

CANADA / JUDGMENT

R v. Pilarinos

2002 BCSC 810

COURT

Supreme Court of British Columbia

DECIDED

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2002BCSC0810

Citation:

HMTQ v. Pilarinos and Clark

Date:

20020528

2002 BCSC 810

Docket:

CC001402

Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

HER MAJESTY THE QUEEN

AGAINST

DIMITRIOS PILARINOS

AND GLEN DAVID CLARK

RULING ON THE MOTION

FOR A DIRECTED VERDICT

OF THE

HONOURABLE MADAM JUSTICE BENNETT

Counsel for the Crown

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Date and Place of Hearing:

May 15, 16 & 17, 2002

Vancouver, BC

[1] Mr. Clark brings an application for a directed verdict against Count 10 in the Indictment. Count 10 reads as follows:

GLEN DAVID CLARK, between December 1, 1997, and March 5, 1999 at or near Vancouver, Penticton, Victoria and elsewhere in the Province of British Columbia, did commit the offence of breach of trust in connection with the duties of his office as an official of the Government of British Columbia, to wit, Premier, President of the Executive Council and Member of the Legislative Assembly, in relation to an application made to the said Government by 545738 B.C. Ltd., a company in which DIMITRIOS PILARINOS held an interest, for a Government licence to operate a casino; and in particular:

- (a) by accepting benefits from Dimitrios Pilarinos in relation to renovations done on his Vancouver residence and his Penticton summer cottage, while the said application was under consideration by the Government of British Columbia;
- (b) by failing to inform the Minister of Employment and Investment that Dimitrios Pilarinos was doing, or had done, work on his Vancouver residence and Penticton summer cottage and that he had received benefits in relation to that work from Mr. Pilarinos;
- (c) before, during, or after receiving the said benefits from Mr. Pilarinos, by assisting 545738 B.C. Ltd. and Mr. Pilarinos in various ways in advancing his casino licence application, including: disclosing to Mr. Pilarinos the official "scores" assigned to 545738 B.C. Ltd.'s application and that of its competitor and exerting influence, directly and/or indirectly, on the Minister of Employment and Investment, Michael Farnworth, to approve the application by 545738 B.C. Ltd. and to facilitate the said company in changing the location of its proposed charitable casino;

- (d) after receiving the "Karmelita" fax in February 1999, by procuring or permitting the use of the influence of his office in order to protect his own personal interests rather than those of the public, including: delegating to George Ford responsibilities with respect to the said fax without disclosing to him his true involvement in connection with the casino application by 545738 B.C. Ltd., and
- (e) after receiving the "Karmelita" fax in February 1999, by failing to ensure that the contents of the said fax were disclosed to the police or to the Ministry of the Attorney General or to GAIO or to Minister Farnworth or to those assisting the Government in dealing with the casino application by 545738 B.C. Ltd. and by acting contrary to the public interest in advising Mr. Pilarinos that one or more Greek "informants" were providing information to investigators concerning the casino application by the said company and thereby jeopardizing ongoing police and GAIO investigations.

and in so doing breached the statutory, expressed, implied or accepted rules, guidelines or terms of office applicable to him as Premier, President of the Executive Council and Member of the Legislative Assembly, including the oaths of office taken by him and the provisions of the Members Conflict of Interest Act, CONTRARY TO SECTION 122 OF THE CRIMINAL CODE.

- [2] The applicable test regarding directing a verdict is the same as that which applies to a committal for trial after a preliminary inquiry (Criminal Code s. 548(1)) and extradition of a fugitive. See: *R. v. Arcuri* (2001), 157 C.C.C. (3d) 21 at 30-31, para. 21 (S.C.C.), and *U.S.A. v. Sheppard* (1976), 30 C.C.C. (2d) 424 (S.C.C.). The test is frequently stated as, "whether or not there is any evidence upon which a properly instructed jury, acting reasonably, could convict". There must be admissible evidence on each essential ingredient of the offence, which could, if believed, result in a conviction. See: *U.S.A. v. Sheppard*, supra; *R. v. Monteleone* (1987), 35 C.C.C. (3d) 193 (S.C.C.), *R. v. Mezzo* (1986), 27 C.C.C. (3d) 97 (S.C.C.), *R. v. Charemski* (1998), 123 C.C.C. (3d) 225 (S.C.C.) and *R. v. Arcuri*, supra. In a case involving circumstantial evidence, the issue of "whether or not there is a rational explanation for that evidence other than the guilt of the accused is for the jury". See: *R. v. Charemski*, supra.
- [3] The defence submits that this test should no longer be the law. The defence makes a compelling argument that the appropriate test is that applied by the appellate courts when reviewing the reasonableness of a verdict pursuant to s. 686(1)(a)(i). The test under this section is, "whether the verdict is one that a properly instructed jury acting judicially could reasonably have rendered". The Court of Appeal is not to substitute its view for that of the jury. Rather, in applying this section, the court must re-examine and to some extent reweigh and consider the effect of the evidence. See: *R. v. Yebes* (1987), 36 C.C.C. (3d) 417 (S.C.C.). This rule also applies to verdicts based on findings of credibility, although the appellate court is expected to give considerable deference to the findings of credibility of the trial court. See: *R. v. W. (R.)* (1992), 74 C.C.C. (3d) 134 (S.C.C.), *R. v. Burke* (1996), 105 C.C.C. (3d) 205 (S.C.C.), and *R. v. Biniaris* (2000), 143 C.C.C. (3d) 1 (S.C.C.).

- [4] The defence relies on several authors who argue that the same test should apply to directed verdicts, preliminary inquiries and appellate review of the reasonableness of a verdict. See: M. Bloos and M. Plaxton, "An Almost Eulogy for the Preliminary Inquiry: 'We Hardly knew Ye'" (2000), 43 *Crim. L.Q.* 516, D. Tanovich, "Monteleone's Legacy: Confusing Sufficiency with Weight" (1994), 27 *C.R.* (4th) 174, D. Tanovich, "Upping the Ante in Directed Verdict Cases Where the Evidence is Circumstantial" (1998), 15 *C.R.* (5th) 21, D. Tanovich, "Should Appellate Courts in Canada be Empowered to Intervene 'Where there Exists a Lurking Doubt?'" in *Towards a Clear and Just Criminal Law*, ed. D. Stuart, R. Delisle and A. Manson, (Toronto: Carswell, 1999) at 422, R. Delisle, "Evidence - Tests for Sufficiency of Evidence: *Mezzo v. The Queen*" (1987), 66 *Can. Bar. Rev.* 389, and R. Deslisle, "Evidence: Principles and Problems" 5th ed., (Toronto: Carswell, 1999) at 158-163, 168-171. The argument is that under the present test a case must go to a jury, even when a judge and eventually an appellate court conclude that the verdict is unreasonable. Bloos argues at p. 521 of his article that this is an unjustifiable discrepancy between the appellate court's standard of deference to the jury and that of the inquiry [or trial] judge. I note that the learned articles relied upon pre-date the Supreme Court's decision in *R. v. Arcuri*, *supra*.
- [5] The argument suffers from three flaws. First, it overlooks the fundamental role of the jury in a democratic society. A jury is more than twelve citizens called upon at random to judge their fellow man or woman. The jury forms part of the democratic process. Its modern origins are exemplified in the trial of William Penn, where the jury insisted on applying the law in the face of judicial orders to do otherwise. See: *Bushel's Case* (1670), 124 *E.R.* 1006. Participation on a jury is the most direct, and sometimes the only way a juror will participate in the democratic process.
- [6] The rationale for the jury system is stated by Jeffrey Abramson in *We The Jury* (BasicBooks: New York, 1994) at p. 6:

The whole point [of a jury] is to subject law to a democratic interpretation, to achieve a justice that resonates with the values and common sense of the people in whose name the law was written.

- [7] The "common sense" approach of the appreciation of the jury has been affirmed a number of times by Canadian courts. See: *R. v. Corbett* (1988), 41 *C.C.C.* (3d) 385 (*S.C.C.*). A single judge's view of the evidence may be quite different than that of the jury. Indeed, jurors are often given this instruction when a judge decides to express his or her view of the evidence.
- [8] The next matter overlooked by the defence is the role of the appellate court in the application of s. 686(1)(a)(i). The review pursuant to s. 686(1)(a)(i) is conducted on the entire record of the proceedings, not just the Crown's case. The distinction between the tests on a directed verdict and the application of s. 686(1)(a)(i) is squarely addressed in the dissenting reasons of Wood J.A. in *R. v. Allender* (1997), 117 *C.C.C.* (3d) 1 at 33. (The difference between the majority and minority decisions was on an analysis of the evidence, not the applicable legal principles) The defence in *Allender*, *supra*, argued firstly, that the judge should have

directed a verdict on the charge of first degree murder (as opposed to second degree). Alternatively, the defence argued that the appellate court should overturn the conviction because it was unreasonable and not supported by the evidence. Wood J.A. noted that the trial judge correctly left the matter with the jury, stating that: "It was no part of his function, when deciding the motion, to weigh that evidence against any which might support a contrary inference". He went on to say, at para. 90:

The principle by which the proper determination of a motion for a directed verdict of acquittal is governed, like the motion itself, is a product of the common law. As such, it acknowledges and affirms the supremacy of the jury in all matters of fact, including the verdict itself. However, supremacy yields to mere deference when, in the exercise of its statutory jurisdiction under s. 686(1)(a)(i) of the Criminal Code, this Court must determine whether, on the whole of the evidence, the verdict was one that a properly instructed jury, acting judicially, could reasonably, have rendered. As was noted in *Yebes v. The Queen*, [1987] 2 S.C.R. 168 at 186, 36 C.C.C. (3d) 417: [Emphasis in original]

While the Court of Appeal must not merely substitute its view for that of the jury, in order to apply the test the court must re-examine and to some extent reweigh and consider the effect of the evidence. This process will be the same whether the case is based on circumstantial or direct evidence. [Emphasis added by Wood J.A.].

[9] The appellate court relies on the judicial experience of more than one judge when assessing the reasonableness of the verdict. See *R. v. Biniaris*, supra, at para. 41. This statutory review provides an additional safety net for the accused based on the entire trial record. A reasoned review of the evidence by the appellate court must take into account the opportunity of the jury to see and assess the witnesses. See: *R. v. Francois* (1994), 91 C.C.C. (3d) 289 (S.C.C.). Thus, the fact-finding process is left to the jury (or judge sitting alone), and the appellate court has a limited statutory ability to review the entire record, and, with due deference to the finder of fact, ascertain whether, on the whole of the evidence, the verdict is supported by the evidence or is unreasonable. Therein lies the importance of the different roles of the trial judge evaluating whether a verdict should be directed and the appellate court's ability to review the entire record.

[10] Finally, although the defence made reference to the decision in *R. v. Arcuri*, supra, their argument overlooks the effect of this decision. This case dealt with the test to be applied to whether there is evidence to commit an accused for trial after a preliminary inquiry. However, the Court confirmed that the test is the same as for a directed verdict, thus the analysis found therein is apposite. The unanimous decision of the Court was given by McLachlin C.J.C., where she stated, at para. 1:

I reaffirm the well-settled rule that a preliminary inquiry judge must determine whether there is sufficient evidence to permit a properly instructed jury, acting reasonably, to convict, and the corollary that the judge must weigh the evidence in the limited sense of assessing whether it is capable of supporting the inferences the Crown asks the jury to draw. As this Court has

consistently held, this task does not require the preliminary judge to draw inferences from the facts or to assess credibility. Rather, the preliminary inquiry judge must, while giving full recognition to the right of the jury to draw justifiable inferences of fact and assess credibility, consider whether the evidence taken as a whole could reasonably support the verdict.

[11] As noted above by Wood J.A. in *R. v. Allender*, supra, the application for a directed verdict is based on the common law. In her reasons, the Chief Justice referred to the articles by Bloos and Tanovich. While it does not appear that the issue I have before me was squarely raised, there is no doubt that the Chief Justice was alive to the issues. In *R. v. Arcuri*, supra, the unanimous Court clearly reaffirmed the current state of the common law regarding the applicable test for a directed verdict. As a trial judge, I am bound by this authority, with which, I add, I respectfully agree.

[12] The test is, as stated above, "whether or not there is any evidence upon which a properly instructed jury, acting reasonably, could convict".

[13] The decision in *R. v. Arcuri*, supra, also provides clear direction to the judge regarding how to apply this test. The Court held that the judge's task in applying the test will vary depending on the nature of the evidence. If there is direct evidence on each essential ingredient of the offence, and the only issue is whether the evidence is believed, the case must go to the jury. See: para. 22.

[14] At para. 23, McLachlin C.J.C. set out the approach to be taken when considering whether to send the matter to the jury:

The judge's task is somewhat more complicated where the Crown has not presented direct evidence as to every element of the offence. The question then

becomes whether the remaining elements of the offence -- that is, those elements as to which the Crown has not advanced direct evidence -- may reasonably be inferred from the circumstantial evidence. Answering this question inevitably

requires the judge to engage in a limited weighing of the evidence because, with circumstantial evidence, there is, by definition, an inferential gap between the evidence and the matter to be established -- that is, an inferential gap beyond

the question of whether the evidence should be believed: see Watt's Manual of Criminal Evidence, supra, at Section 9.01 (circumstantial evidence is "any item of evidence, testimonial or real, other than the testimony of an eyewitness to a

material fact. It is any fact from the existence of which the trier of fact may infer the existence of a fact in issue"); McCormick on Evidence, supra, at pp. 641-42 ("circumstantial evidence . . . may be testimonial, but even if the circumstances depicted are accepted as true, additional reasoning is required to reach the desired conclusion"). The judge must therefore weigh the evidence, in the sense of assessing whether it is reasonably capable of supporting the inferences that the Crown asks the jury to draw. This weighing, however, is limited. The judge does not ask whether she

herself would conclude that the accused is guilty. Nor does the judge draw factual inferences or assess credibility. The judge asks only whether the evidence, if believed, could reasonably support an inference of guilt.

[15] The task for the judge, when circumstantial evidence is relied on by the Crown (including evidence called by the defence at a preliminary inquiry), is whether the inference the Crown is relying on is reasonable. The test is not what inference the judge as a trier of fact would find, but whether the jury could reasonably draw the inference argued for by the Crown based on the admissible evidence. While this is a weighing of the evidence, it is limited. The weighing at this stage involves only an assessment of the reasonableness of the inferences to be drawn from the circumstantial evidence. See: *R. v. Arcuri*, supra, at para. 30.

[16] As noted by the Chief Justice, this principle is not new but well-settled. McLachlin C.J.C. quotes, at para. 24, from the decision of *Metropolitan Railway Co. v. Jackson* (1877), 3 App. Cas. 193 (H.L.), at p. 197:

The Judge has a certain duty to discharge, and the jurors have another and a different duty. The Judge has to say whether any facts have been established by evidence from which [the matter in issue] may be reasonably inferred; the jurors have to say whether, from those facts [the matter in issue] ought to be inferred. [Emphasis omitted].

[17] The Court reaffirmed the principle in *R. v. Mezzo*, supra, that it is not the function of the judge on a motion for a directed verdict (or preliminary inquiry) to determine whether guilt is the only reasonable inference from the circumstantial evidence. The judge cannot draw final inferences from the facts on this type of motion.

[18] The defence submits that when the trial is conducted by judge alone, the distinction between the trier of fact and the judge is artificial because they are one in the same. It must be recalled that this motion is brought before the accused elects to call evidence. I am not asked at this point to determine if the Crown, on the evidence before me, has proved its case beyond a reasonable doubt. This decision is made if the accused either elects to call no evidence or at the end of the trial. The distinction between the two decisions is real and, on the present state of the law, there is a clear line drawn between the task of the judge on a motion for a directed verdict and a verdict based on what the judge knows is all of the evidence tendered at trial.

[19] With this test in mind, I turn to the issue of whether there is evidence in the case before me upon which a properly instructed jury, acting reasonably, could convict.

[20] The elements of the offence are set out in earlier reasons in this trial: *R. v. Pilarinos and Clark* [2002] B.C.J. No. 609 (QL), 2002 BCSC 452. Relying on the decision of *R. v. Perreault* (1992), 75 C.C.C. (3d) 425 at 442, I held that the elements of the *actus reus* are as follows at paras. 73-74:

I have, as noted above, generally adopted the analysis of the Quebec Court of Appeal regarding the actus reus of the offence as stated in *R. v. Perreault*, supra, at 442. For convenience, I set it out again below:

1. that the accused be an official (civil servant);
2. that the impugned act be committed in the general context of the execution of his [or her] duties;
3. that the act constitute a fraud or a breach of trust.

Now to identify the necessary conditions for this third constituent element in the case of a breach of trust, it appears that the following conditions must be met:

- i) The accused did an act or failed to do an act contrary to the duty imposed on him [or her] by statute, regulation, his [or her] contract of employment or directive in connection with his [or her] office.
- ii) The act done must give him [or her] a personal benefit directly (for example: pecuniary compensation, an advantage in kind, in services, etc.) or indirectly (for example: an advantage to his spouse, a member of his family, or even in certain cases a third person). This benefit may be direct (for example: the payment of an amount of money) or indirect (for example: the hope of promotion, the desire to please a superior).

The existence of a real prejudice or a loss to the public or to the state is not an element of the offence according to the jurisprudence which is unanimous in this regard.

As noted above, Baudouin J.A, included "receipt of some benefit" as an essential element in the offence as a way of limiting the ambit of the offence.

[21] The fault element or mens rea is set out in *R. v. Pilarinos and Clark*, supra, at paras. 86-87:

I find that the requisite mens rea for a breach of trust in s. 122 is a subjectively based culpable mental element. The offence does not include an objectively based (ought to have known) fault element. It is a general intent offence and the fault element may also be found on wilful blindness or recklessness.

I conclude that the fault element of s. 122 is met by an official who does a prohibited act intentionally or recklessly, with knowledge of the facts constituting the act, or with wilful blindness towards them: *R. v. City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299 and *R. v. Vander Zalm*, supra. The fault element also includes subjective foresight of the consequences. By this I mean that the official must know, or be reckless or wilfully blind, that by his or her conduct (breach of a duty), he or she will receive a benefit, as defined above. The fault element does not include the intent to commit a breach of trust or even to act dishonestly. The official does not have to know that the act is a breach of their duty. As noted in the section, the prohibited act does not necessarily have to have been unlawful. It is the position of power of the person committing the act that makes the act a crime. Protection of the integrity of government justifies this standard.

- [22] Certain essential elements are not in issue, such as identification and the fact that Mr. Clark was an official. The defence, in their argument, has submitted that there is no evidence on several of the essential elements of the offence. However, their argument can be more properly characterized as asking me to draw inferences from the evidence, as opposed to determining whether the admissible evidence reasonably supports the inferences sought by the Crown.
- [23] There is direct evidence of certain essential elements, plus there is evidence upon which a jury could reasonably draw inferences regarding other essential ingredients. The evidence is that Mr. Pilarinos worked on a renovation for Mr. Clark at his home in East Vancouver and at his summer cottage in Penticton. There is evidence that Mr. Clark did not pay for some or all of the labour. Mr. Clark's explanation for this is a matter to consider, however, as I have repeatedly noted, my task is not to draw inferences at this stage of the proceedings. Thus, there is evidence from which a jury could reasonably infer that Mr. Clark received a benefit. This is not to say that this is the only inference to be drawn on the evidence, only that it is one that is reasonable based on the evidence. There may well be other rational explanations for this evidence, but drawing an inference is not the function I must perform on this motion.
- [24] The defence argued that the construction work done by Mr. Pilarinos was in relation to Mr. Clark's personal and family life, and cannot be connected with his duties as a Premier. However, there is evidence that this work was done at the same time Mr. Pilarinos' application for a casino licence was pending in the government and close in time to when the matter of casino licences came before the Cabinet.
- [25] There is direct evidence from Mr. Farnworth that Mr. Clark discussed the North Burnaby Inn casino application with him, as well as the casino applications generally. There is evidence that Mr. Clark pressured Mr. Farnworth to approve more casinos in the Lower Mainland. This is some evidence that he breached a duty imposed on him by virtue of his office. There is evidence that this act was done intentionally by Mr. Clark and there is evidence from which the inference could be drawn that he knew that he had or would receive a personal or private benefit from this act, keeping in mind that the intent may be founded on recklessness or wilful blindness.
- [26] These are not findings of fact, but simply a statement of evidence.
- [27] On this evidence alone, I find that there is evidence to meet the test set out in *U.S.A. v. Sheppard*, *supra*, as confirmed in *R. v. Arcuri*, *supra*. The Crown is not obliged to ultimately prove each allegation in the indictment beyond a reasonable doubt. The Crown must prove each essential ingredient of the offence beyond a reasonable doubt.
- [28] The Crown has also relied on evidence found in out-of-court statements attributed to Mr. Pilarinos. Some of these statements are heard in the conversations that Mr. Pilarinos allegedly had with others captured by the wiretap. Some of the evidence are statements in writing attributed to Mr. Pilarinos found in documents seized, and some of the evidence are

statements attributed to Mr. Pilarinos by Dimitri Vrahnos, who testified regarding his conversations with Mr. Pilarinos. The evidence upon which the Crown seeks to rely is set out in its written argument, and I have reproduced it verbatim below:

- Mr. Pilarinos' knowledge in August 1998 that his application had scored significantly higher than Mr. Luu's and that he believed he had scored 87 points (in fact he scored 88). See evidence of Rachel Barkey, January 16, 2002, p. 11, p. 35 and p. 39; evidence of Dimitrios Vrahnos, February 28, 2002, p. 6/7 and p. 17; August 14 News Release Ex. 59-11;
- Mr. Pilarinos' knowledge in the fall of 1998 as to how approval-in-principle would be obtained. (Evidence of Dimitrios Vrahnos, February 28, 2002, p.20/1 and statement of Mr. Clark, Ex. 29, p. 36)
- that "Victoria is going to pass a new legislation to override municipalities for having a say in the slot machine issue by February or March". (Fax dated January 5, 1999, Ex. 62-18).
- in response to a fax from Ng (Ex. 62-19) to "make enquiries with your friend and see if this deadline is okay" [February 18, 1999], Mr. Pilarinos responded by fax dated January 7, 1999 (Ex. 62-20) "last night I saw my friend to see if he could do anything for me. His friend is away on holidays and expected back on Sunday. He will know more on Monday".
- references in the intercepted private communications by Mr. Pilarinos to a note that Mr. Clark has put in his file in which a jury could find is reference to the Dix memo. See for example Call #17, p. 1 and 2.
- that in Call #32, Mr. Pilarinos knows that Farnworth sent the "move" letter to MacKinnon to deal with. (p.4)
- that in Tr. No. 49, Mr. Clark is about to tell Mr. Pilarinos what "the situation is", that Mr. Pilarinos has a document to show Mr. Clark, and that they arrange to "talk" at Mr. Clark's residence the next morning.
- that Mr. Pilarinos knew that the GAIO investigation commenced in October (Vrahnos evidence, March 1, 2002, p. 6/7) and that they did not do the investigation of his application at the beginning because "they didn't think [I] would pass". (Intercepted Private Communication Tr. 50, p. 32)
- that Mr. Pilarinos knew that Greeks were alleging that Pascali was a "silent partner" and that they will say more if Pilarinos continues with his application. (Intercepted Private Communication Tr. 52, p. 1-3 and Tr. 59, p. 1/2)

[29] The defence submits that this evidence is hearsay and is therefore inadmissible. The Crown's position is that this evidence is not tendered for the truth of its contents, but as circumstantial evidence. The Crown says that Mr. Pilarinos' knowledge of certain matters is admissible evidence to establish his state of knowledge, and to permit the trier of fact to draw the inference that he learned this information from Mr. Clark.

[30] The difficulty with the analysis is that while the evidence is not being tendered for the truth of its contents, the closer Mr. Pilarinos' knowledge comes to the true state of affairs, the more probative his state of knowledge.

[31] Sometimes in order to analyze a difficult proposition, it is helpful to go back to first principles. The classic definition of hearsay is found in *Subramaniam v. Public Prosecutor*, [1956] 1 W.L.R. 965 (P.C.) at 969:

Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact it was made. The fact that the statement was made, quite apart from the truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or some other person in whose presence the statement was made.

[32] A more modern statement of the law is found in *R. v. Evans*, [1993] 3 S.C.R. 653 at 661-2, where Sopinka J. said:

An out-of-court statement which is admitted for the truth of its contents is hearsay. An out-of-court statement offered simply as proof that the statement was made is not hearsay, and is admissible as long as it has some probative value.

[33] Evidence may be admissible for one purpose and inadmissible for another. A classic example of evidence admissible to prove the fact of a statement as opposed to the truth of its contents is found in *R. v. Ratten*, [1972] A.C. 378 at 387 (P.C.). At issue was the admissibility of a telephone call made by the deceased at a certain time, in a distressed voice. The fact of the telephone call was admitted through the telephone operator to prove the call had been made, not to prove the truth of the contents of the conversation.

[34] The test of admissibility as circumstantial evidence is whether the evidence is relevant. See *R. v. Ratten*, *supra*.

[35] The difference between state of mind as an exception to the hearsay rule and as circumstantial evidence is discussed by Doherty J. (as he then was), in *R. v. P. (R.)* (1990), 58 C.C.C. (3d) 334 (Ont.H.C.), at p. 341:

Assuming relevance, evidence of utterances made by a deceased (although the rule is not limited to deceased persons) which evidence her state of mind are admissible. If the statements are explicit statements of a state of mind, they are admitted as exceptions to the hearsay rule. If those statements permit an inference as to the speaker's state of mind, they are regarded as original testimonial evidence and admitted as circumstantial evidence from which a state of mind can be inferred. The result is the same whichever route is taken

[36] There is no doubt care must be taken when this type of evidence is tendered before a jury. The evidence must be analyzed to ascertain if the probative value of the evidence is outweighed by its prejudicial effect. If the evidence is admitted, a careful instruction must accompany the evidence. However, this is a judge alone trial, and the possibility of prejudice is considerably lessened.

[37] Wigmore addressed the issue in this way:

The hearsay rule forbids merely the use of an extrajudicial utterance as an assertion to evidence the fact asserted. Such a use would be testimonial, i.e., we should be asked to believe the fact because Doe asserted it to be true, precisely as we should be asked to believe Doe's similar assertion if made on the stand. What the hearsay rule forbids is the use of testimonial evidence - i.e., assertions --- uttered not under cross-examination. If, then, an utterance can be used as circumstantial evidence, i.e., without inferring from it as an assertion to the fact asserted ..., the hearsay rule does not oppose any barrier, because it is not applicable. For example, when it is material to show that Doe knew of a sale by Roe, the letter of notification by Roe to Doe, "Take notice that I have this day sold a carload of wheat to J.S.," is receivable, not as a testimonial assertion by Roe to prove the fact of the sale, but as indicating circumstantially (i.e., indirectly) that Doe obtained knowledge of the sale; the fact of sale being proved by other evidence.

[Evidence in Trials at Common Law, Vol. 6, Chadbourn Ed. (Little, Brown and Company,: Toronto, 1976 at 313.]

[38] The law is clear that evidence from a person, not called as a witness, is admissible if it is not tendered for testimonial purposes. Whether the statement is true or not is irrelevant as the evidence is admitted to show the statement was made, not for the truth of its contents. See also *R. v. Chahley*, [1992] B.C.J. No. 1121 (QL) at p. 10 (B.C.C.A), *R. v. Burnett and Ruthbern Holdings Ltd.* (1986), 25 C.C.C. (3d) 111 at 113-118 (Ont. H.C.) and *R. v. Evans*, *supra*, at p. 104.

[39] All of the above-noted statements relied upon by the Crown are relevant with regard to the charges before the Court. The statements attributed to Mr. Pilarinos, either through the wiretap, documents seized or through Mr. Vrahnos are admissible, not for the truth of their contents, but for the fact they were made. The truth of the contents of the statements, if relevant, must be proved by other admissible evidence.

[40] There is evidence of Mr. Clark and Mr. Pilarinos meeting, socializing and driving from Vancouver to Penticton together during the relevant time. There are other explanations regarding how Mr. Pilarinos may have received this information. On a directed verdict application, I must assume the statements were made. It is open to the trier of fact to reasonably infer that Mr. Pilarinos gained his state of knowledge from Mr. Clark. This also forms part of the evidence of the essential elements of s. 122 of the Criminal Code.

[41] The aforementioned statements are therefore admissible as circumstantial evidence against Mr. Clark. The evidence is admissible generally against Mr. Pilarinos. This latter point was not in issue.

[42] The application for a directed verdict of acquittal on Count 10 of the Indictment is dismissed.

"E.A. Bennett, J."

The Honourable Madam Justice E.A. Bennett

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