed at 2019 BCSC 2089, the trial judge concluded Mr. Nelson was the driver of the stolen vehicle and convicted him of eight offences:
- operating a motor vehicle in a manner dangerous to the public, causing bodily harm to Ms. Gonzales (contrary to s. 249(3) of the Criminal Code, R.S.C. 1985, c. C-46);
 - having care and control of a vehicle involved in an accident, and knowing bodily harm was caused, leaving the scene of an accident (contrary to s. 252(1.2));
 - two counts of possession of stolen property under \$5,000, namely, the vehicle and a licence plate (contrary to s. 355(b));
 - one count of possession of stolen property over \$5,000, namely a mountain bike (contrary to s. 355(a));
 - possession of break-in instruments (contrary to s. 351(1));
 - possession of a loaded prohibited firearm with readily accessible ammunition that was capable of being discharged (contrary to s. 95(1)) and;
 - possession of a prohibited cross-bow (contrary to s. 117.01(1)).

[16] Mr. Nelson appeals his convictions.

Issues on Appeal

[17] The appellant submits that Ms. Gonzales and Mr. Vieira were unsavoury witnesses, whose evidence carried a risk of collusion and thereby required caution on the principles enunciated in *Vetrovec v. The Queen*, [1982] 1 S.C.R. 811, and *R. v. Khela*, 2009 SCC 4.

[18] The appellant submits that while the judge recognized the two witnesses as *Vetrovec* witnesses, the judge erred in the use of certain evidence to confirm their testimony.

[19] The Crown disagrees that the judge found Mr. Vieira to be a *Vetrovec* witness. The Crown submits that the judge found confirmatory evidence of Ms. Gonzales' evidence and properly accepted the evidence of both witnesses.

[20] The Crown concedes that the judge erred in his reliance on two pieces of evidence: (1) text messages on a cell phone found in the vehicle; and (2) evidence from Mr. Martins that Mr. Nelson told him the accident was caused by hydroplaning.

[21] However, the Crown says these evidentiary errors were immaterial to the result as there was other overwhelming evidence at trial that Mr. Nelson was the driver. In this regard, the Crown relies on the curative proviso in s. 686(1)(b)(iii) of the Criminal Code.

Discussion

[22] I turn to a discussion of the principles arising from *Vetrovec* and their application to the judge's treatment of the evidence of Ms. Gonzales and Mr. Vieira.

[23] The case of *Vetrovec* involved several accused charged with conspiracy to traffic in heroin. The issue on appeal in that case concerned a long-standing rule of evidence that required a trial judge to instruct the jury that it was dangerous to convict on the evidence of an accomplice unless this testimony was corroborated.

[24] On appeal in *Vetrovec*, the Supreme Court of Canada recognized that the traditional approach to this area of evidence was unnecessarily complex. The Court rejected the rule that all accomplice evidence was untrustworthy and needed corroboration, in favour of a "common sense" approach to the credibility of a witness generally. Several propositions arise from the decision:

- a) there is no fixed rule that all testimony of accomplices is untrustworthy;
- b) rather, judges should direct their mind to the facts of a case and whether there are any factors that might impair the trustworthiness of a witness, and if there are, then give a "clear and sharp warning" to the jury about the risk of accepting the evidence of that witness without more;

- c) if a witness is an accomplice but the judge believes the witness to be trustworthy, no caution to the jury is necessary;
 - d) credibility of a witness goes to the evidence of the witness as a whole, not individual elements of it; and
 - e) what may restore the trust in a witness who has reason to lie, such as an accomplice, can be anything confirming part of the evidence of that witness. It is not necessary that confirmatory evidence be evidence that implicates the accused. It is enough that the confirmatory evidence confirm part of the story of the witness, so as to strengthen the trier of fact's belief that the witness is telling the truth.
- [25] The latter point was addressed again in *R. v. Kehler*, 2004 SCC 11. The Court was dealing with an accomplice to armed robbery, who identified the appellant as committing the robbery with him. The accomplice was the type of witness of concern in *Vetrovec*, whose evidence might be tainted by the hope of receiving a personal advantage such as a more lenient sentence. There was confirmatory evidence of the story of the accomplice witness, but not in respect of anything that implicated the appellant. This confirmatory evidence was enough to satisfy the trial judge of the truth of the accomplice's evidence, and to convict the appellant. On appeal, the Court found no error in the approach of the trial judge. Independent evidence, to be confirmatory of the evidence of a *Vetrovec* witness, does not have to implicate the accused.
- [26] The type of witness whose evidence may require a *Vetrovec* caution has become generally known as an "unsavoury witness". This language encompasses those circumstances where the witness is seen to have such a dishonest moral character, by reason of the nature of the person's past convictions, that the witness cannot be trusted. However, in many circumstances the court's concern is more that the evidence of the witness might be "tainted" by a reason to lie, and a more accurate description would be a "tainted witness". The point is to recognize when it would be dangerous to convict an accused on the evidence of that witness alone. This category was described in *Khela* as follows:
- [3] It is therefore of the utmost importance, in a trial by judge and jury, for the jury to understand when and why it is unsafe to find an accused guilty on the unsupported evidence of witnesses who are "unsavoury", "untrustworthy", "unreliable", or "tainted". For present purposes, I use these terms interchangeably. And I mean to include all witnesses who, because of their amoral character, criminal lifestyle, past dishonesty or interest in the outcome of the trial, cannot be trusted to tell the truth -- even when they have expressly undertaken by oath or affirmation to do so.
- [4] I hasten to add that a specific instruction is sometimes required in this regard not because jurors are thought to be unintelligent, but rather because they might otherwise be uninformed. It is meant to bring home to lay jurors the accumulated wisdom of the law's experience with unsavoury witnesses. Judges are alert to the concern that unsavoury witnesses are prone to favour personal advantage over public duty. And we know from

recent experience that unsavoury witnesses, especially but not only "jailhouse informants", can be convincing liars and can effectively conceal their true motives for testifying as they have: see *R. v. Sauvé* (2004), 182 C.C.C. (3d) 321 (Ont. C.A.), at para. 76.

[Italicized emphasis in original; underlined emphasis added.]

- [27] In *Khela*, the tainted witnesses were two men who had lengthy criminal records and were members of a prison-based gang. The trial judge warned the jury of the reason to look at their evidence with caution, and to look for some confirmation of their evidence before relying on it. The judge also noted that evidence of the female associates could be considered but to keep in mind that the defence had labelled them as liars, and to look to other evidence as well. At the appellate level, it was argued that the judge failed to warn of the risk of collusion and the need for independent confirmatory evidence. The Court found the warning to be adequate considering the charge as a whole.
- [28] In the present case, the appellant relies on the proposition that not all evidence can be considered sufficiently independent to be confirmatory of the evidence of a tainted witness. The appellant submits that Ms. Gonzales and Mr. Vieira's evidence bore the risk of collusion and so they could not truly be considered independent of each other. The appellant relies on the following passage from *Khela*:
- [39] Common sense dictates that not all evidence presented at trial is capable of confirming the testimony of an impugned witness. The attribute of independence defines the kind of evidence that can provide comfort to the trier of fact that the witness is telling the truth. Where evidence is "tainted" by connection to the *Vetrovec* witness it can not serve to confirm his or her testimony (N. Harris, "Vetrovec Cautions and Confirmatory Evidence: A Necessarily Complex Relationship" (2005), 31 C.R. (6th) 216, at p. 225; *R. v. Sanderson*, 2003 MBCA 109, 180 C.C.C. (3d) 53, at para. 61).
- [29] The importance of the evidence to the Crown's case is a factor to be weighed in the decision to give what is now known as a *Vetrovec* caution to the jury. However, the decision to give such a warning is a matter of the trial judge's discretion. As explained in *R. v. Brooks*, 2000 SCC 11:
- [3] Therefore, this Court in *Vetrovec* deliberately chose not to formulate a fixed and invariable rule where "clear and sharp" warnings would be required as a matter of course regarding the testimony of certain categories of witnesses. Rather, where a witness occupies a central position in the determination of guilt and, yet, may be suspect because of a disreputable or untrustworthy character, a clear and sharp warning may be appropriate to alert the jury to the risks of adopting the evidence "without more". It is therefore within the trial judge's discretion to give a *Vetrovec* caution. This discretionary approach was confirmed by this Court in *R. v. Potvin*, [1989] 1 S.C.R. 525, at p. 557, wherein Wilson J. states:

Vetrovec, in my view, represents a rejection of formalistic and a priori categories concerning the trustworthiness of evidence both with regard to warnings and corroboration. In every case it is for the trial judge on the basis of his or her appreciation of all the circumstances and, may I add, on the basis of the application of sound common sense, to decide whether a warning is required.

[Emphasis added in Brooks.]

- [4] In exercising his or her discretion to warn the jury regarding certain evidence, the trial judge may consider, *inter alia*, the credibility of the witness and the importance of the evidence to the Crown's case. These factors affect whether the Vetrovec warning is required. In other words, the greater the concern over the credibility of the witness and the more important the evidence, the more likely the Vetrovec caution will be mandatory. Where the evidence of so called "unsavoury witnesses" represents the whole of the evidence against the accused, a "clear and sharp" Vetrovec warning may be warranted. Where, however, there is strong evidence to support the conviction in the absence of the potentially "unsavoury" evidence, and less reason to doubt the witness's credibility, the Vetrovec warning would not be required, and a lesser instruction would be justified. The trial judge's instruction with respect to the evidence of jailhouse informants must therefore be commensurate with the particular circumstances of the case. For example, the trial judge is not required to give a "clear and sharp" warning on the dangers of convicting on the impugned evidence where, in the circumstances, the trial judge believes that there is no such danger. Similarly, the trial judge may properly decline to give a warning if the warning may prejudice the accused's case rather than assist it. Provided there is a foundation for the trial judge's exercise of discretion, appellate courts should not interfere. Here that foundation is established having regard to the credibility of the witnesses, the importance of their evidence and the failure to request a warning.

[Emphasis added.]

- [30] Keeping in mind that a Vetrovec caution is a caution to the jury directed to the question of the credibility of a witness, a judge sitting without a jury is presumed to know how to assess credibility and to be aware of the dangers of relying on the evidence of tainted witnesses. So long as the judge's reasons demonstrate an awareness of the risks associated with a witness who might be considered "tainted", there is no need for the judge sitting alone to recite the same caution that would be needed in a jury trial: *R. v. Chevers*, 2011 ONCA 570 at para. 4.
- [31] The appellant submits that the reason Ms. Gonzales' evidence required extra scrutiny was because she had a significant motive to lie to reduce her own culpability. She was found in the stolen vehicle with the stolen property in it. She first gave a false name to the police at the scene of the accident. She also told them they would find her fingerprints on the steering wheel and on the cross-bow. On top of this, the appellant contends that Ms. Gonzales was in the throes of heroin addiction and might need to sell stolen property to support her habit. She also was associating with a drug house where criminal activity was known to occur.

- [32] I pause to note that Ms. Gonzales explained in cross-examination that the reason she thought her fingerprints would be on the steering wheel was because she held it while Mr. Nelson was trying to smoke crack cocaine when driving. She explained that she touched the cross-bow when she was trying to get out of the vehicle, because it was in her way. She denied that she was going to pay for her drugs using the stolen merchandise in the vehicle.
- [33] As for Mr. Vieira, the appellant submits that he had a motive to lie to protect Ms. Gonzales, someone he cared about. Mr. Vieira also had a clear animus against the appellant. The appellant points to these motives and to inconsistencies in Mr. Vieira's evidence to submit that he was not credible. The appellant also questions the reliability of Mr. Vieira's evidence, noting he consumed several alcoholic beverages on the evening in question, and was a cocaine addict.
- [34] I observe that the fact that a witness might have a substance use disorder or used drugs does not in and of itself mean that the witness is not credible, has a motive to lie or is of an amoral character justifying being labeled an "unsavoury witness" and requiring a Vetrovec caution. As the Court held in *Brooks* at para. 9, "[n]o special Vetrovec warning is required each time a witness who has consumed drugs testifies."
- [35] But even though a Vetrovec caution may not be warranted, the possibility that the witness has an impaired memory due to substance use may need to be taken into account by the trier of fact in assessing the reliability of their evidence, depending on the witness and the circumstances. In *R. v. Bradshaw*, 2017 SCC 35, the witness' addiction and drug use at the time of the offences were mentioned in the dissent as relevant to his memory and perception, and thus, the reliability of his evidence (paras. 134-35).
- [36] The appellant submits that Mr. Vieira and Ms. Gonzales had the motive and opportunity to collude in their evidence to name Mr. Nelson as the driver, and therefore, this required that their evidence be treated with caution. This opportunity to collude occurred the morning after the accident, when Mr. Vieira met Ms. Gonzales in the hospital for approximately one hour. She expressed concern about the possibility of being charged. Mr. Vieira left and confronted Mr. Nelson before speaking to the police.
- [37] The appellant submits that the judge erred in failing to adequately deal with the potential for, and significance of, collusion between Ms. Gonzales and Mr. Vieira.
- [38] I disagree that the judge did not adequately consider the risks associated with the evidence of Ms. Gonzales and Mr. Vieira.
- [39] The judge was aware of the defence arguments as to the risks of accepting the evidence of Ms. Gonzales and Mr. Vieira. He was aware that the defence also argued that due to inconsistencies in their evidence, they were not credible. He properly took the defence position into account, flagging the credibility concerns at the beginning of his reasons:

- [8] The principal issues urged by Mr. Nelson are these: (1) was Mr. Nelson the male who was tracked to the Schulz Road house and (2) if so, was Mr. Nelson the driver of the Pathfinder?
- [9] The evidence of Ms. Gonzales, who was the passenger who was jammed against the side of the vehicle, and of Mr. Vieira, who had dealings with Ms. Gonzales and Mr. Nelson a few hours before the accident occurred, are important in this regard. The accused says I should be very cautious in considering their evidence, in view of the inconsistencies, if not untruths, the evidence contains. The accused submits that, on the basis of *R. v. Vetrovec*, [1982] 1 S.C.R. 811 and *R. v. Kehler*, 2004 SCC 11, I should look to see if other evidence substantiates the primary facts.
- [40] The judge also returned to this issue in the discussion portion of his reasons, noting:
- [97] Mr. Vieira says that he saw Mr. Nelson driving the Pathfinder earlier. Ms. Gonzales says Mr. Nelson drove the Pathfinder to the accident scene. As I have noted, Mr. Nelson submits their evidence is not reliable, and that I must, in the words of the Supreme Court of Canada, exercise caution in relying on the evidence of unsavoury witnesses. There is a scope within that and, as counsel for the Crown pointed out, in *Vetrovec* and *Kehler* the unsavoury witnesses had numerous convictions. It was Mr. Justice Dickson in *Vetrovec* who cut through a lot of the older law about the corroboration necessary to substantiate a witness in court, and said this (at 823):

Rather than attempting to pigeon-hole a witness into a category and then recite a ritualistic incantation, the trial judge might better direct his mind to the facts of the case, and thoroughly examine all the factors which might impair the worth of a particular witness. If, in his judgment, the credit of the witness is such that the jury should be cautioned, then he may instruct accordingly. If, on the other hand, he believes the witness to be trustworthy, then, regardless of whether the witness is technically an 'accomplice' no warning is necessary.

- [98] A trial judge's discretion concerning when to give a *Vetrovec* warning is not absolute: see Sopinka, Lederman & Brant: *The Law of Evidence in Canada*, 3rd ed (Markham: ON, LexisNexis Canada, 2009) at 1182, n. 22. A *Vetrovec* warning is more likely to be mandatory where the evidence of the unsavoury witness represents the whole of the case against the accused. By contrast, if there is strong evidence to support the conviction in the absence of the witness's evidence, and less reason to doubt the witness's credibility, the *Vetrovec* warning will not be required. Appellate courts accordingly give trial judges a wide latitude.
- [41] Of the two witnesses, only Ms. Gonzales had a motive to lie to protect herself, if, as the defence theory posited, she was the driver. She was the only witness to the person driving the vehicle at the time of the accident, and so her evidence was very important to the Crown's case. Her evidence therefore required the most scrutiny, particularly her evidence that she was a passenger in the vehicle being driven by Mr. Nelson.

- [42] Unlike Ms. Gonzales, Mr. Vieira had no personal motive to lie to protect himself or to gain personal advantage. There was no evidence he was colluding with Ms. Gonzales. He had no criminal history.
- [43] However, Mr. Vieira could be considered a witness with a potential bias to support the evidence of Ms. Gonzales given that he cared about her, knew she was worried about being charged, and considered Mr. Nelson a "punk idiot". The judge took these factors into account in considering his evidence.
- [44] The judge took into account the defence argument that there were some discrepancies between Mr. Vieira's evidence and Ms. Gonzales' evidence as to events earlier in the day on September 14. The judge took into account that Mr. Vieira testified to his long-standing substance use and that Ms. Gonzales suffered from an addiction to heroin, and that the effects of their drug use could impact the reliability of their evidence.
- [45] The judge noted the argument of defence counsel:
- [89] Counsel submitted that Ms. Gonzales' evidence is not reliable, that it differs in many respects from Mr. Vieira's, that I must consider the relationship of Mr. Vieira and Ms. Gonzales, that Ms. Gonzales' heroin addiction makes her evidence inherently unreliable and, given the police pressure on her, that she did, in fact, point the finger at Mr. Nelson to avoid her own jeopardy.
- [46] While the judge found that these points were "fairly made" (para. 99), the judge properly appreciated that what was "key" was Ms. Gonzales' identification of Mr. Nelson as the driver (para. 100).
- [47] The judge carefully scrutinized the independent evidence that was confirmatory of Ms. Gonzales' evidence that Mr. Nelson was the driver and she was the passenger. This included: the evidence of the witness who came upon the accident and found Ms. Gonzales, tangled in the seat belt wrapped tight around her body and trapped in the passenger seat; the description of the accident itself and the injuries suffered by Ms. Gonzales; the witnesses who followed a person of Mr. Nelson's description immediately after the accident; as well as the evidence of the person whose house the man entered. I note that none of this evidence depended on accepting Mr. Vieira's evidence.
- [48] When reviewing a trial judge's reasons, appellate courts are instructed to read the reasons "as a whole": *R. v. Rhyason*, 2007 SCC 39 at para. 10. While the appellant now parses each piece of evidence and finds some inconsistencies in respect of individual pieces of evidence, in my view, this approach fails to appreciate that all of the above-mentioned evidence as a whole was consistent with the conclusion that Ms. Gonzales was the passenger and Mr. Nelson was the driver. It is not necessary that there be no inconsistencies in the evidence.

Passenger Seat Belt

- [49] The appellant takes issue with the judge's conclusion that Ms. Gonzales was wearing a locked seat belt, which the judge found supported Ms. Gonzales' evidence that she was the passenger.
- [50] As mentioned, the judge recognized that the key was Ms. Gonzales' evidence that she was the passenger and Mr. Nelson was the driver. The judge appreciated the appellant's contrary theory that Ms. Gonzales was in fact the driver who named Mr. Nelson to avoid her own criminal liability.
- [51] The appellant criticizes the judge for taking judicial notice of certain matters regarding Ms. Gonzales' seat belt, when making the following observations:
- [101] As we know from the motor vehicle cases we see in the criminal cases, a seat belt is based on a spooling device that locks when the vehicle suddenly decelerates. The location of Ms. Gonzales with the locked tight seat belt across her abdomen can only lead to one conclusion, namely that she was seated in the seat belt at the time of the collision, and the seat belt locked on her at impact.
- [102] I would also note that the injuries to the spleen and ribs and those internal injuries are classic injuries attributable to seat belts. Her seat belt probably saved her from more serious injury.
- [103] So, I find she had a seat belt on at the time of the collision, and was seated in the passenger seat.
- [52] There was evidentiary support for the judge's factual inferences that, at the time of the collision, Ms. Gonzales was in the passenger seat wearing a locked seat belt.
- [53] It must be remembered that an independent witness, Mr. Wasyliw, described in some detail how he found Ms. Gonzales in the passenger seat. His description was substantially similar to Ms. Gonzales' description in that she was in significant pain, her seat belt was tight around her body, she was tangled in the seat belt, and the buckle was inaccessible so that it was impossible to undo. He also testified that her feet were over towards the centre console. Mr. Wasyliw's evidence was that he concluded from the way the seat belt was "zinging tight" and wrapped around Ms. Gonzales, it must have been locked. When he jiggled on the seat belt to loosen it, he was only able to create some slack, perhaps a couple of inches.
- [54] Ms. Gonzales testified that before the accident she was worried Mr. Nelson was driving too fast, so she made sure she had her seat belt on. Others testified as to the vehicle travelling at a high rate of speed as well. Ms. Gonzales testified that she kept her head down, but just before the accident, Mr. Nelson exclaimed, and she looked up, saw the vehicle losing control, and put her feet up on the dash. Her evidence was that after the accident her seat belt was tight, especially around her abdomen, and it was causing her pain.

- [55] I agree with the appellant that the judge went too far in his observations that Ms. Gonzales' injuries were "classic injuries" associated with wearing a seat belt. Given the importance of the issue to the case, this conclusion is not so notorious and generally accepted so as to support the taking of judicial notice in line with the test in *R. v. Spence*, 2005 SCC 71. However, the fact there is a mechanism that, upon a sudden movement, catches a locked seat belt and holds it tight against the wearer, is notoriously well known and a matter of everyday experience and did not require evidence. Her injuries could be seen as consistent with the use of a seatbelt, without taking judicial notice of the injuries being "classic injuries".
- [56] The judge's resort to judicial notice as to the cause of Ms. Gonzales' injuries did not lead to any miscarriage of justice. The conclusion she was wearing the seat belt in the passenger seat when the accident occurred could be reached without resorting to judicial notice. There was sufficient evidence from Mr. Wasyliw that supported the inference that Ms. Gonzales was wearing a locked seat belt, and that confirmed Ms. Gonzales' evidence to the same effect.
- [57] The defence theory would require more than a reasonable doubt that Ms. Gonzales was wearing a seat belt. It would require a reasonable doubt as to whether the mechanics of the accident itself could have possibly caused Ms. Gonzales to move from the driver's seat to the passenger seat, somehow avoiding the other person in the vehicle, and once in the passenger seat, to become tangled and trapped by the passenger seat belt found tight around her. Alternatively, the defence theory was that there should be a reasonable doubt that once the vehicle stopped, Ms. Gonzales was quickly able to move to the position in which she was found, despite her very serious injuries.
- [58] That the defence theories failed to raise a reasonable doubt in my view does not indicate any error on the part of the judge.
- [59] The judge had the opportunity to observe Ms. Gonzales give evidence, including during her cross-examination when it was suggested that she was the driver and had decided to point the finger at Mr. Nelson, propositions she adamantly denied. As trial judges are in an advantageous position in terms of observing witnesses and hearing the evidence, appellate courts are deferential to their assessments of credibility: *R. v. Gagnon*, 2006 SCC 17 at para. 11.
- [60] I see no error arising from the judge's acceptance of Ms. Gonzales' evidence that she was the passenger. Once the judge concluded Ms. Gonzales was credible in this regard, this added credibility to the rest of her evidence, including her evidence identifying Mr. Nelson as the driver.

Mr. Martins' Identification of Mr. Nelson

- [61] The appellant criticizes the judge's reference to Mr. Martins' evidence, identifying Mr. Nelson as the man who entered his home the night of the accident, and who left through the back window. The appellant submits that the judge ought not to have treated this evidence as confirmatory of Ms. Gonzales' evidence that Mr. Nelson was the driver.
- [62] The appellant focuses on the many inconsistencies in Mr. Martins' evidence, who the appellant submits was such a bad witness the judge described him as "entertaining."
- [63] The appellant's argument on this point ignores the fact that Mr. Martins and the man who entered his home knew each other, adding weight to Mr. Martins' identification of Mr. Nelson. In addition, his evidence was not the only evidence identifying Mr. Nelson. It was part of an entire body of evidence that was consistent with Mr. Nelson being the driver, including the evidence of the firefighters who followed him. The evidence of Mr. Wasyliw of the male leaving the scene of the accident was also entitled to some weight on this question. The judge concluded "on all of the evidence", that Mr. Nelson was the driver of the vehicle at the time of the collision (para. 108).
- [64] I can see no error in the judge giving Mr. Martins' evidence some weight in reaching the conclusion that he was satisfied beyond a reasonable doubt that Mr. Nelson was the driver of the vehicle.

Photographs of Mr. Nelson

- [65] Also introduced into evidence were photographs of the appellant taken by a police officer the day after the accident. The judge misunderstood the police officer to say that Mr. Nelson had no injuries. In fact, the police officer who took the photographs noticed a bruise under the appellant's right eye but no other injuries. The judge looked at the photographs and concluded they not only revealed a black eye, but they also revealed bruising across Mr. Nelson's back (paras. 90, 106).
- [66] The appellant submits that it was not open to the judge to interpret the photographs in this manner, and further, the photographs would not reveal whether Mr. Nelson was the driver or the passenger.
- [67] On the other hand, the appellant submits it is open to the court to interpret the photographs in favour of the defence. The appellant submits that it is relevant that one of the firefighters testified that the man they followed went into bramble bushes, yet no scratches were seen in the photographs.
- [68] I do not see that much turned on the photographs, one way or the other.

- [69] The judge preferred his own interpretation of the photographs of Mr. Nelson's back, over the evidence of the police officer eyewitness who took the photographs and who thought there was no back injury. Certainly, trial judges must exercise care in reaching conclusions based on their own interpretation of photographs, the quality and clarity of which may be at issue: see *R. v. Nikolovski*, [1996] 3 S.C.R. 1197 at paras. 28-32.
- [70] It is not disputed that the photographs did document an injury to Mr. Nelson's eye. This did not go to whether or not he was the driver, but was consistent with the notion that he was in the vehicle at the time of the accident. But again, it was on the cumulative effect of the whole of the evidence, not individual pieces of it, that the judge was able to conclude that Mr. Nelson was the driver.
- [71] In short, the challenges by the appellant, set out above, regarding the judge's review of the evidence that was consistent with Ms. Gonzales' evidence that she was the passenger, and with her evidence that the appellant was the driver, do not reveal any error on the part of the trial judge.

Evidentiary Errors

- [72] The parties are agreed that in reciting the overall evidence that was confirmatory of the Crown witnesses, Ms. Gonzales and Mr. Vieira, the judge made two errors.
- [73] First, the judge referred to text messages on a cell phone found in the vehicle that were "clearly tied to Mr. Nelson" (para. 99). While the Crown urged the judge to consider this evidence, the Crown now concedes that the content of the text messages had not been properly authenticated and should not be considered. Despite this, the Crown says there was evidence tying the use of the cell phone to Mr. Nelson, thereby linking him to the vehicle. The cell phone in the vehicle rang upon dialing a number stored in Mr. Martins' phone under the name "Chad Friend". Mr. Martins testified that he saved the number in that manner after receiving several phone calls from Mr. Nelson.
- [74] We are not asked on appeal to determine the issue of the admissibility of the text messages and will assume they should not have been admitted. At most, the content of the text messages could raise a potential inference that the holder of the cell phone knew the vehicle and mountain bike were stolen.
- [75] The importance of Mr. Vieira's evidence related to proof that Mr. Nelson had knowledge of the illicit goods in the vehicle, and therefore, could be held to be in possession of them.
- [76] Before considering the text messages, the judge determined that Mr. Vieira's evidence was credible.
- [77] The judge noted Mr. Vieira's evidence as follows:

- [56] Mr. Vieira said he saw Chad [Mr. Nelson] on the afternoon of the events, September 14, driving a black Pathfinder. He thought it was black and white or gold. He said that Mr. Nelson later drove in the Pathfinder to his house, and dropped off another woman by the name of Jen. Mr. Vieira thought this was near dinner time, and that Chad stayed for two or three hours. He said during that time, he and Chad went out to the Pathfinder to look at a mountain bike Chad said he had for sale, but Mr. Vieira said Chad wanted two or three thousand dollars, which was too much. Mr. Vieira also handled a cross-bow. He said then that earlier in the afternoon at Bob's house, Chad was in the Pathfinder and had shown him a shotgun while he was sitting in an adjacent vehicle - Mr. Vieira identified the pump action shotgun that was an exhibit at trial. He said the back of the Pathfinder also contained clothes and tools. He said the gun was by the centre console when they were looking at the bike.
- [78] The judge recognized that Mr. Vieira did not know who was driving at the time of the accident. He accepted the defence argument that Mr. Vieira had a drug habit and was "more than just a friend of Ms. Gonzales" (para. 67). Nonetheless, the judge found Mr. Vieira to be a believable witness.
- [79] Ms. Gonzales also testified to seeing a bicycle and a cross-bow in the vehicle (para. 72). The judge had reason to be confident in accepting her evidence generally based on the independent confirmatory evidence that she was the passenger and Mr. Nelson was the driver at the time of the accident. Her evidence was largely consistent with Mr. Vieira's.
- [80] The text messages were referred to by the judge in answer to the defence argument that Mr. Vieira and Ms. Gonzales were Vetrovec witnesses whose evidence the judge should treat with caution. The judge stated, after referring to the argument based on Vetrovec:
- [99] The points made by counsel about Mr. Vieira and Ms. Gonzales are fairly made, but I note the following. I accept that Mr. Nelson was seen driving the Pathfinder vehicle earlier. Secondly, the messages on the cellphone that is tied, by Mr. Martins' evidence, to the 98 number, and the phone that was found in the car with the various messages regarding the Pathfinder and the bicycle, are clearly tied to Mr. Nelson.
- [100] The key, then, is Ms. Gonzales saying that Mr. Nelson drove, together with the findings at the scene of the accident, where it is said the male exited the vehicle, and that Ms. Gonzales was held tight in the passenger seat belt. Clearly the seat belt mechanism had worked in the collision.
- [Emphasis added.]
- [81] On appeal the parties disagree as to whether the judge did or did not consider Mr. Vieira to be a Vetrovec witness. I see this debate as formalistic and missing the point. The important issue is whether the judge appreciated and considered the defence arguments going to Mr. Vieira's credibility, before accepting his evidence. In my view, he did so.

- [82] The defence theory that Mr. Vieira's evidence should be treated with skepticism because he could be colluding with Ms. Gonzales to help her avoid charges, was clearly rejected by the judge once the judge concluded that Ms. Gonzales was telling the truth about her being the passenger and Mr. Nelson being the driver of the vehicle. Once Ms. Gonzales' evidence was accepted by the judge, her evidence could be treated as confirmatory of Mr. Vieira's evidence.
- [83] Further, Mr. Vieira's evidence was also less important to the Crown case, and therefore was less important to independently confirm.
- [84] The text messages were treated by the judge as secondary evidence consistent with Mr. Vieira's evidence that Mr. Nelson had knowledge of the stolen property in the vehicle, to address the defence argument that Mr. Vieira was a Vetrovec witness whose evidence required confirmation (para. 99), but the text messages were not necessary to the judge's conclusions as to Mr. Nelson's guilt.
- [85] The finding that Mr. Nelson was in possession of the stolen items in the vehicle was not grounded in the text messages. Rather, this finding was grounded in the conclusions that Mr. Nelson was the driver (of this recently stolen vehicle) and in Mr. Vieira's evidence as to what he had seen in the vehicle:
- [108] I am therefore satisfied, on all of the evidence, that Mr. Nelson was the driver of the Pathfinder at the time of the collision on September 14, 2018.
- [109] There are admissions as to the Pathfinder, the licence plate, and the mountain bike all being stolen. There are concessions as to the shotgun and the cross-bow, and, of course, there was Mr. Vieira's evidence that he had seen those items in the vehicle before the accident. They were still in the vehicle at the time of the accident. Counsel also concedes that the injuries to Ms. Gonzales, should I find Mr. Nelson to be the driver, constitute bodily harm.
- [110] I am therefore satisfied, as well, that Mr. Nelson was in possession of the vehicle and the items listed.
- [86] The requirements to establish possession were: (1) knowledge of the presence of the items in question and the nature of those items; and (2) some element of control over those items: *R. v. Morelli*, 2010 SCC 8 at paras. 15-17, citing *Beaver v. The Queen*, [1957] S.C.R. 531 at 541-42; s. 4(3) of the Criminal Code. Ms. Gonzales' evidence made it clear that she was not the one controlling the vehicle, but had been given a ride in it by Mr. Nelson. Once the judge found that Mr. Nelson was the driver and accepted Mr. Vieira's evidence as to Mr. Nelson handling and showing the gun, as well as showing the cross-bow and mountain bike, the inference that Mr. Nelson had knowledge and control of the vehicle and these items followed logically.

- [87] On the counts of possession of stolen property, it was necessary for the judge to conclude that Mr. Nelson had knowledge that the items were stolen. The admissions of fact provided that the vehicle was stolen on September 12 or 13, 2018, and the mountain bike was stolen on September 13 or 14, 2018, both shortly before the accident. The judge also noted the evidence that the vehicle that was stolen was white, and it was found as black but with a very poor paint job such that the white showed through in many places (para. 40). The stolen licence plate was affixed to the vehicle, which was consistent with the efforts to disguise it.
- [88] Absent an innocent explanation, the possession of recently stolen goods may permit an inference of guilt on counts of possession of stolen property: *R. v. Kowlyk*, [1988] 2 S.C.R. 59.
- [89] In my view, had the content of the text messages been excluded, there is no reasonable possibility the verdict would have been different in respect of the judge's conclusion that Mr. Nelson was in possession of the stolen and illicit items. I therefore do not see the judge's reference to the text messages as having any impact on the judge's conclusions as to Mr. Nelson's guilt.
- [90] There is one exception having to do with the count of possession of break-in instruments. The judge gave no reasons for his conviction on this count. This count requires, pursuant to s. 351(1) of the Criminal Code, possession of break-in instruments suitable for the purpose of breaking into a place under circumstances that give rise to a reasonable inference that the instruments have been used or were intended to be used for such purpose.
- [91] The evidence of Mr. Vieira was to having seen tools in the vehicle, but the tools were not identified by him.
- [92] Early in his reasons the judge referred to what was found in the vehicle after the accident, as an "array of instruments and other items scattered around the vehicle: a bolt cutter, screwdrivers, crowbars and the like" (para. 7). It is not unusual to carry some tools in a vehicle. We do not know if the judge considered and rejected the reasonable inference that the flipping of the vehicle during the accident could have dislodged some tools previously stored in the vehicle by its true owner, tools that were unknown to Mr. Nelson or not for use as break-in instruments.
- [93] The judge's review of the items in the vehicle, prior to finding that Mr. Nelson was "in possession of the vehicle and the items listed", did not mention the tools (paras. 109-110, set out above).
- [94] I am of the view that the judge did not provide sufficient reasons for conviction on the count of possession of break-in instruments to allow for meaningful appellate review: *R. v. Sheppard*, 2002 SCC 26 at paras. 24-25.

- [95] The second factual error had to do with the judge's comment about the evidence of Mr. Martins, whose home Mr. Nelson entered as he was followed by the firefighters after the accident. The judge referred to the fact that Mr. Martins also "mentioned hydroplaning, and could only have got that information from Mr. Nelson" (para. 107).
- [96] The reason the judge referred to this evidence was that it was consistent with Mr. Vieira's evidence that Mr. Nelson told him about hydroplaning in the context of describing the accident. This again was in answer to the defence argument that Mr. Vieira was a Vetrovec witness whose evidence required confirmation. However, the judge did not need confirmatory evidence on this point. It was not necessary evidence given the otherwise overwhelming evidence that Mr. Nelson was the driver.
- [97] Furthermore, although the Crown concedes this was an error, it was a subtle one. In fact, Mr. Martins initially testified that Mr. Nelson mentioned hydroplaning to him, but later, in cross-examination, he agreed it was not Mr. Nelson who said it, it was one of the firefighters. The judge may well have considered that Mr. Martins' evidence in direct was more reliable than his evidence under cross-examination. The judge was entitled to consider that the driver of the vehicle would have had better knowledge of what occurred in the accident, and to have been a more likely source of the hydroplaning comment, than would a firefighter who came on the accident scene afterwards.
- [98] The Crown submits that despite the trial judge's errors in his recitation of the two pieces of evidence, the evidence in support of the verdict was overwhelming such that the verdict would have been the same regardless, which would support the application of what is known as the curative proviso in s. 686(1)(b)(iii) of the Criminal Code.
- [99] The curative proviso is appropriate where an error of law occurred in the trial judgment, but the appellate court is satisfied that no substantial wrong or miscarriage of justice occurred: *R. v. McDowell*, 2020 BCCA 52 at para. 28. This proviso may be relied on when the error is harmless or trivial, or where the error is not minor, but the evidence is so overwhelming that the trier of fact would inevitably convict had the error not been made: *R. v. Van*, 2009 SCC 22 at para. 34. Here, the Crown relies on the latter category.
- [100] In *R. v. Sekhon*, 2014 SCC 15, the Court explained the curative proviso and the proper approach to it:
- [52] Section 686(1)(b)(iii) of the Criminal Code, known as the curative proviso, states:
686. (1) On the hearing of an appeal against a conviction or against a verdict . . . the court of appeal
- (a) may allow the appeal where it is of the opinion that
- . . .

(ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or

...

(b) may dismiss the appeal where

...

(iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred; . . .

[53] As this Court has repeatedly asserted, the curative proviso can only be applied where there is no "reasonable possibility that the verdict would have been different had the error . . . not been made" (R. v. Bevan, [1993] 2 S.C.R. 599, at p. 617, aff'd in R. v. Khan, 2001 SCC 86, [2001] 3 S.C.R. 823, at para. 28). Flowing from this principle, this Court affirmed in Khan that there are two situations where the use of s. 686(1)(b)(iii) is appropriate: (1) where the error is harmless or trivial; or (2) where the evidence is so overwhelming that, notwithstanding that the error is not minor, the trier of fact would inevitably convict (paras. 29-31).

[101] I agree with the Crown that the curative proviso applies in relation to the judge's errors regarding the text messages, Mr. Martins' evidence regarding the comment about hydroplaning, and taking judicial notice of the nature of Ms. Gonzales' injuries. Even considering the cumulative effect of these errors, they could not have affected the verdict. I am satisfied that Mr. Nelson's convictions would have been inevitable based on the strength of the other evidence: R. v. White, 2011 SCC 13 at para. 94. The remaining evidence bearing on Mr. Nelson's guilt was overwhelming, apart from the count of possession of break-in instruments.

[102] The judge's failure to give adequate reasons for the conviction on the count of possession of break-in instruments constitutes an error of law, which I do not consider can be cured under the curative proviso. I also do not see the evidence as capable of supporting a conviction on this count.

[103] In R. v. Felix, 2013 BCCA 404, this Court acquitted the appellant of possession of break-in instruments contrary to s. 351(1) of the Criminal Code, among other offences. The appellant was a passenger in a truck, which was stopped by police who found various items inside including walkie-talkies, binoculars, and bolt cutters. Despite suspicious circumstances, the evidence could not support the convictions.

[104] Similarly, in this case, the evidentiary record cannot support a finding beyond a reasonable doubt that Mr. Nelson had knowledge of the presence of the tools in the vehicle and the intent to use them for the purpose of breaking into a place.

[105] I would set aside the conviction on this count and enter an acquittal.

Conclusion

- [106] The judge made no errors in his approach to assessing the credibility of Ms. Gonzales and Mr. Vieira, properly taking into account any risks in accepting their evidence. In the end, there was overwhelming confirmatory evidence that Ms. Gonzales was a passenger in the vehicle. Accepting her evidence in this regard strengthened her evidence that Mr. Nelson was the driver at the time of the accident. The evidence as a whole from a number of witnesses was overwhelming that Mr. Nelson was the driver.
- [107] The evidence of Ms. Gonzales and Mr. Vieira could properly be accepted as not based on collusion. The judge did not need additional evidence confirming Mr. Vieira's evidence as to the items he saw in the vehicle, shown to him by Mr. Nelson.
- [108] While there were some minor errors in the judge's review of the evidence, these would not have impacted the verdict given the overwhelming amount of evidence, accepted by the judge, that Mr. Nelson was the driver. I see no error in the judge reaching the conclusion that he was satisfied beyond a reasonable doubt that Mr. Nelson was the driver of the vehicle at the time of the accident and knew of the various illicit items in the vehicle, with the exception of the alleged break-in instruments.
- [109] The judge failed to give adequate reasons for the conviction on the count of possession of break-in instruments and the evidence is not capable of supporting a conviction on this count. I would therefore allow the appeal from the conviction on the count of possession of break-in instruments, set aside the conviction and enter an acquittal on this count. I would dismiss the appeal on the other convictions.

"The Honourable Madam Justice Griffin"

I AGREE:

"The Honourable Mr. Justice Willcock"

I AGREE:

"The Honourable Mr. Justice Abrioux"

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