
CANADA / JUDGMENT

R. v. Ziaee

2016 BCSC 2575

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2016 BCSC 2575 R. v. Ziaee

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Ziaee,

2016 BCSC 2575

Date: 20161208

Docket: 164987-1

Registry: Victoria

Regina

v.

Ali Arash Ziaee

Zachary Scott Matheson

Before: The Honourable Mr. Justice B. MacKenzie

Oral Reasons for Judgment

re Accused Zachary Matheson

Counsel for the Crown:

J. Cramer

Counsel for the Accused Zachary Matheson:

B. Hickford

No other appearances

Place and Date of Trial:

Victoria, B.C.

February 2-4, 2016;

and November 14-18, 2016

Place and Date of Judgment:

Victoria, B.C.

December 8, 2016

- [1] THE COURT: Mr. Matheson is charged on this indictment with four narcotic offences arising as a result of a reasonably lengthy police investigation commencing in April 2013, and culminating in the arrest of Mr. Matheson and his co-accused, Mr. Ziaee, on June 6, 2013.
- [2] While Mr. Ziaee has entered a plea of guilty to three of the narcotic charges, one of which where he was charged separately from Mr. Matheson, and all involving possession for the purpose of trafficking, the central issue involving Mr. Matheson is whether the Crown has proven beyond a reasonable doubt that he had knowledge and control and therefore possession of a substantial amount of narcotics located after the execution of a search warrant in an apartment that has been described and indeed properly and fairly acknowledged by the defence as being a stash site or stash house.
- [3] In addition, Mr. Ziaee acknowledged, through his guilty plea, he had two kilos of cocaine in his possession when arrested on the day in question. In this regard, the Crown says that Mr. Matheson had both constructive and joint possession of the cocaine found on Mr. Ziaee, as well as in the stash site.
- [4] The relatively unique aspect of this case is that the defence submits that Mr. Matheson was involved in the trafficking of marihuana with Mr. Ziaee, not trafficking in cocaine, nor trafficking in ecstasy and methamphetamine, drugs that were located in the stash house and the subject matter of the counts involving Mr. Matheson.
- [5] In the case against Mr. Matheson, the Crown led evidence as to the conduct of Mr. Ziaee prior to his arrest, where he would be observed entering the apartment at 306, 2778 Peatt Road in Langford, B.C., on occasion after returning from trips to Vancouver where significant amounts of cocaine were purchased and then transported back to the Peatt Road address.
- [6] Indeed, after coming back from one of these trips to the Lower Mainland, Mr. Ziaee was arrested at the door to 306 on June 6, carrying two bricks of cocaine in a shoebox. While the defence did not call evidence, it did make many admissions, including that Mr. Ziaee was clearly involved in the trafficking of cocaine, having regard to the many short-duration stops he was observed to make where people would enter his vehicle for a moment or two and

then leave. In addition, the defence admitted that whoever had these narcotics in their possession would have them for the purpose of trafficking.

- [7] Notwithstanding this admission, the Crown called Sergeant LeBlanc, who the defence admitted was an expert with respect to the distribution of cocaine, ecstasy, and crystal meth, including the methods and practices of trafficking in these substances, as well as the terminology and jargon commonly used in the drug trade. As there was no issue on the question of whether the drugs were possessed for the purpose of trafficking, the Crown called Sergeant LeBlanc to give opinion evidence with respect to the issue of possession. On this point, defence counsel objected to Sergeant LeBlanc being able to testify as to what I agreed is the ultimate issue for the court. That is, whether or not Mr. Matheson was indeed in possession of the narcotics found at the stash location, as well as on Mr. Ziaee.
- [8] However, I agreed with the Crown that, given the undisputed expertise of Sergeant LeBlanc, he was able to give expert evidence with respect to the areas outlined by Crown counsel.
- [9] While I, as the trier of fact, must determine the ultimate issue, his evidence in this regard is relevant and admissible with respect to the question I must answer; that is, whether or not, given the totality of the circumstances, the Crown has proven beyond a reasonable doubt that Mr. Matheson was in possession of these narcotics, having regard to the definition of possession in the Criminal Code and the Controlled Drugs and Substances Act.
- [10] Section 2 of the Controlled Drugs and Substances Act incorporates the definition of possession in subsection 4(3) of the Criminal Code. As such, in order to constitute constructive or contributed possession, pursuant to s. 4(3)(a)(ii) of the Criminal Code, there must be knowledge and some measure of control or right of control over the item alleged to be possessed. In order to constitute joint possession pursuant to s. 4(3)(b) of the Criminal Code, there must be knowledge, consent, and a measure of control on the part of the person deemed to be in possession under this provision: see *R. v. Fisher* in our Court of Appeal; *R. v. Caldwell* in the Alberta Court of Appeal, and *R. v. Escoffery* in the Ontario Court of Appeal.
- [11] On this point, the following statement at paragraph 24 from Justice Smith in *Fisher* sums it up nicely:

As is evident from my summary of the law, neither constructive possession nor joint possession requires proof of manual handling. To establish constructive possession, it was incumbent upon the Crown to prove beyond a reasonable doubt that the appellant knew of the presence of the cocaine and that he had some measure of control over its location. To establish joint possession, the Crown was required to show that someone other than the appellant had possession of the cocaine with his knowledge and consent and that he had some measure of control over it.

- [12] In addition, knowledge may be proven by both direct and circumstantial evidence, citing *R. v. Barros* and *R. v. Terrence*. Since the case is a circumstantial one, it is also helpful to keep in mind the following comment from *Fisher* at paragraph 42:

As was reiterated in *R. v. Smith* ... "possession ... is a matter to be determined on the facts of each case." In *R. v. To McEachern* C.J.B.C made the following apt remarks:

- [41] It must be remembered that we are not expected to treat real life cases as a completely intellectual exercise where no conclusion can be reached if there is the slightest competing possibility. The criminal law requires a very high degree of proof, especially for inferences consistent with guilt, but it does not demand certainty...
- [13] Finally, as always, the onus is on the Crown to prove beyond a reasonable doubt all of the essential elements with respect to the offences. On this issue, in cases such as the present where the Crown attempts to prove its case by circumstantial evidence, the court may draw appropriate inferences from the evidence that a particular defendant has control and also knowledge of the presence of the narcotic: see *R. v. Chambers* in the Ontario Court of Appeal.
- [14] At the same time, as articulated by the Supreme Court of Canada in *R. v. Cooper*, in order to find an accused guilty on circumstantial evidence, the trier of fact must be satisfied beyond a reasonable doubt that the guilt of the accused is the only reasonable inference to be drawn from the proven facts.
- [15] With these principles in mind, the Crown submits that, given the totality of the evidence, it has established beyond a reasonable doubt that Mr. Matheson was involved in a joint enterprise with Mr. Ziaee, and that there is no doubt that Mr. Matheson had knowledge and control over the narcotics found in Apartment 306, 2778 Peatt Road, the admitted stash site, as well as the cocaine found in Mr. Ziaee's possession, and pursuant to the admissions made by the defence, that Mr. Matheson had these narcotics in his possession for the purpose of trafficking.
- [16] In support of its submission, the Crown referred to the evidence of Sergeant LeBlanc when he described a stash site, a stash house as a place where large bulk quantities of drugs are kept and eventually packaged for distribution. He added that in order to safeguard their product, drug dealers will keep to a minimum the number of people who have knowledge and access to the stash sites. Similarly, for security reasons, drug dealers would not sell their drugs from a stash site, in order to keep its location known to only a few trusted colleagues, especially when there is a significant amount of drugs located therein as in the present case.
- [17] In addition, the state of the apartment, including the fact that there was no hydro, makes it abundantly clear, in my view, that the apartment's sole use was a stash site for drugs.
- [18] As I have mentioned, the position advanced by the defence is that all of the evidence, especially the contents of the numerous text messages exchanged between Mr. Matheson and Mr. Ziaee from mid-March to around April 20th, is as consistent with the trafficking in marihuana as it is with the trafficking of cocaine, methamphetamine, and ecstasy, given there was no specific reference to the nature of the drugs that were being distributed by Mr. Ziaee, apart from one exchange where there was reference to marihuana plants. On this

point, Sergeant LeBlanc conceded that, based on the contents of the text messages alone, one could not conclude which drugs were being discussed.

- [19] The basis for the defence submission as to the possibility of this alternative interference is because Mr. Matheson and two other people associated with his residence on Claude Road, a short distance from the stash site, had licences to grow medical marihuana, with the result that 15 kilos of marihuana were found in various packages in Mr. Matheson's residence after he was arrested on June 6. While the Health Canada authorizations allowed these three persons to possess a total of approximately 12 and a half kilograms of marihuana, even though Mr. Matheson was to store his marihuana at another location, the defence says this is a reasonable explanation as to the presence of two money counters and a digital scale in Mr. Matheson's residence.
- [20] On the other hand, the Crown submits the money counters, the scale, and three cell phones are "tools" used by mid-level traffickers in cocaine and crystal meth and ecstasy, and because these persons were entitled to store and have in their possession a combined total of over 12 kilos of marihuana, that this undermines the defence submission.
- [21] The defence also submits that the observations of Mr. Ziaee driving to Mr. Matheson's residence a short distance from the stash site on a relatively regular basis prior to June 6 could be related to the grow operation and not related, as Sergeant LeBlanc opined, for the purpose of distributing the other narcotics located in the stash site, again similar to the defence submission as to the evidentiary value of the text messages.
- [22] In response, the Crown submits there is insufficient evidence to support the inference Mr. Ziaee and Mr. Matheson were trafficking in marihuana, and that the only evidence with respect to the issue of marihuana production involving Mr. Ziaee and Mr. Matheson is when Mr. Matheson, on the one occasion I have referred to, chastised Mr. Ziaee in a text for not spraying his marihuana plants in order to prevent infestation by bugs.
- [23] As a result, the Crown submits the defence submission that there is a reasonable alternative inference to be drawn from the evidence does not have a basis in evidence, and is based on mere speculation, contrary to the principles cited by the Ontario Court of Appeal in *R. v. McIver*.
- [24] On this point, I do not agree with the Crown that this suggested scenario by the defence is irrational or unsupported by the evidence. In my view, there is some evidence to support the defence submission. At the same time, however, this is not fatal to the Crown's case.
- [25] As the Crown submits, even if there is some evidence to establish that Mr. Matheson was engaged in the trafficking of marihuana, this submission ignores the evidence that the Crown says overwhelmingly supports a conclusion that Mr. Matheson had knowledge and control of the cocaine, ecstasy, and crystal meth, and that he possessed these drugs for the purpose of trafficking.

- [26] In support of this submission, the Crown points out what it says is the dramatic evidence pertaining to the arrest of Mr. Ziaee on June 6th, after he returned from one of his trips to Vancouver. After stopping at nearby restaurant, he was observed to have lunch with an unidentified male, and then observed to drive to Peatt Road. One minute prior to arriving at the apartment building, Mr. Ziaee sent a text message to phone number 250-818-4860. This text message stated, "I'm there in 4 min. Come meet me for lunch." One minute later, the phone that was found in Mr. Matheson's possession when he was arrested shortly thereafter sent a reply to Mr. Ziaee's phone saying, "K."
- [27] Sergeant LeBlanc testified that these text messages were consistent with crypted or coded communications between drug traffickers arranging a time to meet. On this particular point, even without this testimony from Sergeant LeBlanc, I would have been satisfied beyond a reasonable doubt that the text speaks for itself and that Mr. Ziaee was arranging for Mr. Matheson to attend at the stash site at Apartment 306.
- [28] In any event, Mr. Ziaee was arrested as he approached Unit 306, about four minutes after sending his text message to Mr. Matheson. He had in his possession the shoebox containing the two kilos of cocaine valued in the range of 100 to \$110,000. Moreover, Mr. Ziaee was in possession of a black leather pouch containing 14 baggies of crack cocaine and keys which opened the front door of the building, as well as the door to Unit 306.
- [29] At the same time this was occurring, police observed Mr. Matheson leave his residence a short distance away. Seconds later, Mr. Matheson was observed using a key to unlock the front door of the apartment building and enter the lobby. Mr. Matheson then entered a stairwell leading to the second and third floors. He entered the third-floor hallway at the same time Mr. Ziaee was being placed under arrest. At this precise moment, one of the officers, Constable Taylor, recognized Mr. Matheson and observed him to immediately turn into an alcove near the elevator and depart the scene. He was observed by one police officer to walk "briskly" from the apartment building across a parking lot, heading towards his residence. To be fair, the Crown concedes another officer described Mr. Matheson as walking at an ordinary gait.
- [30] In any event, Mr. Matheson was arrested about a minute after leaving the apartment building on Peatt Road.
- [31] When arrested, Mr. Matheson had in his possession a set of four keys and a cell phone. Of crucial significance is the fact that two of these keys opened two safes that were located inside Unit 306: one a fairly large Acme safe, and the second a smaller Sentry safe. In addition, one of the other keys opened the door to Unit 306. The fourth key opened the front door of the apartment building.

- [32] At the same time, Mr. Matheson also had a backpack containing a digital scale with cocaine residue on it and a square plastic bowl that had both cocaine residue and tetrahydrocannabinol residue on it, the latter residue from marihuana resin. In addition, Mr. Matheson had a folding knife with a five-inch blade.
- [33] With respect to these items, Sergeant LeBlanc testified that based on his experience, it was his opinion that the square bowl, the scale, and the folding knife are consistent with tools used to break down bulk quantities of cocaine into smaller quantities with the scale being used to weigh out specific amounts of drugs suitable for street-level distribution.
- [34] The cocaine residue found on the scale and the bowl clearly supports Sergeant LeBlanc's opinion. In addition, the cell phone on Mr. Matheson at the time of his arrest was registered in the name of another person. Sergeant LeBlanc testified that it was not uncommon for drug dealers to have their phones registered in a fake name for the obvious reason. Again on this point, the defence submits the fake subscriber name could be because Mr. Matheson and Mr. Ziaee were dealing in marihuana.
- [35] In addition, as I have noted, the cell phone seized from Mr. Matheson was programmed to operate using phone number 250-818-4860, the same phone Mr. Ziaee communicated with moments before he and Mr. Matheson attended the apartment building where Mr. Ziaee was arrested with the kilos of cocaine.
- [36] Given the totality of this evidence, Sergeant LeBlanc again expressed his opinion that only trusted persons who were involved in the distribution of narcotics would have access to a stash site, again with such a significant amount of narcotics being contained therein.
- [37] Moreover, because none of the keys found on Mr. Ziaee would open the larger Acme safe, whereas the keys found on Mr. Matheson would provide access to both safes, I accept Sergeant LeBlanc's opinion that this circumstance significantly contributes to the inference that Mr. Ziaee was subordinate to Mr. Matheson in the enterprise where cocaine, crystal meth, and ecstasy was distributed. Moreover, the fact that Mr. Ziaee had the 14 baggies of crack cocaine suitable for street-level distribution, as well as the two kilos of powder cocaine, also supports Sergeant LeBlanc's opinion that Mr. Ziaee was a street-level dealer working for Mr. Matheson, as well as his courier for the delivery of cocaine from Vancouver.
- [38] Having regard to this latter evidence, the Crown submits that the expert evidence of Sergeant LeBlanc establishes clearly Mr. Ziaee was in the employ of Mr. Matheson, again as Mr. Matheson was the only person with a key for both safes. In addition to this evidence, there was an admission that the Acme safe in Apartment 306 did in fact belong to Mr. Matheson, as there was evidence that this safe was seized in a prior criminal investigation some years earlier, but that it was returned to Mr. Matheson pursuant to a court order made upon the application of Mr. Matheson for its return.

- [39] I pause here to acknowledge the fact that the large Acme safe had a hole in the back about two inches by two and a half to three inches, which of course makes the safe obviously less secure than otherwise would be the case. However, not all the bags containing the drugs could fit through this hole, nor was the top shelf with some ammunition on it accessible through this hole. In addition, the back of the safe was up against the wall in the storage room where it was located and not in plain view. As a result, I am not persuaded this fact undermines the Crown's submission that the evidence supports the inference that this was Mr. Matheson's safe and he had knowledge and control of its contents as of June 6th.
- [40] As the Crown says, to accede to this submission would be to ignore the fact that Mr. Matheson arranged to attend Apartment 306 on June 6 with keys that opened both safes, one safe containing approximately \$50,000 worth of narcotics.
- [41] With respect to this evidence, the defence has made two observations: (1) police surveillance from April 20 to June 6 did not establish any observations of Mr. Matheson entering the Peatt Road apartment building, let alone Unit 306, although he was seen walking in front of the building on June 4th; (2) no one observed Mr. Matheson to actually enter Unit 306, especially on June 6th.
- [42] In light of these observations, or the lack thereof, the defence submits the evidence does not support the inference the Crown asks the court to draw; namely, that Mr. Matheson had knowledge and control of either the contents of 306 or the two kilos of cocaine Mr. Ziaee had in his possession.
- [43] Similarly, the defence says the mere fact that Mr. Matheson had keys for the apartment building, as well as 306 and the two safes does not establish knowledge and control, as he was not observed at or near 306 prior to June 6th.
- [44] The end result is, the defence submits, the circumstances here are significantly different than several of the cases relied upon by the Crown where often the accused person is actually observed entering the apartment in question or is in the apartment when the police arrive. In addition, the defence understandably emphasizes that while a shopping bag and a FoodSaver bag had Mr. Ziaee's prints on them, and a zip-lock bag had Mr. Hillier's prints on it, Hillier being the person who had initially entered into the tenancy agreement for the apartment, Mr. Matheson's prints were not located on any items found within 306.
- [45] The Crown says, however, this submission that Mr. Matheson cannot be linked to Unit 306 is undermined by the additional fact that when the police searched Mr. Matheson's residence, they found in the fire box of a woodstove a notice of eviction addressed to Mr. Hillier. The evidence established, however, that Mr. Hillier left the apartment to go fishing up north on April 4, 2013, and there was no evidence to suggest he had returned prior to June 6.
- [46] On this point, the Crown points out that the notice of eviction was because of non-payment of \$50 in rent and that when combined with the evidence that the people who had been paying Mr. Hillier's rent at Unit 306 had not paid any rent after April 2013, this clearly

establishes Mr. Matheson had control over 306. Moreover, it was admitted that the manager of the apartment building provided two keys to Unit 306, and the Crown says in the absence of any evidence to the contrary, it is reasonable to infer these were the two sets of keys to the apartment found on Mr. Matheson and Mr. Ziaee on June 6.

- [47] In addition, the Crown says further particularly cogent evidence is a text message sent by Mr. Ziaee to Mr. Matheson on April 11th. In this text, Mr. Ziaee asked Mr. Matheson, "Hey bro, did you take care of that 50 for rent?" With respect, in my view, the only logical and reasonable inference is that this refers to Unit 306. Mr. Matheson texted Mr. Ziaee and said, "I did lol." Mr. Ziaee replied, "K, cool, I was worried, lol."
- [48] The response from the defence with respect to this highly incriminating evidence is that this simply establishes that Mr. Ziaee was asking Mr. Matheson to pay the \$50 rent and nothing more. I am unable to accept the innocuous interpretation the defence has put on this particular evidence. Instead, I find it is highly probative with respect to the Crown's submission that Mr. Matheson had knowledge and control over Unit 306. Moreover, I am satisfied it establishes beyond a reasonable doubt that Mr. Matheson had knowledge and control, not only of the stash site itself, but also the contents contained in the two safes for which Mr. Matheson had keys.
- [49] The Crown also submits that Mr. Matheson's conduct when he witnessed the police arresting Mr. Ziaee is consistent with Mr. Matheson going to meet Mr. Ziaee, knowing Mr. Ziaee had the two kilos of cocaine. The Crown submits that if this was an innocuous meeting for lunch, Mr. Matheson would not have immediately departed the third floor hallway and attempted to return to his residence. On this point, I agree with the Crown that this is additional evidence that Mr. Matheson in fact knew that Mr. Ziaee was bringing two kilos of cocaine to Unit 306 and that the arrangement was for Mr. Matheson to attend there with him.
- [50] As far as the suggestion by the defence is concerned that it was because Mr. Matheson and Mr. Ziaee were trafficking in marihuana that Mr. Matheson wanted to leave in a hurry, I do not find that this is a reasonable inference, given the totality of the evidence.
- [51] Again, the primary submission by the defence is that all of the evidence contained in the text messages, the presence of the money counters, phones, and digital scales found in Mr. Matheson's residence are consistent with the trafficking of marihuana and that this undermines the Crown's submission that Mr. Matheson had knowledge and the requisite degree of control of the contents of 306.
- [52] On this particular point, as I have already stated, the Crown says even if Mr. Matheson and Mr. Ziaee were engaged in the production and ultimately trafficking of marihuana, this scenario does not undermine the overwhelming evidence which the Crown says, in its entirety, establishes beyond a reasonable doubt that Mr. Matheson had knowledge and control of the contents of 306 and the cocaine found on Mr. Ziaee.

- [53] Both Crown and defence provided several cases in support of their respective submissions with respect to constructive and joint possession and the general principles surrounding circumstantial evidence. In this regard, while other decisions are often helpful, there is no disagreement as to the legal principles surrounding the question of possession.
- [54] In this particular case, having regard to the totality of the evidence, the question is whether, on the whole of the evidence, the Crown has proven beyond a reasonable doubt that Mr. Matheson had knowledge of and some measure of control over the drugs found in Apartment 306, as well as the cocaine found on Mr. Ziaee.
- [55] While I accept that Mr. Matheson and Mr. Ziaee might have been involved in the distribution of marihuana, this possibility does not detract from or undermine the abundance of evidence pertaining to their involvement in the possession and distribution of the other drugs. Indeed, in my respectful view, the argument that they were only involved in the joint enterprise as regards marihuana fails to take into account the significant evidence relating to the other drugs. While I am prepared to acknowledge that there is evidence to support the inference that Mr. Ziaee and Mr. Matheson were involved in the production and distribution of marihuana, I cannot ignore or disregard the abundance of evidence that supports the conclusion they were involved in the trafficking of the other drugs.
- [56] Guided by these principles and the definition of possession, both joint and constructive, I am satisfied that despite the very able submissions of defence counsel, I am driven to the inescapable conclusion that, given the totality of the evidence, Mr. Matheson had constructive and joint possession of the narcotics found on June 6th in the two safes located in Unit 306.
- [57] Similarly, having regard to the text message on June 6 from Mr. Ziaee setting up the meeting with Mr. Matheson, Mr. Matheson's attendance and then departure, combined with all the other evidence I have referred to, satisfies me the evidence supports only one reasonable inference, and that is that Mr. Matheson knew Mr. Ziaee was attending Unit 306 with the cocaine and that Mr. Matheson had the requisite knowledge and control of that cocaine and the contents of the apartment.
- [58] In my view, the totality of the evidence overwhelmingly supports the conclusion that Mr. Matheson and Mr. Ziaee were involved in a joint enterprise and were in possession of these drugs for the purpose of trafficking.
- [59] As an aside, in response to the Crown's brief alternative submission, I am also satisfied that, given the totality of the evidence, the Crown has established beyond a reasonable doubt the guilt of Mr. Matheson as a party to Mr. Ziaee's possession of the narcotics pursuant to the provisions of s. 21(1) of the Criminal Code.
- [60] So for these reasons, Mr. Matheson is found guilty on Counts 1, 2, 3, and 4.

"B.D. MacKenzie, J."

The Honourable Mr. Justice B.D. MacKenzie

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