
CANADA / JUDGMENT

R. v. Sawatsky

2021 BCSC 1788

COURT

Supreme Court of British Columbia

DECIDED

20 August 2021

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2021 BCSC 1788 R. v. Sawatsky

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Sawatsky,

2021 BCSC 1788

Date: 20210820

Docket: 16490

Registry: Powell River

Regina

v.

Jason William Sawatsky, also known as Jason William Swatsky

Corrected Judgment: The Place of Judgment on the cover page has been amended on September 16, 2021

Before: The Honourable Mr. Justice Basran

Oral Reasons for Judgment

Counsel for the Crown:

L.T. Phipps

Counsel for the Accused:

C. Hodson

Place and Date of Trial:

Powell River, B.C.

June 14-17, 2021

Place and Date of Judgment:

Nanaimo, B.C.

August 20, 2021

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Introduction

[1] Mr. Sawatsky is charged with four offences:

- a) Count 1 - On September 11, 2019, he broke into and entered 9295 Kristensen Road, Powell River, B.C. (the "Kristensen Road Property") and stole six firearms contrary to s. 98(1) of the Criminal Code;
- b) Count 2 - On September 11, 2019, he possessed instruments suitable for breaking into a place under circumstances that give rise to a reasonable inference that the instrument has been used, or is or was intended to be used for such purpose, contrary to Section 351(1) of the Criminal Code;
- c) Count 3 - On September 12, 2019, he committed mischief by wilfully damaging a wall of the Powell River RCMP Detachment, contrary to Section 430 of the Criminal Code; and
- d) Count 4 - on September 11, 2019, at or near Powell River, he unlawfully possessed a controlled substance, cocaine, contrary to Section 4(1) of the Controlled Drugs and Substances Act, S.C. 1996, c.19.

[2] At the conclusion of the evidentiary phase of the trial, counsel for Mr. Sawatsky invited the court to enter convictions on count 3 and count 4.

Statutory Provisions

[3] I will begin by setting out the relevant Criminal Code, R.S.C. 1985, c. C-46 provisions.

98 (1) Every person commits an offence who

- (a) breaks and enters a place with intent to steal a firearm located in it;
- (b) breaks and enters a place and steals a firearm located in it; or
- (c) breaks out of a place after
 - (i) stealing a firearm located in it, or
 - (ii) entering the place with intent to steal a firearm located in it.

351 (1) Every person who, without lawful excuse, has in their possession any instrument suitable for the purpose of breaking into any place, motor vehicle, vault or safe knowing that the instrument has been used or is intended to be used for that purpose,

- (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years; or
- (b) is guilty of an offence punishable on summary conviction.

430 (1) Every one commits mischief who wilfully

- (a) destroys or damages property;
- (b) renders property dangerous, useless, inoperative or ineffective;
- (c) obstructs, interrupts or interferes with the lawful use, enjoyment or operation of property; or
- (d) obstructs, interrupts or interferes with any person in the lawful use, enjoyment or operation of property.

[4] I will also set out the relevant provision of the Controlled Drugs and Substances Act.

4 (1) Except as authorized under the regulations, no person shall possess a substance included in Schedule I, II or III.

The Crown Evidence

The Evidence of the Ewan Family and Mr. Peterson

- [5] In early August 2019, Rachel Ewan ("Ms. Ewan") and Emry Peterson bought and moved into the Kristensen Road Property. It is a rural property consisting of a house, workshop, and shed on 1.25 acres. There is a forest across Kristensen Street from their property. They have a neighbour adjoining one side of their property and a vacant lot on the other side.
- [6] Ms. Ewan and Mr. Peterson did not receive keys from the previous owner when they took possession so they changed the locks on all exterior doors of the house shortly after they moved in.
- [7] Ms. Ewan and Mr. Peterson both left for work on the morning of September 11, 2019. They habitually lock all exterior doors prior to leaving their house.
- [8] At approximately 2:00 p.m. on September 11, 2019, Ms. Ewan's parents, Holly Ewan and Terry Ewan, arrived at the Kristensen Road Property. They were helping their daughter and soon to be son-in-law settle into their new home by assisting with gardening. Both noticed that the door to the workshop was open. On closer inspection, the door appeared to have been forced open. They did not call either Ms. Ewan or Mr. Peterson because neither are available by phone while working.
- [9] On September 11, 2019, Ms. Ewan returned from work between 3:30 p.m. and 4:00 p.m. Her parents told her that the workshop door appeared to have been forced open and a main floor exterior door handle on the house was sagging and not operating properly. Ms. Ewan thought it was odd that the workshop door was open. She thought it was possible that Mr. Peterson may have broken into the workshop so she decided to discuss the matter with him when he returned home. Mr. Peterson used the workshop and she expected him to arrive home from work in approximately one hour. In the interim, she entered the home and started painting a bathroom.
- [10] Mr. Peterson returned home from work at approximately 5:15 pm on September 11, 2019. Mr. and Mrs. Ewan informed him that they saw the shop door open when they arrived earlier that afternoon. He told them he did not break into the shop. Inside the workshop, Mr. Peterson noticed drawers of his toolbox were open but nothing appeared to be missing. He asked Ms. Ewan to call the police and report that their workshop had been broken into but nothing appeared to be missing.
- [11] After calling the police, Ms. Ewan and Mr. Peterson noticed a broken lock cylinder on the floor adjacent to a spare bedroom in their residence. Inside this bedroom is a gun cabinet in which they stored six guns. It had been pried open and all six firearms removed. Nothing else in the house was missing or out of place.
- [12] The six firearms were:
- a) a .357 Magnum handgun;

- b) a 3030 rifle;
- c) a 303 hunting rifle;
- d) a two gauge shotgun; and
- e) two .22 calibre rifles.

- [13] Ms. Ewan and Mr. Peterson held current licenses for the ownership, use, and storage of these firearms. Prior to their theft, each firearm had a trigger lock and they were stored in a key locked gun cabinet.
- [14] Mr. Peterson asked Ms. Ewan to call the police again and provide them with the update regarding the missing firearms. Next, he went through the house and examined all of its exterior doors. A red exterior door accessible from a second floor deck appeared to have been forced open. There were scuffmarks and scratches on the exterior side of this door, the door jam, and on the metal trim adjacent to it. The lock to this door was a simple doorknob lock. Unlike the two main floor exterior doors, the red exterior door did not have a deadbolt lock.
- [15] Ms. Ewan and Mr. Peterson confirmed that all of the exterior doors were locked and in working order when they left for work on the morning of September 11, 2019. Mr. Ewan recalls that the gun cabinet was also locked when he left their home that morning.
- [16] Ms. Ewan posted some of the details of the robbery of their home on social media. Several responses suggested that "Kevin Hall" might have been responsible for it because he was allegedly a known thief in the area. Ms. Ewan conveyed this information to the RCMP.

The Woodstove/Fireplace Evidence

- [17] On September 11, 2019, Robert Rottluff lived in a house on Gela Road with Cameron McRae and one other individual. Gela Road is the next road west of Kristensen Road and it runs parallel to it. On that day, between 11:30 a.m. and 12:30 p.m., Mr. Sawatsky climbed the exterior stairs of the Gela Road residence and knocked on the exterior door.
- [18] Mr. Rottluff opened the door and Mr. Sawatsky inquired about the sale of a woodstove/fireplace located in the yard of this property. Mr. Rottluff told Mr. Sawatsky that the woodstove/fireplace belonged to Mr. McRae and that he was not available. He wrote down Mr. Sawatsky's telephone number and told him that he would provide it to Mr. McRae with a message that Mr. Sawatsky was interested in purchasing the woodstove/fireplace. Mr. Rottluff recalled that Mr. Sawatsky arrived on the Gela Road property in a silver vehicle.

- [19] Mr. McRae owns the residence on Gela Road, between Palmer Road and McLean Road. On September 11, 2019, he lived there with Mr. Rottluff. After Mr. Rottluff told him that Mr. Sawatsky was interested in purchasing the woodstove/fireplace, Mr. McRae called Mr. Sawatsky using the telephone number he provided. Mr. McRae recalls that Mr. Sawatsky was not interested in purchasing the woodstove/fireplace. Mr. McRae does not recall negotiating a price for that reason.
- [20] Corporal Zakkour examined Mr. Sawatsky's phone after his arrest on the evening of September 11, 2019. He noted an incoming 23-second call from Mr. McRae to Mr. Sawatsky at 12:35 p.m. on that day.

RCMP Evidence

- [21] On September 11, 2019, Constable Hewitt, Corporal Venselaar, and Corporal Zakkour conducted surveillance on Mr. Sawatsky because he was a suspected drug dealer.
- [22] At approximately 10:45 a.m. on September 11, 2019, Const. Hewitt observed Mr. Sawatsky driving a Honda Civic. He recognized the license plate on the vehicle.
- [23] Corporal Zakkour observed a silver Honda Civic at Black Point Auto Wreckers, on McLean road. He parked near the intersection of Williams Road and Palmer road. He observed a male return to this car, drive towards him on Williams Road and turn east onto Palmer Road. He lost sight of the vehicle as it drove east on Palmer Road. He broadcasted its location to Const. Hewitt and Cpl. Venselaar using his police radio.
- [24] Corporal Zakkour ran a check of the license plate on the vehicle he observed and found that it was the vehicle operated by Mr. Sawatsky.
- [25] Around 12:00 p.m., he observed Mr. Sawatsky turning right onto Gela Road from Palmer Road. Kristensen Road is parallel to Gela Road and the next road north of it.
- [26] Constable Hewitt did not follow Mr. Sawatsky onto Gela Road and instead set up one end of a containment perimeter at the intersection of Palmer Road and Gela road.
- [27] At about 12:10 p.m., Cpl. Venselaar positioned himself on Williams Road close to its intersection with McLean Road. McLean Road is parallel to Palmer Road. Kristensen Road connects these two roads at their northern termination. Palmer Road and McLean road are the only two roads out of the area where Gela Road and Kristensen Road are located. Accordingly, anyone departing Kristensen Road or Gela Road would be visible from one of the two checkpoints established by Const. Hewitt and Cpl. Venselaar.
- [28] The three RCMP members were in radio contact with one another during their surveillance of Mr. Sawatsky.

- [29] At approximately 12:25 p.m., Const. Venselaar left his vehicle and walked north on McLean road looking for the accused. Mr. Sawatsky was a drug trafficking target and person of interest so Const. Venselaar wanted to determine what he was doing in this neighbourhood.
- [30] Once Const. Venselaar reached the intersection of McLean Road and Gela Road, he looked down Gela road and saw nothing of note. He continued walking north on McLean Road towards its intersection with Kristensen Road. After reaching this intersection, he heard a vehicle engine start and observed Mr. Sawatsky reversing his vehicle out of a driveway on the south side of Kristensen Road. This driveway was approximately 150 meters from the intersection of McLean Road and Kristensen Road. After exiting the driveway, Mr. Sawatsky drove west on Kristensen Road and out of Cpl. Venselaar's sight.
- [31] Corporal Venselaar did not take note of the address of the residence on Kristensen Road in the moments after he observed Mr. Sawatsky reversing out of the driveway on it. He returned to this location a few hours later and noted that the address of the property from which Mr. Sawatsky exited the driveway was 9295 Kristensen Road. He recalled that from his earlier vantage point at the intersection of McLean Road and Kristensen Road, the driveway to the 9295 Kristensen Road residence is the first driveway on the south side of Kristensen Road.
- [32] At approximately 12:30 p.m., Const. Hewitt and Cpl. Zakkour each saw Mr. Sawatsky drive south on Palmer Road and turn west onto Highway 101 towards Powell River. They separately followed him but Cpl. Zakkour eventually lost sight of Mr. Sawatsky. Constable Hewitt continued following him. At one point, Mr. Sawatsky made a U-turn so they drove past one another. Constable Hewitt recalled that Mr. Sawatsky was the lone occupant of the vehicle he was driving.
- [33] Later that evening, an RCMP colleague called Cpl. Zakkour and told him about the break and enter on Kristensen Road involving missing firearms. Corporal Zakkour in turn called Const. Hewitt and Cpl. Venselaar and asked them to return to the detachment to help locate the missing firearms.
- [34] That evening, Const. Hewitt observed a silver Honda Civic driving past the RCMP detachment. It was the same vehicle he had observed and followed earlier that day. He stopped the vehicle and confirmed the license plate from earlier that day. Mr. Sawatsky was the driver. Constable Hewitt arrested him for breaking and entering the Kristensen Road Property.
- [35] Constable Crossman arrived on the scene to assist Const. Hewitt. She found a flap of drugs on the driver's seat of Mr. Sawatsky's vehicle. Constable Hewitt advised Mr. Sawatsky that he was also being arrested for possession of a controlled substance. At around this time, Cpl. Venselaar also arrived at the scene of the arrest. He began searching Mr. Sawatsky's vehicle and found a number of items including a baggie of cocaine and a cell phone. Corporal Venselaar had the vehicle towed to the detachment so he could continue searching it in a safer, better lit, and more controlled environment. He followed the towed vehicle to the

detachment where it was placed in a secure bay.

- [36] At approximately 9:20 pm on September 11, 2019, Cpl. Venselaar began a detailed search of Mr. Sawatsky's vehicle. Constable Hewitt assisted by taking photographs.
- [37] Under the driver's side seat, Cpl. Venselaar found a black fanny pack that contained a large baggy with eight smaller bags inside of it that appeared to contain crack cocaine. He also found another baggie of what appeared to be powder cocaine. He sent samples of these drugs for analysis.
- [38] Constable Venselaar also found a pry bar and flathead screwdriver under the front passenger seat. Another officer photographed these tools at the arrest scene when Const. Hewitt pulled Mr. Sawatsky over that evening.
- [39] On September 12, 2019, Cpl. Venselaar tried to interview Mr. Sawatsky while he was in custody. Mr. Sawatsky became agitated and wanted to return to his cell. He left the interview room and began walking down a hall towards the cellblock. Corporal Venselaar instructed him to stop and reminded him that he was in custody. Constable Hewitt and another officer assisted. Mr. Sawatsky complied and turned to face a wall. While facing it, he slammed his own head into the wall, damaging the drywall. Corporal Venselaar immobilized and handcuffed Mr. Sawatsky. This exchange was recorded on video and a copy of the recording was an exhibit at trial.
- [40] On September 12, 2019, Constable Perry collected samples from the red exterior door and gun cabinet from the residence at the Kristensen Road Property. These samples were sent for forensic analysis. The accused does not allege that these exhibits were changed, or materially altered, from the time of their seizure by the police to the time of their subsequent forensic examination.
- [41] Corporal Venselaar processed the pry bar, flathead screwdriver, and drug exhibits on September 17, 2019. He sent the tools and drugs for forensic analysis. The certificate of analysis from Health Canada identifies the drug samples as cocaine.
- [42] I qualified Steven Pitts as an expert qualified to provide opinion evidence on the analysis and comparison of paint. He prepared a report on his analysis of the pry bar, screwdriver, gun safe sample, and red door sample.
- [43] Mr. Pitts observed that the predominantly black pry bar had yellow paint droplets on it. He concluded that red paint found on the pry bar originated either from the red door or from another similarly painted source. He also found that the black and yellow paint from the pry bar was found on the red door. He noted that the presence of yellow paint droplets on the red door indicates that they probably came from the pry bar.
- [44] Mr. Pitts further concluded that the red paint on the pry bar and red exterior door is comparable in visual, microscopic, and chemical analysis. This suggests a transfer of this paint from the red exterior door to the pry bar.

The Evidence of Mr. Sawatsky

[45] Mr. Sawatsky was the only defence witness. The approach to be taken by the trier of fact in cases where the accused has testified was set out by the Supreme Court of Canada in *R. v. W. (D.)*, [1991] 1 S.C.R. 742 in the following terms.

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

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

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

[46] The analysis of the accused's evidence, his defence, and the Crown's evidence does not proceed in a vacuum, but in the context of all the evidence: *R.P. c. R.*, 2010 QCCA 2237 at para. 214, *aff'd R. v. R.P.*, 2012 SCC 22.

[47] The testimony given by Mr. Sawatsky relies substantially on his assertion that Kevin Hall broke into the Kristensen Road Property, stole the firearms, and then sold them to Mr. Sawatsky.

[48] Mr. Sawatsky described September 2019 as a dark time in his life. He was broke, his mother had recently died, and he had resumed his addiction to drugs. He has suffered from addiction problems throughout his life.

[49] Earlier that summer, Mr. Sawatsky received approximately \$38,000 from his mother's estate. He spent all of these funds on his \$1,000 per day crack habit. After spending this money, he began selling drugs to support his addiction. He earned between \$2,000 and \$3,000 per day from selling drugs but purports to have reduced his expenditure on drugs to between \$600 and \$700 per day after spending all of the funds he inherited.

[50] He obtained a Honda Civic from one of his "partners" and used this vehicle to sell drugs. As of September 11, 2019, he was addicted to drugs and selling them. At this time, and for approximately 25 days to that point, he lived in a recreational vehicle trailer owned by a friend.

[51] On the morning of September 11, 2019, Mr. Sawatsky recalled waking at approximately 5:00 a.m. in his car. He had spent the previous night in Lund, B.C. While driving back to Powell River that morning he clipped a dump truck travelling in the opposite direction. The collision broke off his driver side mirror.

[52] After returning to Powell River, Mr. Sawatsky slept in the RV trailer until a friend, Sam Wilson, came to pick him up. Together they completed a few drug deliveries.

- [53] Mr. Sawatsky asserts that on the morning of September 11, 2019, he received a telephone call from Kevin Hall. Mr. Hall purportedly offered to sell some firearms to Mr. Sawatsky in exchange for drugs. Mr. Sawatsky testified that he received two telephone calls from Mr. Hall. The first was before 10:00 a.m. when Mr. Hall told him that he had the guns for sale. They purportedly next spoke when Mr. Sawatsky was at Black Point Auto Wreckers, obtaining a new side mirror for his vehicle.
- [54] Mr. Sawatsky testified that Mr. Hall told him to meet him on Kristensen Road at the entrance to the forest trails.
- [55] According to Mr. Sawatsky, on his way to meet Mr. Hall on Kristensen Road, he stopped at the residence owned by Mr. McRae on Gela road because he wanted to purchase a fireplace for his RV trailer in the winter. He agrees with Mr. Rottluff's description of their exchange. Approximately five or ten minutes after he left this residence, he received a call from Mr. McRae who offered to sell the woodstove/fireplace for \$150. Mr. Sawatsky recalls telling Mr. McRae that he would be back the next day with a truck to pick it up. There is no independent evidence suggesting that Mr. Hall and Mr. Sawatsky spoke by phone on September 11, 2019. Although Cpl. Zakkour inspected the call log on Mr. Sawatsky's phone, he did not inspect it for all calls on September 11, 2019. He focused only on calls and texts received and made during the period when Mr. Sawatsky was at the Kristensen Road Property, from 12:00 p.m. to 12:30 p.m.
- [56] According to Mr. Sawatsky, when he arrived on Kristensen Road, Mr. Hall emerged from the forest north of the road and directed Mr. Sawatsky to a driveway and then towards a gravel pile adjacent to a residence. Photos taken by the RCMP depict a gravel pile next to the home owned by Ms. Ewan and Mr. Peterson.
- [57] After exiting his vehicle, Mr. Sawatsky says that he opened the trunk so that Mr. Hall could place the firearms in it. He recalls that they were wrapped in a blanket, but did not fit in the trunk so Mr. Hall loaded them and some tools onto the backseat floor of Mr. Sawatsky's vehicle.
- [58] Mr. Sawatsky recalled giving Mr. Hall two "eight balls" of crack cocaine, worth approximately \$600 as payment for the guns. He testified that while they were both seated in the vehicle, he weighed seven ounces of drugs on a scale balanced on the dashboard, and then gave them to Mr. Hall in exchange for the guns. Mr. Hall did some of these drugs in the car with Mr. Sawatsky, then got out of the car and walked toward the house. Mr. Sawatsky backed out of the driveway and drove west on Kristensen Road towards Highway 101.
- [59] Mr. Sawatsky denies going into the house on Kristensen Road and says he did not see Mr. Hall go into the house. He testified that he thought the home belonged to one of Mr. Hall's friends. Later, he gave evidence that he knew the guns and tools had been stolen from the residence on the Kristensen Road Property.

- [60] He reiterated that Mr. Hall exited the trails and walked toward the house when they arrived at the Kristensen Road Property. Mr. Sawatsky alluded to the trails in the forest north of Kristensen Road possibly leading to a property owned by Mr. Hall. His evidence on this point was vague.
- [61] Initially, Mr. Sawatsky testified that he did not see the guns because they were wrapped in a blanket. He later indicated that some of the gun barrels protruded from the blanket so he knew that the package contained guns but he agreed that he did not know what type of firearms he had bought.
- [62] Mr. Sawatsky also testified that Mr. Hall also gave him a hammer, a couple of pry bars, pliers, a few screwdrivers, and an electrical tester. Mr. Sawatsky recalls Mr. Hall loading several different pry bars into the floor of the backseat of his vehicle. He said Mr. Hall pulled them out of a backpack while sitting in the front seat and placed them on the floor in the backseat.
- [63] After leaving Kristensen Road, Mr. Sawatsky drove back to his trailer and unloaded the firearms and tools into it.
- [64] He recalls that he and Mr. Wilson looked at the firearms. Mr. Sawatsky testified that he agreed to purchase the firearms from Mr. Hall because he knew that Mr. Wilson wanted a handgun. However, Mr. Wilson did not want the handgun obtained by Mr. Sawatsky because it was too large.
- [65] Referring to a photo of the pry bar and flathead screwdriver, Mr. Sawatsky thinks that he must have failed to remove these tools from his vehicle because they slid under the seat while he was driving. He says that these were some of the tools that Mr. Hall gave him by putting them in the backseat of his vehicle.
- [66] After leaving the firearms and tools in his trailer, he did a few more drug deliveries. He was on his way to deliver drugs to someone who lived in a trailer near the police station when the police pulled over his vehicle and arrested him.
- [67] Mr. Sawatsky does not dispute that there were drugs in the black fanny pack beneath the driver's seat. He admits that they were his drugs and he was selling and using them. Similarly, he does not dispute that he head butted the detachment wall.
- [68] Mr. Sawatsky admits to having an extensive criminal record in the period from 1993 to 2013 that included several convictions for breaking and entering.

Circumstantial Evidence and Credibility - Legal Principles

- [69] The accused is presumed innocent unless the Crown proves his guilt beyond a reasonable doubt. The burden to prove the elements of the offences rests upon the Crown to prove beyond a reasonable doubt and never shifts to the accused. However, the Crown is not required to prove each individual piece of evidence that makes up its theory beyond a reasonable doubt: *R. v. Morin*, [1988] 2 S.C.R. 345; *R. v. Arp*, [1998] 3 S.C.R. 339.
- [70] There is no direct evidence that links Mr. Sawatsky to the theft of firearms at the Kristensen Road Property. The Crown's case relies on circumstantial evidence.
- [71] Both parties agree that the principles in *R. v. Villaroman*, 2016 SCC 33, govern the analysis of reasonable inferences that may be drawn from circumstantial evidence. The Supreme Court of Canada held:
- [36] I agree with the respondent's position that a reasonable doubt, or theory alternative to guilt, is not rendered "speculative" by the mere fact that it arises from a lack of evidence. As stated by this Court in *Lifchus*, a reasonable doubt "is a doubt based on reason and common sense which must be logically based upon the evidence or lack of evidence": para. 30 (emphasis added). A certain gap in the evidence may result in inferences other than guilt. But those inferences must be reasonable given the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense.
- [37] When assessing circumstantial evidence, the trier of fact should consider "other plausible theor[ies]" and "other reasonable possibilities" which are inconsistent with guilt: *R. v. Comba*, [1938] O.R. 200 (C.A.), at pp. 205 and 211, per Middleton J.A., aff'd [1938] S.C.R. 396; *R. v. Baigent*, 2013 BCCA 28, 335 B.C.A.C. 11, at para. 20; *R. v. Mitchell*, [2008] QCA 394 (AustLII), at para. 35. I agree with the appellant that the Crown thus may need to negative these reasonable possibilities, but certainly does not need to "negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused": *R. v. Bagshaw*, [1972] S.C.R. 2, at p. 8. "Other plausible theories" or "other reasonable possibilities" must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation.
- [38] Of course, the line between a "plausible theory" and "speculation" is not always easy to draw. But the basic question is 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.
- [39] I have found two particularly useful statements of this principle.
- [40] The first is from an old Australian case, *Martin v. Osborne* (1936), 55 C.L.R. 367 (H.C.), at p. 375:

In the inculcation of an accused person the evidentiary circumstances must bear no other reasonable explanation. This means that, according to the common course of human affairs, the degree of probability that the occurrence of the facts proved would be accompanied by the occurrence of the fact to be proved is so high that the contrary cannot reasonably be supposed.

[Emphasis added.]

- [41] While this language is not appropriate for a jury instruction, I find the idea expressed in this passage -- that to justify a conviction, the circumstantial evidence, assessed in light of human experience, should be such that it excludes any other reasonable alternative -- a helpful way of describing the line between plausible theories and speculation.
- [42] The second is from *R. v. Dipnarine*, 2014 ABCA 328, 584 A.R. 138, at paras. 22 and 24-25. The court stated that "[c]ircumstantial evidence does not have to totally exclude other conceivable inferences"; that the trier of fact should not act on alternative interpretations of the circumstances that it considers to be unreasonable; and that alternative inferences must be reasonable, not just possible.
- [43] Where the line is to be drawn between speculation and reasonable inferences in a particular case cannot be described with greater clarity than it is in these passages.
- [72] In *R. v. Robinson*, 2017 BCCA 6, aff'd 2017 SCC 52, the B.C. Court of Appeal commented on Villaroman:
- [38] I approach the first ground of appeal, then, on the basis that this court's task is to determine "whether the trier of fact, acting judicially, could reasonably be satisfied that the accused's guilt was the only reasonable inference available on the totality of the evidence." (Villaroman, at para. 55.) This does not constitute a different standard of review for circumstantial cases; but it does provide finders of fact and appellate courts with an alternate formulation by which to assess such cases - in the words of Professor Berger, a kind of "inferential litmus test." (At 71.) In circumstantial cases, as in non-circumstantial cases, the appellate court may not interfere if the verdict is one that a properly instructed jury could reasonably have rendered. (Yebes, at 186.) It is generally the task of the finder of fact to draw the line between reasonable doubt and speculation. (Villaroman, at para. 71.) It is not open to a court of appeal to conceive of inferences or explanations that are not reasonable possibilities; nor to attempt to revive evidence or inferences that the trial judge reasonably rejected. (Grover, at para. 2, quoting from the reasons of Jackson J.A. in the Court of Appeal.) If an appellant is to succeed, an inference other than guilt must be "reasonable given the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense." (Villaroman, at para. 36.)
- [73] More recently, that Court noted, "The court in Villaroman acknowledged that a reasonable doubt may be based on the lack of evidence, but also confirmed that inferences drawn from the absence of evidence must be reasonable. It did not equate 'plausible theory' with 'speculation'" (emphasis in original): *R. v. Paquette*, 2019 BCCA 396 at para. 26.

[74] In *Bradshaw v. Stenner*, 2010 BCSC 1398, Justice Dillon provided a useful discussion of the assessment of credibility at para. 186:

[186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides ... The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally ... Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time. ...

[Internal citations omitted.]

Analysis

Problems with Mr. Sawatsky's evidence

[75] I do not believe Mr. Sawatsky's evidence because of several inconsistencies and logical implausibilities in his testimony. For example, Mr. Sawatsky initially testified that his personal circumstances were difficult as of September 11, 2019, and he had to reduce his daily expenditures on drugs from \$1,000 per day to \$600-\$700 per day after he spent the \$38,000 inheritance from his mother's estate on drugs. Mr. Sawatsky explained that he lived rent free in a friend's trailer because he was spending all of his money on drugs. However, he later testified that he earned \$2,000 to \$3,000 per day from selling drugs and a WCB pension. He recalled that at this time, he was making "quite a bit of money".

[76] As of September 11, 2019, Mr. Sawatsky had lived in his friend's trailer for less than a month. It was the fourth place he had lived in the previous four months, but he purports to have been planning for colder temperatures in the coming months by proactively looking for a woodstove/fireplace. He testified that this was why he approached Mr. McRae's residence on Gela Road and inquired about the woodstove/fireplace. His explanation strains credulity. During this turbulent period, Mr. Sawatsky described his life as a blur. He frequently consumed cocaine and lived day-to-day. I do not accept that while on his way to meet someone to exchange drugs for firearms, he detoured to Mr. McRae's residence because he was planning for the colder months by looking for a woodstove/fireplace for a trailer he had only recently begun residing in. I am satisfied that he approached this residence to determine if it was occupied.

- [77] In September 2019, Mr. Sawatsky sold drugs to support his dependency on drugs. His evidence is that Mr. Hall contacted him on the morning of September 11, 2019, with an offer to exchange firearms for drugs. Initially, Mr. Sawatsky testified that he did not examine the firearms because they were wrapped in a blanket. Later, he indicated that he knew the package contained guns because he saw some of the barrels of the long firearms protruding from the blanket. He also testified that he wanted to obtain a handgun for his friend, Mr. Wilson. He did not examine the firearms to confirm that they included a handgun, how many guns were in the blanket, or if they were in working order. I do not accept that Mr. Sawatsky would have blithely accepted a wrapped package of purported firearms, without examining them, in exchange for approximately \$600 worth of drugs.
- [78] Mr. Sawatsky's evidence of the details surrounding the exchange of firearms for drugs is not believable. He testified that after Mr. Hall placed the firearms in the backseat of his vehicle, Mr. Sawatsky used a scale balanced on the dashboard of his vehicle to weigh the drugs for Mr. Hall. After giving these drugs to Mr. Hall, they consumed drugs while still seated in Mr. Sawatsky's vehicle that remained parked in the driveway of the Kristensen Road Property.
- [79] In cross-examination, Mr. Sawatsky testified that he believed the guns and tools could have been stolen from this residence. Earlier in his direct evidence and in re-examination he indicated that he thought the residence on Kristensen Road belonged to one of Mr. Hall's friends and he was uncertain where the firearms and tools came from.
- [80] In any event, if I were to believe Mr. Sawatsky's version of the events, he knew he was purchasing stolen firearms, which he did not have a license to possess or transport, in exchange for illegal drugs. I do not accept that he would have taken the time to weigh drugs and casually consume some of them with Mr. Hall at the very location from where Mr. Sawatsky at least suspected that the firearms and tools were stolen. I see no reason why they would have delayed leaving the scene of their obviously criminal exchange of stolen firearms for illegal drugs.
- [81] In the 20-year period from October 1993 to October 2013, Mr. Sawatsky was convicted of breaking and entering eight times. On at least one of these occasions, he admitted being confronted by the owner of the residence he was breaking into. Given this experience, it is inconceivable that he would have lingered at the Kristensen Road Property by taking the time to use drugs there after completing an exchange of stolen firearms for illegal drugs, all the while suspecting that Mr. Hall had stolen the firearms from that property.
- [82] In addition to the firearms, Mr. Sawatsky testified that Mr. Hall gratuitously gave him several tools stolen from the Kristensen Road Property. According to Mr. Sawatsky, this included a pry bar set. Mr. Sawatsky testified that he removed most of these tools and the firearms from his vehicle and placed them in his RV trailer after departing the Kristensen Road Property. He believes the pry bar and flathead screwdriver found under the passenger seat must have slid under it during a U-turn so he did not see them when he removed the other tools and firearms from his vehicle.

- [83] Based on the evidence of Mr. Pitts, I am satisfied that the pry bar and flathead screwdriver were the two tools used to break into the Kristensen Road Property. The pry bar had red paint over blue paint scrapings on it that is consistent with the sample taken from the red exterior door of the Kristensen Road Property. The sample taken from this door had black paint with yellow droplets consistent with the manner in which the pry bar had been painted. Mr. Sawatsky took no issue with the chain of custody of the forensic exhibits.
- [84] Mr. Petersen testified that none of his tools were missing from the Kristensen Road Property and that he did not own a pry bar or a pry bar set. I accept that the pry bar and flathead screwdriver used to break into the residence did not belong to Mr. Petersen. Therefore, whoever broke into the house brought these tools to the Kristensen Road Property. Mr. Sawatsky testified that Mr. Hall removed several tools from a backpack and placed them in the backseat floor of Mr. Sawatsky's vehicle. There is no explanation for this gratuitous inclusion of several tools along with the stolen firearms. I do not believe Mr. Sawatsky's story that he removed all of the firearms and visible tools from the backseat floor of his car but he simply did not see the two tools used to break into the Kristen Road Property.
- [85] Accepting Mr. Sawatsky's evidence surrounding his purchase of stolen firearms requires that I believe Mr. Hall broke into the Kristensen Road Property, left a trail of debris including the gun cabinet lock cylinder, removed the firearms, wrapped them in a blanket, then left them outside the residence. Next, he called Mr. Hall and arranged to meet him at the scene of the robbery. Mr. Hall returned to the Kristensen Road Property on foot, emerging from the forest across the street from the Property and directed Mr. Sawatsky to the driveway. Once they were both there, they casually and without any sense of urgency exchanged the stolen firearms for drugs and decided to take further time to use drugs together. When Mr. Sawatsky reversed out of the driveway, departing the property, Mr. Hall apparently walked towards the house. This narrative is neither reasonable nor believable.

Putting Aside Mr. Sawatsky's Evidence

- [86] Putting aside Mr. Sawatsky's evidence, the remaining evidence is that the residence on the Kristensen Road Property was broken into on September 11, 2019, between the time when Ms. Ewan left for work in the morning and when her parents arrived at 2:00 pm that afternoon. The red exterior door was forced open and six firearms were forcibly removed from a gun cabinet. During this period, Cpl. Venselaar observed Mr. Sawatsky reversing his car out of this property. He did not see anyone else at this location during the relevant timeframe.
- [87] Later that day, when Const. Hewitt stopped Mr. Sawatsky, the pry bar and flathead screwdriver used to break into the residence on the Kristensen Road Property were in his vehicle and the firearms were recovered from Mr. Sawatsky's trailer.

- [88] In my view, the inferences required to accept the theory that Mr. Hall broke into the Kristensen Road Property, stole the firearms, and deposited them and the break-in tools in Mr. Sawatsky's car are not reasonable or plausible "given the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense": Villaroman para. 36.
- [89] The circumstantial evidence in this case places Mr. Sawatsky at the scene of the break and enter during the relevant period on September 11, 2019. Later that day, he was found in possession of both the break-in tools and the stolen firearms. On the totality of the evidence, I am satisfied beyond a reasonable doubt that Mr. Sawatsky broke into the residence at the Kirsten Road Property by using the pry bar to force the red exterior door open. He then stole the six firearms from the gun cabinet. The circumstantial evidence in this case does not lead to any other reasonable inference. I therefore find Mr. Sawatsky guilty on counts 1 and 2 of the indictment.
- [90] Based on the invitation of defence counsel and the uncontroverted evidence, Mr. Sawatsky is also guilty of counts 3 and 4 of the indictment: mischief by willfully damaging a wall in the Powell River RCMP detachment and possession of a controlled substance.
- [91] Mr. Sawatsky, please stand. For the reasons I just described, I find you guilty on counts one to four of the indictment.

"Basran, J."

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