
CANADA / JUDGMENT

R. v. Seo

2017 BCSC 2143

COURT

Supreme Court of British Columbia

DECIDED

13 July 2017

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2017 BCSC 2143 R. v. Seo

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Seo,

2017 BCSC 2143

Date: 20170713

Docket: X078231-2

Registry: New Westminster

Regina

v.

Suk Won Seo

Before: The Honourable Madam Justice Burke

Oral Reasons for Judgment

Counsel for the Crown:

S. Hamade

Counsel for the Accused:

J. Myers

Place and Date of Trial:

New Westminster, B.C.

June 6-9, 2016

June 26-28, 2017

Place and Date of Judgment:

New Westminster, B.C.

July 13, 2017

INTRODUCTION

- [1] The accused, Suk Won Seo, stands charged with two counts of break and enter. The first is the charge that Suk Won Seo did break and enter into a dwelling house, located at 302 - 2338 Hospital Street, New Westminster, British Columbia, and commit theft therefrom, contrary to s. 348(1)(b) of the Criminal Code. The alleged offence took place on October 3, 2014.
- [2] The second offence is that Suk Won Seo did break and enter into a dwelling house, located at 308 - 517 10th Street, New Westminster, and commit theft therefrom contrary to s. 348(1)(b) of the Criminal Code. The alleged offence took place on October 8, 2014.

FACTUAL BACKGROUND

- [3] On November 30, 2015, the defence admitted certain facts pursuant to s. 655 of the Criminal Code to dispense with the proof of those facts. They are as follows:
1. That on 8 October, 2014 Margarita HRISTOVA secured her residence at 8:30 in the morning. That she was the last occupant of the residence to leave that day. That she lives in the residence with her daughter Lilja HRISTOVA, her husband Nicolas HRISTOVA and her younger brother Nikola HRISTOVA jr. This residence is an apartment suite located at #308 - 517 10th ST. New Westminster, BC
 2. That at approximately 3:30 pm on 8 October, 2014--the same day--Nikola HRISTOVA (sr.) returned to the residence to discover that the residence had been broken into and entered. The front door had been damaged and the door locks overcome by apparent force. The residence was presently unlocked and insecure. The contents of the residence had been ransacked and valuable property had been removed. The Police were notified upon the discovery of this Break and Enter and that Police attended.
 3. That the entry to their residence was without permission to anyone, and all keys to the residence were accounted for.
 4. That among their property which was found to be stolen during this break and enter were included:
 - a) Panasonic Camera in a black case model # DMCZS50 (police exhibit #4)
 - b) Sony Camera "Cyberstorm DSC W550" (police exhibit #5)
 - c) Pentax Binocular S/N 1:09986 (police exhibit # 10)

- d) "Michael Kors" watch timepiece (police exhibit #14)
- e) Toshiba Laptop Computer S/N 1:5A669545Q (police exhibit #15)
- 5. That on 28 October, 2014 and 4 November, 2014, items (a) through to (e) above were identified as their property by Lilja Hristova and returned to them by New Westminster Police.
- 6. That Neither Margarita, Lilja, Nikola (jr) and Nikola Hristova knows Suk Won SEO, nor did they give him permission to attend into their residence nor to possess any of their property.
- 7. That on 3 October, 2014 Renante SOMOLO secured his residence at 8:00 a.m. That upon his return home from work at 4:00 p.m. he found his residence to have been broken into and entered. The door and locks had been damaged and defeated. His residence is an apartment suite located at 302 - 338 Hospital St. in New Westminster, BC.st. At 4:17 p.m. he reported this Break and Enter to New Westminster Police.
- 8. That among his property stolen during this break and enter were:
 - a) A pair of OAKLEY sunglasses and case (police exhibit #2)
 - b) A Brinks "Safety Deposit Box" Container (police exhibit #11)
- 9. That on [November 14, 2014] items a) and b) above were identified as his property by [Renante] SOMOLO and returned to him by New Westminster Police.
- 10. That at the time of the reported break and entry, there existed machinery and apparatus to create closed circuit television video recordings of portions of the 3rd floor common area of 338 HOSPITAL Street, New Westminster BC. That the recordings include views of access and egress in the common area leading to and from 302 - 338 HOSPITAL Street (the residence of Renante SOMOLO). That the recordings include the time periods between the departure of Renante SOMOLO and his return to his residence on the date of 03 October, 2014.
- 11. That 3 photographs previously disclosed as taken by Lilja HRISTROVA depicting items b), c) and d) of paragraph 4 are true and accurate as to authorship.

[Errors in the original.]

[4] On June 8, 2017, the defence admitted further facts pursuant to s. 655 of the Criminal Code for the purpose of dispensing with their proof. They are as follows:

- 1. On October 9, 2014, Mr. Seo resided at 309-731 5th Avenue in New Westminster, British Columbia (the "Seo Residence").
- 2. On October 3, 2014, the apartment located at 302-338 Hospital Street in New Westminster, British Columbia (the "Hospital Street Apartment") was broken into and entered. The following items were stolen from the Hospital Street Apartment:
 - i. A Brinks Safety Deposit Box;

ii. A pair of Oakley Sunglasses; and

iii. A Citizen Eco-Drive Watch.

(Collectively the "Hospital Street Items").

3. On October 8, 2014 between the hours of 0830hours and 1530hours, the apartment located at 308-517 10th Street in New Westminster, British Columbia (the "10th Street Apartment") was broken into and entered. The following items were stolen from the 10th Street Apartment.

i. A gold Michael Kors Watch;

ii. A black Pentax 8x25 pair of binoculars;

iii. A red, grey and black wireless computer mouse;

iv. A black Panasonic digital camera;

v. A grey Sony digital camera; and

vi. A black Toshiba laptop (model #C65001V)

(Collectively the "10th Street items".)

4. On October 9, 2014, at approximately 1355hours, Mr. Seo was arrested exiting the front doors of the apartment building located at 731 5th Ave in New Westminster, British Columbia (the "Seo Apartment Building").

5. Search incidental to arrest revealed Mr. Seo had possession of a set of keys. One key unlocked the door leading to the front lobby of the Seo Apartment Building. A second key unlocked the front door of the Seo Residence.

6. At approximately 1704hours, the Seo Residence was searched. The Hospital Street Items and the 10th Street Items were located inside the Seo Residence.

7. During the search of the Seo Residence, the Seo Residence was cleared for officer safety. No other individuals were located inside the Seo Residence.

[Errors in the original.]

[5] On October 8, 2014, the New Westminster Police obtained a search warrant that was executed on October 9, 2014. As set out in my oral ruling of June 7, 2016, I concluded the search warrant was valid and a breach of Mr. Seo's s. 8 Charter rights did not occur.

[6] The Crown called four witnesses.

[7] Sgt. Wayne Raymond, the forensic identification officer, gave evidence about the processing of the crime scene on October 8, 2014, of 308 - 517 10th Street, New Westminster, British Columbia. Sgt. Raymond processed the evidence, took photos of the scene and supervised the forensic evidence.

- [8] Det. Mathew Robson, a member of the New Westminster Police was the arresting officer. At 1:55 p.m., he attended at 731- 5th Avenue, New Westminster, to arrest the accused. He arrested the accused and found keys and a cell phone. One of the keys opened the lobby to the apartment building and one opened Suite 309. At that time, Det. Robson set up scene security at the apartment as the search warrant was to be executed later that day. He said no one entered the scene between the time of the arrest and the execution of the search warrant.
- [9] At 5:04 p.m., the police executed the search warrant and searched the apartment pursuant to that warrant. Det. Robson assisted with that search. Det. Robson described the apartment and noted he was assigned to search the closet in the hallway. In that closet, he located a tool bag with multiple tools including a hammer and screwdriver. In addition, a pry bar wrapped in a golf shirt was located in the closet. A black cloth bag with Apple computer equipment was also in the closet along with a pair of utility gloves. A black bag containing two yellow and black DeWalt drills and chargers was also located in the closet.
- [10] Det. Andrew Wickham also participated in the search on that day and located a number of items on the kitchen table including a black wallet, which contained the government identification for the accused, Mr. Seo. He also located two digital cameras, a black and gold Citizen watch and a pair of Pentax binoculars inside a brown case. Against the wall close to the kitchen, he located a white and blue safety deposit box inside a blue and white jewelry bag.
- [11] On October 8, 2014, at 8:25 a.m. Det. Wickham, at the request of Det. Phillips, reviewed the video of the Hospital Street Apartment, at which one of the break and enters occurred. Det. Wickham testified he recognized Mr. Seo the first time he saw the video and was "100% confident" in this recognition.
- [12] Det. Wickham said he recognized Mr. Seo as he had conducted surveillance on him twice in September 2013 (i.e. on September 29 and 30), on November 28, 2013, and on January 8, 2014.
- [13] Det. Wickham described these surveillance incidences in relative detail, indicating throughout his surveillance that his view of Mr. Seo was relatively unobstructed with the exception of other people or cars occasionally interrupting that view. He observed him outside his apartment at least twice, followed him via the Skytrain from New Westminster to Broadway and Commercial, and observed him walking down at least one residential street. He also observed him at the time of his arrest and release in January 2014. In the first three sessions, it was daylight and therefore the light was good. In the last, it was evening but he indicated the street lighting and light from the police vehicle made his view clear.
- [14] Det. Wickham said he recognized Mr. Seo on the video as he could see Mr. Seo's features and recognized his hair, and eyebrows, his very chiseled jaw, his complexion, and the way he walked down the hallway in the video. He noted the way an individual walks is something that one recognizes when doing surveillance and Mr. Seo had a very distinct look about him.

He described him as having a slender build and average height of between 5 foot 7 and 5 foot 8. He identified Mr. Seo, the accused in this case, as present in the courtroom, sitting beside counsel at the time. He noted that there were some differences at present, as Mr. Seo had: shaved his head, put on muscle, grown a size in his shoulders, and had facial stubble. He also was a bit more tanned.

- [15] At the re-commencement of these proceedings on June 23, 2017, the defence admitted Mr. Seo was the person in the video on the floor of the Hospital Street Apartment.

Legal Principles

- [16] The applicable legal principles in assessing a charge of breaking and entering have been succinctly set out in *R. v. Singh*, 2012 BCSC 338. In that decision, the Court noted at paras. 72 and 73:

A charge of breaking and entering with intent contains the following essential elements of the offence: (1) the identity of the accused as the offender; (2) the time and place of the offence as set out in the indictment; (3) that the accused broke into and entered that place; (4) that the accused intended to break and enter that place; and (5) that the accused intended to commit an indictable offence in that place.

Section 348 (2) describes a presumption. The presumption is that proof of breaking and entering is also, in the absence of proof to the contrary, proof that the breaking and entering was done with intent to commit an indictable offence while in that place. The Court may rely on this presumption unless there is some evidence to the contrary: that is, evidence that the accused did not have such intent. The presumption exists because people do not usually break into places just for the sake of breaking in.

- [17] Both the Crown and the accused agree that the principles set out by the Supreme Court of Canada in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, are applicable in the circumstances of this case. There, Mr. Justice Cory speaking for the majority at 757 said:

In a case where credibility is important, the trial judge must instruct the jury that the rule of reasonable doubt applies to that issue. The trial judge should instruct the jury that they need not firmly believe or disbelieve any witness or set of witnesses. Specifically, the trial judge is required to instruct the jury that they must acquit the accused in two situations. First, if they believe the accused. Second, if they do not believe the accused's evidence but still have a reasonable doubt as to his guilt after considering the accused's evidence in the context of the evidence as a whole.

[Emphasis in original.]

- [18] Mr. Justice Cory went on to formulate the following jury instruction at 758:

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.

[19] In *R. v. C.W.H.*, [1991] B.C.J. No. 2753 (C.A.), our Court of Appeal considered this set of instructions. Mr. Justice Wood provided a slight modification of or addition to this test. He said at para. 24:

I would add one more instruction in such cases, which logically ought to be second in the order, namely:

If, after a careful consideration of all of the evidence, you are unable to decide whom to believe, you must acquit.

[20] A trial judge sitting without a jury must follow the same analytical progression.

[21] The Crown's case in this matter is entirely circumstantial in nature.

[22] The authorities establish in order to convict an accused person solely on the basis of circumstantial evidence, the court must be satisfied beyond a reasonable doubt that the only rational inference that can be drawn from the evidence is that the accused is guilty: see *R. v. Cooper*, [1978] 1 S.C.R. 860 at 881 and *R. v. Griffin*, 2009 SCC 28 at para. 28.

[23] In *R. v. Villaroman*, 2016 SCC 33, Cromwell J. in writing for the Court, said:

[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.

[Italics in original, underlining added.]

THE PARTIES' POSITIONS

Crown

- [24] It is the Crown's position that when the evidence is viewed in its entirety, the only rational inference that can be drawn is that the accused committed both robberies. The Crown submits there must be something about the accused's testimony that if accepted raises reasonable doubt. In this case, the Crown says the accused's evidence must be rejected in its entirety. Once that is done, the court can assess the Crown's case on the evidence that remains.
- [25] Overall, the Crown submits the accused is not reliable or credible on his own admission of being a drug user, including his use of drugs on October 8 and 9, 2014. This impacted his memory of events and his emotions. In direct, the accused said he had difficulty recalling and was in a "daze"; in cross, he said he was "out of it" due to drugs.
- [26] The Crown points out the accused also agreed he was dishonest when it benefitted him. This included admitting he worked for cash, did not pay taxes, and would be dishonest with a girlfriend, as he "wanted to look good." He also admitted he was willing to commit criminal activity for his own benefit, including assaulting or threatening to assault someone. He said he did not care if the goods were stolen.
- [27] The Crown attacks the credibility of the accused's explanation, pointing to both internal and external inconsistencies. The Crown points out the accused changed his story a number of times; including initially indicating the items provided by Mr. Lee, the individual identified as part of Mr. Seo's explanation, were worth more than \$100. He later said they would sell for less than that at a pawn shop. Initially he said Mr. Lee provided the items for collateral. He later said Mr. Lee told Mr. Seo to sell all the items.
- [28] Crown also points out the stolen items at issue were found in plain view in the accused's apartment. This is not consistent with his testimony that items were left in a bag in his apartment by Mr. Lee. Crown points out Mr. Seo then changed his story and said Mr. Lee must have been looking at the items and placed them on the kitchen table.
- [29] The Crown submits the accused does not adequately explain the video of him in the hallway of the Hospital Street Apartment, pointing out:
- a. The accused is seen "running off" twice when he hears someone approaching. While the accused says he does not want to be seen as he intends to assault Mr. Lee if he does not get his money, he has already assaulted Mr. Lee in broad daylight on Columbia Street, New Westminster.
 - b. Furthermore, it is also not logical that, as the accused said, he would not have seen a hole above the lock of apartment 302 when he was walking through the hallway. This apartment is admitted to have been broken into that day, when he was walking through the hallway;
 - c. The accused is seen carrying items. He cannot say he was given the items as he was wearing gloves. This is not adequately explained.

- d. The accused is seen peering into a mailbox slot of an apartment. That is not adequately explained.
 - e. Mr. Lee is never seen on the video and if he committed the break and enter, it was not logical Mr. Lee would return to the same floor to give Mr. Seo the items as Mr. Seo claims.
- [30] The Crown submits, applying the W.(D.) analysis, that the accused's evidence is rife with inconsistencies and cannot be believed. His evidence does not give rise to a reasonable doubt. It submits further that when the evidence is considered in its entirety, the only rational inference that can be drawn is that the accused committed the break and enters.
- [31] The Crown cites a number of cases as part of its argument, including: Villaroman; R. v. Reid, [2002] O.J. No. 4792 (C.A.); R. v. L'Hirondelle, [1992] A.J. No. 414 (C.A.).

The Accused

- [32] The accused's position is that the Crown's case rests entirely on circumstantial evidence. He maintains the Crown has failed to establish that the only logical or rational inference to be drawn from that evidence is that the accused committed the robberies.
- [33] The accused points out no fingerprint or DNA evidence exists and Mr. Seo was not found in either of the apartments.
- [34] The accused maintains he has provided a reasonable explanation for his presence on the video in the Hospital Street Apartment and the presence of the stolen goods in his apartment.
- [35] In support of his submission that the Crown has not met its burden, the accused also cited Villaroman. The accused also relied upon R. v. Aldridge, 2001 BCCA 55, to argue he should not be convicted of the offence of possession of stolen property.

Analysis

- [36] The starting point for the analysis in this case is W.(D.) and the analytical approach set out by the Supreme Court in that decision.
- [37] The first part of that approach requires me to consider whether I believe the accused's explanation as to why he is on the video in the hallway of the Hospital Street Apartment and how he came to possess the property at issue. If I believe Mr. Seo, I must acquit. The second part is whether, even if I do not believe Mr. Seo's evidence, that evidence nonetheless gives rise to a reasonable doubt. Finally, even if I reject the evidence of Mr. Seo, I must then decide if the Crown has proved its case.
- [38] When considered in its entirety, I find that while some of the accused's evidence is not believable; his explanation has sufficient consistent detail in pertinent areas such that it raises a reasonable doubt as to Mr. Seo's guilt in this case. While it may or may not be that Mr. Seo had some involvement in the break and enters at issue, I conclude the Crown has

not met the burden to prove Mr. Seo's guilt beyond a reasonable doubt. The standard of proof is higher than a probability and I am not satisfied that the Crown had proved its case beyond a reasonable doubt.

- [39] I note first the Crown's reliance on certain of the accused's remarks are taken out of context. This includes reference to his drug use and other potential illegal activity. While no doubt drug usage and time have impacted on his memory, certain details of his explanation were quite specific and consistently repeated throughout the accused's testimony, including in cross examination. Furthermore, the remarks relied upon, despite what Crown says, appear to further a propensity argument rather than deal with the specifics of this matter.
- [40] I turn to these specifics now.
- [41] Two break and enters in separate residences occurred on October 3, 2014 and October 8, 2014. On October 9, items stolen from each of those residences are found in Mr. Seo's home. In addition, Mr. Seo is seen on a video in the Hospital Street address and in at least one shot he is seen carrying items that he did not initially have.
- [42] The accused took the stand to explain his presence at the Hospital Street Apartment as well as his possession of the items stolen from the apartment.
- [43] Mr. Seo is 43 and presently lives in a recovery house in Vancouver.
- [44] In October 2014, he lived in New Westminster as he had for a number of years. He worked sporadically for a temporary agency as he said for some reason "I keep getting fired," despite being a good worker.
- [45] Mr. Seo has admitted to a number of the items being located in his apartment in New Westminster. He recalls the safety deposit box; the sunglasses and the Citizen eco-drive watch. He also recalls a Michael Kors watch, and two laptops.
- [46] Mr. Seo testified these items came into his possession as a result of \$100 debt due to him by a previous friend, Michael Lee. Mr. Seo said he and Mr. Lee became friends a couple of years before 2014. He met him at 2nd Avenue and Ontario St. in Vancouver, a place where employers arrive at 5:00 a.m. to pick up workers for projects and pay cash. Mr. Seo recalls working with Mr. Lee for 5 days on a metal roofing job in Coquitlam and they became friends. They continued to work together on and off. Mr. Lee would sometimes stay at Mr. Seo's apartment in New Westminster. The two used drugs together and Mr. Seo was on methadone. Mr. Seo said methadone sometimes made him violent.
- [47] Mr. Lee would occasionally need a place to stay. Mr. Seo would agree to let him stay at his apartment and Mr. Lee would pay him \$20 to do so. Mr. Lee stayed at Mr. Seo's apartment at least a dozen times, sometimes due to a fight with his girlfriend.

- [48] Mr. Seo said one morning he woke up and Mr. Lee was gone. Mr. Lee had put all his work stuff in his work bag and left. Later that day, Mr. Seo realized that \$100 was missing from his wallet. Nothing else was missing. Mr. Seo attributed this loss to Mr. Lee. He did not see Mr. Lee again for about a year.
- [49] In October 2014, Mr. Seo ran into Mr. Lee on Columbia Street in New Westminster when he was attending physiotherapy. He confronted Mr. Lee, who denied he stole the \$100. Mr. Seo then assaulted Mr. Lee, who apologized and said he would get the money from his girlfriend.
- [50] The two then went to a car, a silver Honda Civic Mr. Seo had borrowed from a friend, and Mr. Lee gave him directions to his girlfriend's apartment on Hospital Street in New Westminster. Mr. Seo said he parked behind an old brown Caravan on the block but not near the front entrance. Mr. Lee said he was going to run upstairs to his girlfriend's apartment and borrow some money from her. When Mr. Seo was hesitant, Mr. Lee gave him his cell phone to hold onto. Mr. Lee then walked towards the entrance and made a right into the building.
- [51] After Mr. Seo waited 15 minutes, he decided Mr. Lee had again duped him, noting the cell phone had no service. He was furious and grabbed his workbag emptying everything but his gloves and a hammer. He entered the building as another person was leaving. He wanted to find Mr. Lee and "get his money." He said he would use his hammer to threaten Mr. Lee. Mr. Seo said he took his gloves, which he needed if he was going to get into a fight with Mr. Lee.
- [52] Mr. Seo then went through each of the three or four floor hallways looking for Mr. Lee, hoping to find him in the hallways. He said Mr. Lee had a distinctive voice so he spent some time listening; perhaps to hear him arguing with his girlfriend, as they argued a lot. At one point, he thought he heard Mr. Lee so he looked through a mail slot but no one was in that suite.
- [53] Mr. Seo said he was just about to give up and was walking down the hall when Mr. Lee came up behind him. At that point, he was angry. As soon as he saw Mr. Lee, he reached for his gloves and pulled out his hammer. Mr. Lee asked where he had been, as Mr. Lee had returned to the car and Mr. Seo was not there. He then pleaded, "Take this stuff as collateral" as he did not get the money. Mr. Seo said, "I knew that was going to happen." This occurred just before a fire door at the end of the hall.
- [54] Mr. Seo said Mr. Lee said it was "his stuff"; he had taken it from his girlfriend's apartment. The items were a men's watch, a cheap laptop, and a fireproof safety deposit box. As these were men's items, Mr. Seo said this made sense. He asked Mr. Seo to "hold onto it for a little while," while he tried to obtain the money. Mr. Lee told Mr. Seo to go back to the car and wait for him as he needed to speak to his girlfriend "who was really mad."

- [55] Mr. Seo did and when Mr. Lee joined him shortly afterwards, he drove and dropped him at the Skytrain. He gave Mr. Lee his phone number and said he would give him a week at the most. If Mr. Lee did not give him the \$100, he would sell the items.
- [56] Mr. Seo explained his actions on the video, which I will deal with later.
- [57] Mr. Seo then said Mr. Lee called him some five days later to tell him he still did not have the money, but he would give him his girlfriend's stuff to sell. He came by late, said he had broken up with his girlfriend and gave Mr. Seo a Michael Kors watch, and laptop with other items in a bag to see if it would add up to \$100 when sold. Mr. Seo said he never really looked in the bag. He saw the watch and laptop and thought he would sell "whatever was in there." He had a friend who would buy them.
- [58] Mr. Seo specifically denied breaking into either 302 - 2338 Hospital Street or 308 - 517 10th Street, in New Westminster.
- [59] While the accused gave conflicting evidence at different times about certain details, and I do not believe the accused's evidence in its entirety, overall I conclude the essence of the story is consistent and believable such that a reasonable doubt is raised in this case.
- [60] I note in particular the reference by the accused to Mr. Lee coming up behind him in the hallway. This was not necessary to his narrative but was consistently said in both chief and cross. In addition, amongst others, there is the detail of Mr. Lee providing his cell phone to Mr. Seo essentially as "collateral" while he went into the Hospital Street Apartment. There is also the spontaneous remark of Mr. Seo that he "knew that was going to happen" when Mr. Lee did not get the \$100 when at the Hospital Street Apartment. These are all details that underpin the explanation and give it some credibility.
- [61] Mr. Seo added details that were not necessary to and indeed were discreditable. This included the accused recounting an assault on Mr. Lee on Columbia Street and his intention to threaten him with a hammer at the Hospital Street apartment. These do not reflect an individual making up a story. There was no reason to describe an assault as part of his explanation. Rather, he could simply have said Mr. Lee gave him the goods in question, without such potentially incriminating details.
- [62] While I believe certain details of the explanation, I do not believe all and I turn to consider, under the second prong of the W.(D.) test, whether the evidence gives rise to a reasonable doubt. On this point, the accused submits the Crown has not met its burden of proving his guilt beyond a reasonable doubt.
- [63] Ultimately, I conclude the accused was able to explain his actions and presence on the video to the extent that it raised reasonable doubt about his guilt. I say this for the following reasons:

- a) With respect to the allegation he was seen "running off" in the video when he heard the sounds of someone approaching, he said when he heard children's voices he disappeared as he did not want to be around children as his intention was to assault Mr. Lee, who he was very angry at. He also said this applied generally to him not wanting to be seen in the hallways.
 - b) Furthermore, it is not apparent that a hole up above the lock of the 302 apartment would have been obvious. Mr. Seo's answer in cross examination that he did not see one when he was walking through the hallway is therefore explainable.
 - c) Mr. Seo provided an explanation as to why he was carrying items and wearing gloves. This he said was part of his plan to intimidate Mr. Lee if he did not provide the money he was owed.
 - d) Mr. Seo explained why he was seen peering into a mailbox slot of an apartment. He indicated he thought he had heard Mr. Lee's voice, which he had been listening for in order to track him down. He also noted the apartment was empty when he viewed it. Shortly afterwards the video shows two individuals returning to that apartment, which would appear to corroborate his testimony. The video also shows two men leaving the adjacent apartment, which appears to corroborate his testimony that he heard voices and was investigating if those voices included Mr. Lee.
 - e) As to the fact that Mr. Lee is never seen on the video, it is not apparent that this is the only pertinent video as the building has three floors with a number of hallways. The argument that it would not be logical for Mr. Lee to return to the same floor that he committed the break and enter is a remote factor that would require more to make it pertinent. The accused has said Mr. Lee obtained "his stuff" from his girlfriend's apartment in that building.
- [64] As is apparent, I have not rejected the accused's evidence in its entirety. No doubt questions arise due the reality the accused has admitted he has memory and emotional problems due to his drug use at the time. In addition, his explanation about his knowledge of the items in the apartment is less believable. The question becomes whether, given the circumstantial nature of the Crown's case, the only rational inference that can be drawn is that the accused committed the robberies. I conclude this is not the only rational inference that can be drawn in these circumstances.
- [65] Based on my reasons set out earlier, the accused's explanation raises a reasonable doubt such that the Crown's case is not sufficiently conclusive to establish the accused's guilt. As noted by Cromwell J. in *Villaroman* at para. 38, the basic question is whether:

the circumstantial evidence, viewed logically and in light of human experience [and I add especially this person's experience], is reasonably capable of supporting an inference other than that the accused is guilty. [Emphasis added.]

Possession of Stolen Property

[66] Counsel for the accused also maintains that the accused cannot be convicted of possession of stolen property. As per R. v. Kowlyk, [1988] 2 S.C.R. 59 at 74-64, the Court says proof of unexplained possession "may," not must draw the inference:

In summary, then, it is my view, based on the cases, both English and Canadian, which I have referred to, that what has been called the doctrine of recent possession may be succinctly stated in the following terms. Upon proof of the unexplained possession of recently stolen property, the trier of fact may--but not must--draw an inference of guilt of theft or of offences incidental thereto. Where the circumstances are such that a question could arise as to whether the accused was a thief or merely a possessor, it will be for the trier of fact upon a consideration of all the circumstances to decide which, if either, inference should be drawn. In all recent possession cases the inference of guilt is permissive, not mandatory, and when an explanation is offered which might reasonably be true, even though the trier of fact is not satisfied of its truth, the doctrine will not apply. [Emphasis added.]

[67] As I have found the explanation proffered might be reasonably true, even if I am not fully satisfied of its truth, I conclude the doctrine does not apply and the inference of guilt of theft or of offence incidental thereto cannot be drawn on this basis.

[68] Furthermore as per Aldridge at para. 19, the possession of stolen property in this instance is a separate transaction and should have been a separate count in the indictment. The accused cannot therefore be convicted of possession of stolen property.

[69] I therefore find that the Crown has not proven beyond a reasonable doubt that the accused broke and entered into 302 - 2338 Hospital Street, New Westminster, British Columbia and 308 - 517 10th Street, New Westminster.

[70] I find the accused not guilty on both counts of the indictment.

The Honourable Madam Justice E. Burke

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