

CANADA / JUDGMENT

R. v. Plotnikoff

2022 BCSC 2453

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Supreme Court of British Columbia

DECIDED

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2022 BCSC 2453 R. v. Plotnikoff

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Plotnikoff,

2022 BCSC 2453

Date: 20220713

Docket: 93950-2

Registry: Kelowna

Regina

v.

Ryan Lawrence Robert Plotnikoff

Before: The Honourable Madam Justice Hardwick

Oral Reasons for Judgment

Counsel for the Crown:

F. Lépine

Counsel for the Accused:

D.M. Melville

Place and Date of Trial/Hearing:

Kelowna, B.C.

July 13, 2022

Place and Date of Judgment:

Kelowna, B.C.

July 13, 2022

- [1] THE COURT: These are my oral reasons for judgment in respect of the one-count indictment for Ryan Lawrence Robert Plotnikoff in relation to a single indictment arising from a lone incident in the late hours of December 26 and the early morning hours of December 27, 2020. I have elected to give oral reasons for judgment today in order to expedite the delivery of same. If I took additional time to craft these reasons, they might be more grammatically correct and eloquent, but ultimately my decision would be the same.
- [2] In this regard, I will note that as these are oral reasons for judgment, should a transcript be ordered, I reserve the right to edit these reasons to include full citations of any statutory authority and case law referred to, and to edit for style and grammar. However, again, the substance of my decision will not change.
- [3] As alluded to above, Mr. Plotnikoff is charged on a single-count indictment as follows:

Count 1

Ryan Lawrence Robert PLOTNIKOFF, on or about the 26th day of December, 2020, at or near the City of Kelowna, in the Province of British Columbia, did unlawfully possess a controlled substance, to wit: Methamphetamine, for the purpose of trafficking, contrary to Section 5(2) of the Controlled Drugs and Substances Act.

- [4] Mr. Plotnikoff admits that he was in possession of the controlled substance referred to in the indictment, and there are no issues raised which invoked a consideration of the Charter of Rights and Freedoms [Charter] beyond the obvious principle enshrined in s. 11 of the Charter that Mr. Plotnikoff is presumed innocent of the charge unless proven guilty beyond a reasonable doubt. As such, Mr. Plotnikoff's counsel has invited the Court to find Mr. Plotnikoff guilty on the lesser included offence of possession of the named substance under s. 4(1) of the Controlled Drugs and Substances Act in the event I conclude that he is not guilty of possession of the controlled substance for the purpose of trafficking.
- [5] To reiterate this point, and as I will return to further slightly in the analysis portion of these oral reasons for judgment, this case fundamentally turns on whether Mr. Plotnikoff was possessing the controlled substance in issue for personal use or whether he was possessing the controlled substance in issue for the purpose of trafficking it.
- [6] Substantially all of the facts of this case are uncontroverted. There is an agreed statement of facts pursuant to s. 655 of the Criminal Code entered as Exhibit 1 at the trial. The are as follows:

- [1] On Dec 26, 2020 at 11:31 pm, the Kelowna RCMP were advised by a civilian that a Toyota was stuck in the snow near the Big White Ski resort as a result of a motor vehicle accident and that its occupants required assistance.
- [2] Cst. Ruitenbeck was on patrol and responded to the call. He found the Toyota at 12:52 am on December 27, 2020 near a forest service road, about 63 km from Kelowna on Highway 33 near the Arlington Lakes turn off in the province of British Columbia.
- [3] When Cst. Ruitenbeck arrived at the scene of the accident, Pamela Cochran, the registered owner of the Toyota, was in the driver's seat. Ryan Plotnikoff, the accused, was in the front passenger seat.
- [4] Cst. Ruitenbeck confirmed that the occupants of the vehicle were not injured and was advised that the Toyota had a completely flat rear tire and was stuck in the snow.
- [5] By conducting certain checks, Cst. Ruitenbeck learned that Ryan Plotnikoff was associated to the Toyota and to Ms. Cochran and had an outstanding endorsed warrant for his arrest.
- [6] Cst. Ruitenbeck determined that the passenger was Ryan Plotnikoff and arrested him on his outstanding warrant at 1:05 a.m. on December 27, 2020.
- [7] Cst. Ruitenbeck searched Mr. Plotnikoff at the scene and found in the right front pocket of his sweater a Ziploc bag that contained 5 one ounce bags of methamphetamine, a controlled substance.
- [8] The photograph attached to this document accurately depicts the five bags of methamphetamine and the bigger Ziploc bag in which Cst. Ruitenbeck found them.
- [9] Cst. Ruitenbeck searched the Toyota but did not find anything else of note.
- [10] The five bags of methamphetamine weighed 29 grams, 29 grams, 28.5 grams, 28.8 grams and 29.3 grams, for a total of 144.6 grams, with the bags.
- [10] Each of those five bags, when emptied, weighed 1.2 grams.
- [11] The total weight of the methamphetamine, without any bag, was 138.6 grams.
- [12] Ryan Plotnikoff was in possession of those 138.6 grams of methamphetamine (the "methamphetamine") at all relevant times.
- [13] Ryan Plotnikoff admits all the elements of the offence except that he possessed the methamphetamine for the purpose of trafficking.
- [7] The key facts admitted are that Mr. Plotnikoff had 138.6 grams of methamphetamine in his possession at the time of his arrest. This is not an insignificant amount for a single individual to possess and was in separate bags.

- [8] There were no score sheets, no other drug paraphernalia, and no cash on Mr. Plotnikoff. It may be that Mr. Plotnikoff had a cellphone. This was not clear on the evidence, but it was clear he did not have multiple cellphones.
- [9] The only other evidence tendered was the expert evidence of Sergeant Greg Woodcox. He was qualified as an expert in the following areas without objection from defence counsel: (a) packaging, (b) methods of distribution/methods of sale, (c) consumption and rate of consumption (basically how long a user would go through that quantity of methamphetamine), (d) prices and values, and (e) purchasing habits of drug users.
- [10] Sergeant Woodcox provided helpful evidence to the Court within the areas of his expertise. It is very clear that he is indeed a properly qualified expert in these matters. He also clearly appreciates his role as an expert is to be impartial and not an advocate.
- [11] The difficulty that arises from Sergeant Woodcox's testimony is where he offered up that it was possible that the controlled substance possessed by Mr. Plotnikoff was for personal use, although he qualified it was likely not plausible. Sergeant Woodcox then offered other scenarios where personal users would possibly buy in bulk, larger than what a "usual drug user" would acquire in smaller quantities. His ultimate opinion, though, was that the amount of drugs, the lack of drug use paraphernalia, and the evenly-measured nature of the bag supported a conclusion that the controlled substance was in Mr. Plotnikoff's possession for the purpose of trafficking.
- [12] On cross-examination, Sergeant Woodcox stressed that he does not like to speak in absolutes, such as to say something is impossible. He continued to maintain his position that it was possible but not plausible.
- [13] Following the end of cross-examination of Sergeant Woodcox, counsel for the defence brought an application for a directed verdict. Considering the test set forth at para. 19 in *R. v. Wright*, 2009 BCCA 514, which adopts the principles from the decision of the Supreme Court of Canada in *R. v. Charemski*, I dismissed that application. In so doing, I made it clear that the fact that an expert concedes that something is possible does not invalidate their opinion. Truly anything is possible. That does not make it plausible.
- [14] I thus proceeded to consider the matter on its merits. In so doing, I have reviewed the caselaw referred to me by counsel.
- [15] Although I am mindful these matters are entirely fact specific, and that it is my role as the trier of fact to conclude if guilt beyond a reasonable doubt has been proven on the single count of the indictment in accordance with the presumption of innocence, the decision of *R. v. Haroon*, a decision of Judge Dhillon of the Provincial Court, has many similar facts and contains a very helpful summary of other relevant authorities, including Court of Appeal authorities and Supreme Court of Canada authorities.

- [16] As Haroon does not appear to be formally reported, I shall insert the entirety of paras. 36 to 62 into these reasons for judgment at this juncture:
- [36] The central issue in this case is whether the Crown has proven to the criminal standard that the accused had possession of 52.25 grams methamphetamine for the purpose of trafficking. This element relates to the purpose or intention behind the accused's possession of the drugs.
- [37] The accused is presumed to be innocent of the charges against him and is not obliged to testify. He did not do so.
- [38] Proof of the purpose or intention behind the possession of the drugs in this case depends largely on an assessment of the circumstantial evidence. The Supreme Court of Canada in *R. v. Villaroman*, 2016 SCC 33 (CanLII), [2016] S.C.J. 33 (S.C.C) at para. 55, stated that where the Crown's case depends on circumstantial evidence, the question is whether the trier of fact, acting judicially, could reasonably be satisfied that the accused's guilt is the only reasonable conclusion available on the totality of the evidence.
- [39] The SCC directed the fact-finder to proceed with caution in drawing inferences from circumstantial evidence. At paras. 36-38 of *Villaroman*, the following instructions are set out:
- (i) In assessing circumstantial evidence, the trier of fact should consider a range of reasonable inferences that can be drawn from the proven facts, including any plausible theories and reasonable possibilities that are inconsistent with guilt.
 - (ii) Other plausible theories or reasonable possibilities must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation.
 - (iii) A theory alternative to guilt may not be speculative simply because it arises from the absence of evidence. A gap in the evidence may result in an inference other than guilt, if such an inference is a reasonable one and arises on the evidence assessed logically and in light of human experience and common sense.
 - (iv) Ultimately, the trier of fact must ask "whether the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty."
- [40] In a circumstantial case, the trier of fact must take into account the relevance of all the evidence to the issue to be decided. It must consider what inferences a piece of evidence may or may not support, either by itself or in relation to other evidence, or to the absence of evidence. In undertaking this assessment, some pieces of circumstantial evidence may not carry much weight when initially placed on the evidentiary scale, but may take on a different cast when joined with other evidence and assessed collectively. The duty of the Court is to examine the evidence in its totality to determine whether collectively the circumstantial evidence, or the absence of evidence, provides the level of certitude

necessary to meet the criminal standard for conviction.

- [41] The strongest single element pointing towards possession for the purpose of trafficking is the 52.25 grams of methamphetamine found on Mr. Haroon. This amount of methamphetamine represents over a three to four week supply of drugs or longer, if possessed for personal use by a very heavy, daily user of methamphetamine.
- [42] The expert evidence of DC Belkin was that it is not common for a typical user, specifically a street user, to possess this amount of bulk methamphetamine because the drug is readily available for purchase in the community. [Emphasis in original]
- [43] The Crown contends that this amount of methamphetamine, taken together with the weapons, digital scales, and small plastic baggies, and cash establishes that the methamphetamine was intended for distribution, including by repackaging into smaller baggies for resale. The Crown's theory is that it was possessed for the purpose of trafficking.
- [44] The position put forward by the Crown must be assessed in the context of the concessions made by the DC Belkin during cross-examination. He was, in my view, a fair and balanced expert, who was disinclined to speculate and was prepared to consider alternative inferences that might arise on the evidence. He agreed that the digital scales found on Mr. Haroon can also be found on drug users seeking to verify purchase amounts on their own scales. He also agreed that both drug sellers and drug addicts possess a variety of weapons for personal protection.
- [45] He conceded that a heavy user of methamphetamine, particularly one who is not a street user and who has sufficient financial resources to buy in bulk, could purchase at the ounce level to attain a significant saving in the purchase price.
- [46] He agreed that although Mr. Haroon did not have drug use paraphernalia such as pipes or syringes as is typically and very commonly found on a street user, such paraphernalia is not required for a heavy user who snorts methamphetamine.
- [47] The \$672.50 cash seized from Mr. Haroon was said to be a "fair amount", but not described as a significant amount. As the denominations were not recoded after seizure, the cash does not provide additional strength to the indicia of street level trafficking.
- [48] The absence of cell phones, which are commonly a tool of the trade in drug trafficking, and score sheets which are used to record sales, is a further factor in the assessment of culpability.
- [49] The question I must decide is whether the Crown in this case has discharged its burden to show, beyond a reasonable doubt, that the circumstantial evidence in this case permits, as the only reasonable inference, that the accused possessed the methamphetamine for purposes of trafficking. I must ask whether there are any plausible theories or other reasonable possibilities which are inconsistent with guilt and consistent with possession of the drugs for any purpose other than trafficking.

- [50] In *R. v. Khan*, 2017 BCCA 101, the B.C. Court of Appeal dismissed a conviction appeal where the amount and value of the drugs were so overwhelming as to negate personal possession as a reasonable inference. The expert evidence of trafficking in *Khan* was anchored in the "significant street-value of the drugs and how long it would take a user to consume them". The value of the drugs was in excess of \$14,000, and possibly up to \$72,000 on one estimate, depending on the method of sale. As to drug consumption rate, the opinion evidence was that it would take a heavy user 11 years to consume 3,200 ecstasy tablets and 200 grams of ecstasy powder found in the accused's residence.
- [51] In *Khan*, the absence of several indicia associated with possession for purpose of trafficking, such as weapons, score sheets, or packaging materials, did not detract from the strong inference of trafficking established by the significant commercial value of the drugs. The astronomical period of time required for personal consumption, permitted no other reasonable inference but that of possession for trafficking.
- [52] By contrast, in *R. v. Perjalian*, 2011 BCCA 323, the B.C. Court of Appeal noted that the amount of drugs found must be assessed in light of all the evidence, including the following concessions by the expert in that case:
- [75] ... As well, the trial judge's analysis failed to acknowledge Det. Cst. Haupt's concessions that a user may buy in bulk to obtain a better price, that not all users carry drug paraphernalia but may instead go home to use the cocaine, and that some users might consume both forms of cocaine found in the film container. Finally, Mr. Perjalian makes the point the packaging cannot be decisive because dealers sell and users buy the drug packaged in the same manner.
- [76] I am satisfied that when this additional information is considered, along with the absence of other indicia typically found with trafficking, it cannot be said that possession for the purpose of trafficking was the only reasonable inference to be drawn from the totality of the circumstances. Simple possession was an equally reasonable conclusion.
- [53] To revert back to *R. v. Villaroman*, in assessing circumstantial evidence the trier of fact should consider a range of reasonable inferences that can be drawn from the proven facts, including any plausible theories and reasonable possibilities that are inconsistent with guilt. If there are reasonable inferences other than guilt, the Crown's evidence does not meet the standard of proof beyond a reasonable doubt.
- [54] It is my view that the facts in this case fall far closer to *Perjalian* than *Khan*.
- [55] I do accept and find that the methamphetamine valued at \$1,100.00 and weighing over 50 grams is atypical for a street user to possess. Such an amount, however, is not necessarily unreasonable for a heavy user who is not living on the streets, and who has the financial resources to buy in bulk. Unlike in *Khan*, above, the weight and value of the methamphetamine in this case is not so great that it leads inexorably to no other conclusion but being possessed for the purpose of trafficking.

- [56] The area where Mr. Haroon was found is a neutral factor for drug trafficking and does not add evidential weight to the inference sought by the Crown. His behaviour or conduct prior to arrest was also neutral. He was walking along Kingsway in the early morning hours when observed and stopped by police.
- [57] There was an absence of evidence linking Mr. Haroon's possession of the methamphetamine to commercial drug activity, such as receiving phone calls for product or records of sales on score sheets, both of which are highly probative pieces of circumstantial evidence. Such evidence can add weight to the other pieces of circumstantial evidence, and lead to a robust and irrefutable inference that he was in the drug trade and holding methamphetamine for that purpose.
- [58] Accordingly, the absence of cell phones, which are commonly a tool of the trade in drug trafficking, and score sheets which are used to record sales, are factors in the overall assessment of criminal culpability.
- [59] The empty dime baggies, if unused, are relevant to show a plan to repackage the bulk methamphetamine into smaller baggies for resale. The digital scales would aid in that endeavour. On the other hand, the number of baggies were a small handful, and clearly not enough to repackage 52.50 grams of bulk methamphetamine into the commonly traded point, half gram or one gram weight packages that are the stock in trade of sellers.
- [60] The \$672.50 of cash seized is not known to consist of smaller denominations, another signifier of a drug trafficking link. Nor were the funds so significant in amount that the only reasonable inference to be drawn from having this amount of cash is that it derives from drug dealing.

[61] I adopt the comments in *R. v. West* 2020 BCSC 1927, at para 10:

Where, as here, the Crown's case is based on circumstantial factors, I must be satisfied beyond a reasonable doubt that Mr. West's possession of the drugs for the purposes of trafficking is the only reasonable inference from the facts, *R. v. Villaroman*, 2016 SCC 33, at para. 35. There is no onus on Mr. West to advance an alternative theory or to prove anything. A reasonable doubt arises if the evidence admits of other rational inferences, *R. v. Hynes*, 2019 BCSC 1930, at paras. 60 to 64. Finally, the assessment must be of the whole of the evidence, not each piece of it, *R. v. Morin*, 1988 CanLII 8 (SCC), [1988] 2 S.C.R. 345, and *R. v. J.M.H.*, 2011 SCC 45, at para. 31.

[62] To conclude, the 52.25 grams of methamphetamine is significant enough to call into question whether it was held for the purpose of trafficking. However, this amount could sustain a heavy user of the drug for over three weeks or more. Other circumstantial evidence, such as weapons and digital scales, is equivocal in that they are found on those who personally possess drugs for their own use as well on those who seek to trade, sell or deliver drugs. He was not found in a high drug trade area, with product packaged for resale, to add weight to the purpose behind the drug possession. There is an absence of evidence of any commercial drug activity through calls or records to more persuasively tie Mr. Haman's

possession of methamphetamine to an intention to traffic.

[17] At para. 63 of R. v. Haroon, Judge Dhillon summarizes the propositions which R. v. Lifchus and R. v. Starr stand for:

[63] The standard for conviction is not proof to an absolute certainty or proof beyond any doubt. However, more is required than probable guilt, and the burden is closer to an absolute certainty than probable guilt . . .

[Emphasis in original]

[18] In this case, I have significant doubt that Mr. Plotnikoff had purchased 138.6 grams of methamphetamine and was travelling with it to or from Big White ski resort in the late hours of December 26 and the early morning of December 27 without any paraphernalia to actually consume said methamphetamine. Much like Sergeant Woodcox, I do not find that very plausible. However, that is not the standard I must apply, as set out above. I must find proof beyond a reasonable doubt and, like Judge Dhillon in Haroon, I cannot ultimately conclude that the Crown has met that burden on this particular fact pattern and based upon the evidence that was adduced at this trial.

[19] Ultimately, having regard to the foregoing and the application of the burden of proof and the presumption of innocence enshrined in s. 11 of the Charter of Rights and Freedoms, I find Mr. Plotnikoff innocent on the single count listed in the above-named indictment.

[20] As invited to by counsel for Mr. Plotnikoff, I do find Mr. Plotnikoff guilty of the lesser included offence of possession of the aforementioned controlled substance contrary to s. 4(1) of the Controlled Drugs and Substances Act.

[21] Those are my reasons for judgment.

"Hardwick J."

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