

CANADA / JUDGMENT

R. v. Trifunski

2021 BCSC 2680

COURT

Supreme Court of British Columbia

DECIDED

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2021 BCSC 2680 R. v. Trifunski

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Trifunski,

2021 BCSC 2680

Date: 20210901

Docket: 170259-2

Registry: Victoria

Regina

v.

Lee Michael Trifunski

Godofredo Narboneta Ruiz

Before: The Honourable Mr. Justice Ball

Oral Reasons for Judgment

Re Accused Lee Michael Trifunski

Counsel for the Crown:

M. Adams

The Accused, appearing on his own behalf:

L.M. Trifunski

The Accused, Godofredo Narboneta Ruiz:

No appearance

Place and Dates of Trial:

Victoria, B.C.

August 30 & 31, 2021

Place and Date of Judgment:

Victoria, B.C.

September 1, 2021

- [1] THE COURT: I am now in a position to give oral reasons for judgment. As with all oral reasons, I reserve the right to edit them for grammar and just simple mistakes. The result, obviously, will not change.
- [2] These are reasons for judgment on a trial where the accused was charged with the offence of unlawful possession of a controlled substance, in this case methamphetamine, for the purpose of trafficking, contrary to s. 5(2) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19 [CDSA]. Apart from admissions of fact made by the accused, the evidence on this trial consisted of the evidence of Constable Jackson, an RCMP member, and Sergeant Pollard, also a member of the RCMP, an expert witness called on the issue of possession for the purpose of trafficking. The accused, Lee Michael Trifunski, decided not to call witnesses for the defence.
- [3] The chief admission was that the substance in two Ziploc-type baggies, referred to hereafter as "the baggies", was methamphetamine and the weight thereof in the two bags combined was 41 grams, a weight sufficient to support a finding that the purpose of possession was trafficking; a conclusion also supported by the evidence of the expert witness, discussed below.
- [4] On August 7, 2016, Constable Jackson was patrolling along Upper Church Road on the Tsawout First Nation, a patrol he regularly conducted. At approximately 10 minutes after 9:00 a.m., while driving on that road, when looking down from the road into a clearing in a forested area, Constable Jackson noted three persons standing adjacent to the rear of a white Toyota Corolla automobile ("the Toyota"). On the rear hood of the Toyota, Constable Jackson observed a digital weigh scale, a small amount of dried marihuana, and two baggies containing a white substance. On seeing those items, Constable Jackson formed the opinion he was watching a drug trafficking transaction taking place.
- [5] Constable Jackson stopped his vehicle and, while standing on the road, continued to observe the three individuals: the accused later identified as Lee Michael Trifunski, Dion Sam Joseph Junior [phonetic], and Ann Hoffman [phonetic]. A fourth individual, Mr. Ruiz, was found sitting inside the Toyota.

- [6] Constable Jackson knew Dion Sam Joseph from earlier dealings in the community. Speaking from the roadway, Constable Jackson advised all four persons in the clearing that they were under arrest. He told the same four persons that they should remain still and he wanted to see their hands at all times.
- [7] Constable Jackson was involved in a one-officer patrol and, having just arrested four persons involved in what he believed was a drug transaction, he was concerned for his personal safety, as drug transactions are often accompanied by weapons and, on some occasions, violence.
- [8] Constable Jackson only had a single pair of handcuffs with him and could not safely deal with four persons who were then under arrest. Constable Jackson used his police radio to summon backup officers from the nearest RCMP detachments to assist with safety concerns with a number of arrested persons. According to Constable Jackson, all of the persons arrested remained still with their hands showing, except for the accused, who repeatedly put his hands into the pockets of his jacket, and then took his hands out of his pockets again. Also, the accused was repeatedly turning around. At that time, Constable Jackson saw the accused as agitated and excited because of his furtive movements.
- [9] The accused had the baggies, one in each hand, which Constable Jackson was able to recognize because of the coloured stripe near the seal of each of the baggies. According to Constable Jackson, the baggies were then thrown into the woods by the accused, landing close to the edge of the clearing. At that time, Constable Jackson was 20 to 25 feet from the accused. Constable Jackson could see where the baggies landed as they entered the foliage on the forest floor, but once the baggies had landed, they were no longer in view.
- [10] According to Constable Jackson, after the accused threw the baggies into the woods, he turned away from Constable Jackson and began to urinate on the ground. Constable Jackson then waited approximately five minutes for other police officers to arrive at the clearing. All persons arrested were subsequently placed in handcuffs. Constable Jackson read Charter notices and warnings from his RCMP-issued card to the accused at 9:38 a.m., and thereafter the accused was searched by Constable Jamieson in the presence of Constable Jackson.
- [11] The accused declined the invitation to contact legal counsel at that time, and no attempt was made at the scene to obtain a statement from him.
- [12] Incident to arrest, Constable Jamieson searched the accused in the presence of Constable Jackson. The items found on the person of the accused included \$186 and some coins, as well as batteries of the type used in the digital scale, and a pair of underwear. These items were recorded in the photograph marked number 22 in the booklet of photographs marked Exhibit 3 on this trial. All four persons arrested were then taken from the scene to local RCMP detachments by other RCMP members.

- [13] Constable Jackson remained at the scene of the arrest with another RCMP member, Constable Davey, to process the scene. He drew a diagram of the scene in his notebook to record where the baggies had been thrown into the bush by the accused. Constable Jackson, in the company of Constable Davey, then searched the area of the bush where he had earlier seen the plastic baggies landed and found the baggies which Constable Jackson marked as Exhibits 4 and 5 in his notebook. The two officers together searched the area of bush around where the baggies were found and no other items of interest or of recent deposit were located. The contents of one of the baggies had partially spilled on a rock near where the baggies landed. The contents of the baggies were sent for scientific analysis. That analysis revealed the two baggies contained methamphetamine in a combined amount of 41 grams.
- [14] During the processing of the scene, Constable Jackson located a plastic bag in plain view near the rear of the pickup canopy which contained \$1,160 cash; 18 fifty-dollar bills and 13 twenty-dollar bills, totalling \$1,160. Those bills were counted by Constable Jackson in company with Constable Davey. When the bag containing those bills was lifted, there was a bus pass in the name of the accused laying underneath the bag. The Toyota was also searched and revealed "all sorts of evidence of drug use", including a plastic Ziploc bag with a substance to be methamphetamine, which was seized by Constable Lee of the RCMP.
- [15] Several methamphetamine pipes were located in the Toyota. As the Toyota and its contents have little relevance to issues in this trial, except to provide some evidence of the circumstances in the clearing, I do not propose to discuss items found in the Toyota further.
- [16] Constable Jackson testified that he did not withdraw his issued firearm from its holster at any time between the time he first saw the four persons that he arrested and when the persons arrested left the scene with other officers. Constable Jackson also testified that he did not have further dealings at his detachment with the accused.
- [17] The second witness called by the Crown was Sergeant Ryan Pollard. Sergeant Pollard is a 28-year veteran of the RCMP who has continually held positions involving drug trafficking interdiction. He testified, at length, various positions he had held which satisfied this court that he was indeed an expert witness on the subject of drugs and their use, their price, their packaging, and consumption techniques, including those matters as they apply to methamphetamine.
- [18] This officer was admitted and qualified as an expert witness in the use, packaging, sale, and distribution of methamphetamine. He described methamphetamine as a stimulant that had a significant effect on the central nervous system of a human causing a huge euphoric energy burst in the body, high body temperature, and creating situations where users cannot sleep. He described how users binge on methamphetamine for extended periods of time, have poor hygiene, eat poorly, sleep poorly, have poor judgment, and these binges can go on for days. He described how it is even possible for an individual using methamphetamine to die as a result of heart or kidney failure.

- [19] He reviewed the circumstances of the reports which he received from the arresting officers, as well as the analysis of the contents of the baggies from the federal health lab, and advised the court he was of the opinion that the 41 grams in the two Ziploc baggies, in the circumstances of this case, amounted to a situation where this was not a street-level purchase. This was, in the totality of things seized and found, led him to the conclusion that this was an amount of narcotics in these circumstances supporting the conclusion of possession of methamphetamine for the purpose of trafficking. His evidence was unchallenged.
- [20] Crown counsel submitted that, in the case for the Crown, the evidence proved all of the elements of the charge in the indictment beyond a reasonable doubt, and that the accused should therefore be found guilty as charged.
- [21] Mr. Trifunski argued on his own behalf. The thrust of his submissions was there was insufficient evidence to convict, and the evidence presented by Constable Jackson should not be accepted at full value because the evidence of the constable was neither credible nor reliable. There was some repeated difficulty in the course of this submission by a tendering of previously unheard evidence from Mr. Trifunski. On several occasions, the court intervened to remind Mr. Trifunski that it was not appropriate for him to give evidence during final submissions, but I will certainly comment further on his submissions below.
- [22] In support of the Crown's submission that the case has been proven beyond a reasonable doubt, the Crown cited four cases: *R. v. Villaroman*, 2016 SCC 33 [Villaroman]; *R. v. De Aquino*, 2017 BCCA 36 [De Aquino]; *R. v. Wan*, 2008 BCSC 268 [Wan]; and *R. v. Schirmer*, 2020 BCSC 291 [Schirmer].
- [23] For the purposes of this judgment, it is useful to discuss the De Aquino case in some detail, as it bears a similarity to the facts of the case now before the court. There, Mr. De Aquino was a motorcyclist involved in an accident with a skateboarder at an intersection. While awaiting the attendance of police, a bystander observed Mr. De Aquino approach a hedge on one corner of the intersection and place his hand under the bottom of the hedge. The bystander did not see anything in Mr. De Aquino's hand, but the bystander's suspicions were aroused. The bystander pointed out to police the exact location where Mr. De Aquino put his hand under the hedge. The police officer examined the location and found 26 small bags of cocaine, which were admitted to be cocaine by the accused after analysis.
- [24] Mr. De Aquino was charged with possession of cocaine for the purpose of trafficking and was convicted in the Provincial Court. The sole issue on appeal was whether the verdict was unreasonable or that it should be set aside pursuant to s. 686(1)(a)(i) of the Criminal Code, R.S.C. 1985, c. C-46 [Code]. The appellant advanced two arguments: first, that the evidence did not establish that only the appellant had exclusive opportunity to place drugs under the hedge; and second, that the judge erred in reasoning which found that the accused had motive to hide drugs, without proof that the accused had drugs in the first place, thereby putting "the cart before the horse."

- [25] In responding to the issues raised in De Aquino about reliance on circumstantial evidence, it was noted at para. 19:
- [19] A guilty verdict based on circumstantial evidence is sound if the trier of fact is "satisfied beyond a reasonable doubt that the guilt of the accused is the only reasonable inference to be drawn from the proven facts": R. v. Cooper, [1987] 1 S.C.R. 860.
- [26] There followed quotations from the Villaroman case explaining the task of a trier of fact dealing with circumstantial evidence at para. 20:
- [20] In Villaroman, Cromwell J. noted that the words "rational" and "reasonable" are "virtually synonyms" and the reasonable alternatives do not need to be exclusively drawn from proven facts. In explaining the trier of fact's task, he said:
- [35] The issue with respect to circumstantial evidence is the range of reasonable inferences that can be drawn from it. If there are reasonable inferences other than guilt, the Crown's evidence does not meet the standard of proof beyond a reasonable doubt.
- [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, [1997] 3 S.C.R. 320, 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 CanLII 14 (ON CA), [1938] O.R. 200 (C.A.), at pp. 205 and 211, per Middleton J.A., aff'd 1938 CanLII 7 (SCC), [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, 1971 CanLII 13 (SCC), [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.
- [21] In explaining the difference between a plausible theory and speculation, Cromwell J. said:
- [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 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*, 55 C.L.R. 367, 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.

[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.

[Emphasis by Cromwell J.]

[22] In this case, on appellate review, this Court must consider whether the properly instructed trier of fact, acting judicially and considering the totality of the evidence, could reasonably conclude that the only reasonable conclusion to be reached is that the appellant possessed the cocaine found under the hedge for the purpose of trafficking. The assessment of the evidence is made in light of human experience and common sense.

[27] In this case, the court must consider if the properly instructed trier of fact, myself, acting judicially and considering the totality of the evidence, could reasonably find that the only reasonable conclusion to be reached is that Mr. Trifunski possessed the baggies of methamphetamine for the purpose of trafficking. It must be remembered in this case, unlike De Aquino, Constable Jackson testified that he saw the accused throw the baggies into the foliage at the edge of the clearing and subsequently found the baggies in that location. That is direct and not circumstantial evidence.

[28] The evidence of Constable Jackson was not perfectly consistent when describing the throwing of the baggies by the accused, but it was clear to the court that he did not change his evidence or waiver from the testimony that the accused was seen to throw the baggies into the foliage at the edge of the clearing. No evidence was heard to the contrary. I accept as accurate the description that the baggies were thrown by the accused into the foliage at the edge of the clearing.

- [29] The reliability of Constable Jackson's evidence is also supported by the fact that there was no evidence or allegation from any other person in that clearing that anyone other than the accused was the source of the baggies. Shortly after the observed throwing of those baggies, the baggies were found in the foliage and found to contain methamphetamine.
- [30] In these circumstances, I adopt and rely upon the contents in the De Aquino case at p. 9, para. 29, as follows:
- [29] Looking at the evidence "through the lens of judicial experience" and applying a good dose of common sense, (R. v. Swales, 2014 BCCA 350 at para. 65) I would not accede to the appellant's argument on this point. Bock is distinguishable based on its substantially different facts. I conclude it was reasonable for the trial judge to find that the only reasonable conclusion supported on the evidence here is that the appellant placed the cocaine under the hedge. On an assessment of the totality of the evidence in this case, the appellant's theory was not a plausible one based on logic and experience and was, at best, speculative: Villaroman at paras. 35-36.

Imputing a Motive

- [31] I adopt and rely upon the comments in De Aquino at paras. 30 and 31 with reference to the imputation of motive:
- [30] The appellant's second argument is that the judge improperly imputed to him a motive by inferring that, because of the value of the cocaine, it must have been placed there recently and under some sense of urgency. He argues that a motive and opportunity to commit the crime, with nothing more, is insufficient to sustain a conviction absent evidence of exclusive opportunity . . .
- [32] There follows a citation from R. v. Yebes, [1987] S.C.R. 168 at para. 26, and the following appears in De Aquino at para. 31:
- [31] However, later in that same paragraph in Yebes, McIntyre J. reviewed the statement of the same principle in R. v. MacFarlane (1981), 1981 CanLII 3324 (ON CA), 61 C.C.C. (2d) 458 (Ont. C.A.), and stated that:

It may then be concluded that where it is shown that a crime has been committed and the incriminating evidence against the accused is primarily evidence of opportunity, the guilt of the accused is not the only rational inference which can be drawn unless the accused had exclusive opportunity. In a case, however, where evidence of opportunity is accompanied by other inculpatory evidence, something less than exclusive opportunity may suffice. . . .

- [33] As in the case of De Aquino, the circumstances here describing the conduct of the accused are not limited to a case of exclusive opportunity, and I refer now to para. 32 in the De Aquino case:

- [32] This is not a case of exclusive opportunity alone. This is a case where the evidence demonstrates opportunity is accompanied by other inculpatory evidence. In this case, the bystander's evidence that the person wearing motorcycle clothes reached his hand under the hedge where the drugs were found shortly after is that other inculpatory evidence. No explanation was provided as to why the appellant reached under the hedge. While the appellant was entitled to remain silent, and no adverse inferences may be drawn in that regard, this Court noted in *R. v. Wu*, 2010 BCCA 589, at para. 46, that the fact the appellant "did not offer any explanation in the face of otherwise inculpatory facts is a matter this Court can consider in assessing the reasonableness of the verdict."
- [34] The expert in this case testified that the methamphetamine in the two baggies had a value, depending on the way it was sold, of between \$1,000 and \$4,100. That evidence was not challenged. Throwing drugs of that value in plastic baggies, one of which leaked methamphetamine onto the ground, was an act done with "extensive urgency". There has been a lack of any evidence to support any alternative explanation, and the court may not speculate about alternative explanations.
- [35] I accept as reasonable the evidence as a whole excludes all reasonable alternatives. I cite there *De Aquino*, page 11, para. 30.
- [36] Insofar as the evidence about the baggies being thrown into the foliage at the edge of the clearing is circumstantial, I find the only reasonable conclusion is inconsistent with any alternative theory based on innocence.
- [37] Further, I find the *Crown* case, taken as a totality, was strong and compelling and I am able to draw inferences which are only consistent with the guilt of this accused.
- [38] The *Crown* has also relied on *Wan*, which demonstrates a further strength in the *Crown's* case. Beginning at para. 27 in that case, the evidence was described as proving the identity of the accused, the date, time, and place of the offence charged; likewise in the case at bar. The evidence of the expert witness, Sergeant Pollard, was unchallenged that in the circumstances of this case, and in particular the amount and value of methamphetamine in the baggies, together with the cash found in plain sight, supported his opinion that the possession in this case was for the purpose of trafficking.
- [39] Possession has been defined on several occasions, including the Code at s. 4(3), which states:
- 4 (3) For the purposes of this Act,
- (a) a person has anything in possession when he has it in his personal possession or knowingly
 - (i) has it in the actual possession or custody of another person, or
 - (ii) has it in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or of another person . . .
- [40] The section goes on to describe where more than one person is in possession.

- [41] As noted in Wan, it would be a matter of extraordinary coincidence if the drugs found by Constable Jackson in the foliage at the edge of the clearing were not the same baggies which Constable Jackson described being thrown there a short time earlier by this accused. I find the sole and only reasonable explanation for the presence of the baggies that were found, and I am satisfied beyond a reasonable doubt, is this accused was in possession of the methamphetamine as charged.
- [42] The final authority referred to by the Crown is Schirmer, a case where the accused was found to have attempted to hide a large quantity of drugs from police while fleeing. The accused fled into a garden behind a private home and stashed a black valise-type bag containing drugs in a bush there. At para. 37 of that judgment, when considering possession, the court makes reference to a provision of the Code dealing with possession, which has very similar language to the provisions of the CDSA.
- [43] Paragraph 37 to which I have made reference reads:
- [37] Personal possession requires actual physical possession, together with knowledge and control. A person has something in his actual physical possession when it is on his or her person, as in a pocket, or when it is inside something that he is carrying, such as a briefcase: R. v. Lepage, [1995] 1 S.C.R. 654. Knowledge can be proved by direct or circumstantial evidence or by a combination of both.
- [44] The court in Schirmer reviewed the evidence in the case and at para. 53 said the following:
- [53] Taking all of the evidence into consideration, I am satisfied beyond a reasonable doubt that the man that leapt from the van was the same man that was running through the yards and the same man that was arrested in the bike shop. That man is Mr. Schirmer. There are no other reasonable inferences to be drawn from that evidence. There is no credible evidence to support the possibility that there were two men running through the same quiet residential neighbourhood at the same time, with dark hair, wearing a black ball cap and blue shirt and carrying a black satchel. That premise is incredible.
- [45] In the case at bar, we have a circumstance where Mr. Trifunski was witnessed throwing the baggies into the foliage at the edge of the clearing. There is no other reasonable inference to be drawn from that evidence other than that Mr. Trifunski acted in that manner for the purpose of keeping the methamphetamine from the police.
- [46] I am satisfied in these circumstances, with the presence of the scale, cash, and found baggies, that Mr. Trifunski was in possession of methamphetamine for the purpose of trafficking on the date and place in question. Having examined the evidence as a whole, treating the evidence as a totality and subject to the findings I have made herein, I find Mr. Trifunski guilty as charged.

"Ball J."

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