COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Bui, 2014 ONCA 614
DATE: 20140829
DOCKET: C55994

Sharpe, Simmons and Pardu JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Thu Van Bui

Appellant

Delmar Doucette and Daniel Santoro, for the appellant

Xenia Proestos, for the respondent

Heard: August 12, 2014

On appeal from the conviction entered by Justice Peter Hryn of the Ontario Court of Justice on March 21, 2012.

Simmons J.A.:

A. INTRODUCTION

[1] On January 15, 2009, the police executed a search warrant at a house jointly owned by the appellant and his wife. When the police entered the house, they detected a strong smell of freshly grown marijuana. During their search, the police found a significant marijuana grow operation. In addition, they found a loaded handgun hidden between the mattress and box-spring of a bed located in a second floor bedroom.

[2] Apart from the bed, the house was sparsely furnished. Police found limited food, dishes or cooking utensils in the house. However, both men's and women's clothing was found in the second floor bedroom; and prescription pill bottles in the names of six different individuals were found on the kitchen table.

[3] The appellant arrived at the house shortly after the search warrant was executed and was arrested immediately. Following his arrest, the police found a key to the house in his pocket.

[4] The appellant and his wife were subsequently charged with a number of offences, including: production of marijuana; possession of marijuana for the purpose of trafficking; possession of the proceeds of crime; theft of electricity; possession of a prohibited weapon, namely a knife, (collectively the "grow operation charges"); and various firearms offences.

[5] On the third day of trial, the Crown withdrew all charges against the appellant's wife. At the conclusion of the Crown's case, the appellant did not call evidence. Rather, it was his position that the Crown had failed to disprove potential innocent explanations for the circumstantial evidence it presented, such as him being an absentee landlord who was visiting the house for the first time. He pointed to the absence of surveillance or other evidence suggesting that he occupied the home or was personally involved in the marijuana grow operation. Further, the appellant contended that the case with respect to the handgun was even weaker than the case with respect to the marijuana grow operation. According to him, a person could be involved in the marijuana grow operation without knowing about the hidden gun.

[6] The trial judge found the appellant guilty of all charges. In his reasons, he found no evidence of another person or persons being involved with the marijuana grow operation. Indeed, in his view, the evidence was to the contrary. He concluded there were "no proven facts upon which [he could] infer" that someone else controlled the marijuana grow operation without the appellant's knowledge.

[7] The main issues on appeal are: i) whether the trial judge erred in his statement and application of the rule in Hodge's Case; and ii) whether the trial judge's findings of guilt on the firearms charges constituted an unreasonable verdict.

[8] For the reasons that follow, I would allow the appeal.

B. BACKGROUND

[9] The appellant and his wife purchased the house in April 2004. Ministry of Transportation records disclosed that the appellant had updated his residential address seven times over 20 years but that he had never shown the address of the house as his residential address.

[10] Two days before the execution of the search warrant, the police conducted surveillance of the house for about four hours. A van registered in the appellant's name was parked in the driveway. However, during their observations, the police did not see anyone at the house.

[11] When the police executed the search warrant, the appellant's van was again parked in the driveway, but no one was in the house. During their search of the house, the police found 50 baby clone marijuana plants on the second floor and 323 marijuana plants in various states of growth in the basement. In addition, they found a hydro meter by-pass; fans and a ventilation system; and, in the second floor bathroom, two drums of water and pesticide.

[12] In addition to the marijuana grow operation, the police found a loaded semi-automatic handgun in a second floor bedroom of the house. The bedroom contained the only bed in the house – a mattress on top of a box- spring sitting directly on the floor. The handgun and some ammunition were found wrapped in

white packing paper, hidden between the mattress and box-spring. A knife that opened by centrifugal force was found in the family room.

[13] The police also found: men's and women's clothing (including women's underwear) in the second floor bedroom; feminine hygiene products in the second floor bathroom; and seven pill bottles with six different persons' names on them on the kitchen table. The medications in the pill bottles had been prescribed between 2005 and 2008. One of the pill bottles had the appellant's name on it for medication prescribed in 2006.

[14] Among other items found during the search, the police seized opened mail related to the property, such as a water bill and a gas bill, all in the names of the appellant and his wife. No mail was found in anyone else's name.

[15] As the police were in the process of leaving the house after completing their search, the appellant drove down the street and parked his car. He waited on the road – and then, with several readily identifiable police officers nearby, drove into the driveway as soon as a police van pulled out. The police arrested the appellant as he was getting out of his car. On searching him, the police found a key to the house in his pocket.

[16] At trial, the Crown led evidence about hydro consumption and called an expert witness who testified about hydro consumption patterns and theft of electricity. The evidence indicated that after the house was purchased the hydro

service was registered in the appellant's name and continued to be registered in his name until the execution of the search warrant. In the first few months after the appellant and his wife purchased the house, electrical consumption rose to about three times the daily consumption of the previous owners. Thereafter, consumption dropped, consistent with the installation of a hydro meter by-pass. Further, on specified dates between June 2007 and January 2009, the pattern of consumption followed a 12 hour on-and-off cycle that differed from the pattern of the previous owners and the neighbours, and that was consistent with the use of an electrical lighting timer for growing plants.

[17] A police officer, who was qualified as an expert in marijuana grow operations, testified that one person could care for a marijuana grow operation of this size. In cross-examination he indicated that he could not recall arresting more than two persons at a time – usually a couple – for a grow operation of this size. Another officer acknowledged that it was not possible to know how many persons had been involved in this grow operation.

C. THE TRIAL JUDGE'S REASONS

[18] At the outset of his reasons, the trial judge noted that the issue in dispute was whether the appellant had knowledge and control of the items found in the house. As the appellant owned the home since 2004, the trial judge found that if

the appellant had knowledge, he also had control. The issue therefore was knowledge.

[19] After observing that the Crown's case was based on circumstantial evidence, the trial judge quoted the following portion of *R. v. McIver*, [1965] 4 C.C.C. 182, at para. 7, in which this court repeated the requirement from the rule in Hodge's Case that conclusions alternative to the guilt of the accused must be rational conclusions based on inferences drawn from proven facts:

> The rule in Hodge's Case … was that before [the jury] could find a prisoner guilty, they must be satisfied "not only that the circumstances were consistent with his having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than the prisoner was the guilty person". In his judgment, the Chief Justice said:
>
> > The rule makes it clear that the case is to be decided on the facts, that is, the facts proved in evidence, and the conclusions alternative to the guilt of the accused must be rational conclusions based on inferences drawn from proven facts. No conclusion can be a rational conclusion that is not founded on evidence. Such a conclusion would be a speculative, imaginative conclusion, not a rational one. [Emphasis added.]

[20] The trial judge went on to review the position of the Crown, the evidence the Crown relied on and the position of the defence. He then set out his analysis. Included in this review and analysis were the following observations:

- there was evidence that the marijuana grow operation required an experienced grower, and likely one individual or a couple;
- except, perhaps, for some dated prescription containers in various names, there was no evidence that multiple individuals attended the house and the marijuana grow operation;
- with respect to the defence submissions, it did not assist him to comment on how the police conducted the investigation; that is, what surveillance was or was not conducted, and whether fingerprints or DNA evidence was or was not collected. His role was to weigh the evidence that was in fact collected and presented in court;
- there was no evidence that the property was rented out;
- there was no evidence that the male clothing fit more than one male, nor that it did not fit the accused. There was women's clothing and costume jewellery. The accused's wife was a co-owner; and
- there was no evidence, but the opposite, that multiple individuals were involved in the operation of the marijuana grow and that therefore, one individual could have secreted a handgun without the knowledge of the others.

[21] The trial judge concluded his reasons with the following assessment:

> *There are no proven facts upon which I can infer that some imagined person other than the accused, controlled the marijuana grow operation in the accused's house without the accused's knowledge*. Such a conclusion would be speculative, and not a rational conclusion. The Crown has proven the accused's guilt beyond a reasonable doubt. The accused is found guilty of all counts. [Emphasis added.]

D. DISCUSSION

(1) Did the trial judge err in his statement and application of the rule in Hodge's Case?

[22] The appellant submits that, in setting out the principles that apply to assessing circumstantial evidence, the trial judge erred in holding that conclusions alternative to the guilt of the accused can arise only from proven facts. The appellant says this error led the trial judge to shift the onus of proof and casts serious doubt on his findings of guilt.

[23] In response, the Crown submits that, read in context, the trial judge's rejection of the hypothetical alternatives to guilt relied on by the defence was not the product of reversing the burden of proof. The Crown is not required to disprove hypothetical theories not grounded in the evidence. The trial judge's references to "proven facts" were nothing more than a response to the hypothetical alternatives to guilt advanced by the appellant that lacked an evidentiary foundation.

[24] I agree with the appellant that the trial judge erred in law in holding that, when assessing circumstantial evidence, conclusions alternative to the guilt of

the accused must arise from “proven facts”. Further, in my view, the trial judge’s reasons demonstrate that this error infected his reasoning process.

[25] In *R. v. Robert* (2000), 143 C.C.C. (3d) 330, at para. 15, this court explained that, since the decision of the Supreme Court of Canada in *R. v. Cooper*, [1978] 1 S.C.R. 860, it has been clear that the rule in Hodge’s Case is not “an inexorable rule of law in Canada”. Further, the rule’s reference to requiring “proven facts” to ground alternative explanations is problematic because there is no obligation on an accused to prove any facts. Rather, an accused is entitled to an acquittal if there is “a reasonable doubt on all of the evidence, a conclusion sustainable at a threshold significantly lower than a “reasonable inference” from “proven facts””: *Robert*, at paras. 17, 21 and 25.

[26] The Crown submits that this case is distinguishable from *Robert* because the accused in *Robert* called expert evidence to show that the fire he was charged with setting could have been caused accidentally. In *Robert*, the trial judge erred by requiring the appellant to prove that the fire was caused accidentally as opposed to considering whether the evidence raised a reasonable doubt.

[27] According to the Crown, this case is different from *Robert* because, in this case, there was no competing evidence to consider and, indeed, no issue as to the “proven facts”. The facts were not in dispute. In the absence of evidence, the

Crown is not required to disprove every conceivable explanation that could be urged upon the court.

[28] In my view, this submission ignores the fact that the question of whether a reasonable doubt exists must be assessed based on the totality of the evidence adduced at trial and not simply based on the “proven facts”. While the evidence at trial may not have been in dispute, the inferences capable of being drawn from that evidence were very much in dispute.

[29] As I read his reasons, the trial judge blurred the distinction between evidence, available inferences and proven facts. For example, in rejecting the defence submission that someone else could have hidden the handgun in the bed, he found that “there [was] no evidence, but the opposite, that multiple individuals were involved in the operation of the marijuana grow”.

[30] While it is true that no one testified about the presence of persons other than the accused at the house, the evidence that both male and female clothing was found in the house and of the presence of prescription pill bottles in the names of several persons, gave rise to an available inference that more than one person had been in the house. Taking account of the state of the house (including the sparse furnishings, limited food and large number of marijuana plants) this, in turn, gave rise to an available inference that more than one person was involved in the marijuana grow operation. Although that inference may not

have been strong enough to constitute a “proven fact”, it was not a mere theoretical possibility lacking any evidentiary foundation.

[31] In my view, the trial judge erred in finding that there was no evidence that multiple persons were involved in the marijuana grow operation and in rejecting the defence submission about the handgun on that basis. As I read his reasons, this erroneous conclusion was driven by an incorrect view that, in a case involving circumstantial evidence, alternatives to guilt must be based on proven facts.

[32] Although I acknowledge that the Crown’s case that the appellant was at least a participant in the grow operation was strong, the trial judge’s erroneous approach to assessing the evidence could well have tainted his assessment of this issue. The Crown does not ask that we apply the proviso. In the circumstances, I would give effect to this ground of appeal. I will deal with the appropriate remedy after discussing the second ground of appeal.

(2) Did the trial judge’s decision on the firearms charges constitute an unreasonable verdict?

[33] The appellant does not dispute that the evidence led by the Crown at trial was capable of supporting findings of guilt on the grow operation charges. However, he contends that the trial judge’s decision on the firearms charges constitutes an unreasonable verdict. I agree.

[34] To find the appellant guilty of the firearms offences, the trier of fact would have to be satisfied beyond a reasonable doubt that the appellant knew about the presence of the gun and had an element of control over it: *R. v. Pham* (2005), 77 O.R. (3d) 401 (C.A.), at para. 15, aff'd 2006 SCC 26; *R. v. Provost (appeal by Watson)*, 2011 ONCA 437, 94 W.C.B. (2d) 733, at para. 10.

[35] For the reasons I have explained, I am satisfied that the evidence of both male and female clothing being found in the house and of the presence of prescription pill bottles in the names of several persons, together with the evidence about the state of the house, gave rise to available inferences that more than one person had been in the house and that more than one person was involved in the marijuana grow operation.

[36] In these circumstances, in the absence of some specific evidence linking the appellant to the gun, I see no basis on which a trier of fact could exclude the possibility, founded on the evidence, that another person hid the handgun and ammunition in the bed without the appellant's knowledge.

E. REMEDY

[37] The appellant seeks a new trial on the grow operation charges and an acquittal on the firearms charges. In its factum, the Crown submitted that, if the appeal is allowed, we should order a new trial on all charges. For reasons that I will explain, I would not accept this submission.

[38] At trial, the Crown tendered an inculpatory statement made by the appellant immediately following his arrest in which the appellant acknowledged operating the marijuana grow operation and purchasing the handgun. The Crown sought to prove the statement was voluntary. The appellant brought an application seeking to exclude the statement under ss. 10(a), (b) and 24(2) of the *Charter*. He denied making the statement and testified that he had virtually no ability to communicate in English. The trial judge excluded the statement, holding that the Crown had not proven beyond a reasonable doubt that it was given voluntarily. In the result, the trial judge did not address the appellant's *Charter* application or make findings of fact concerning the appellant's credibility.

[39] On appeal, the Crown contends that the trial judge erred in excluding the statement simply on the basis that it was not recorded. In addition, the Crown submits that if this court allows the appeal in respect of the firearms charges, the appropriate remedy is to order a new trial so that the admissibility of the appellant's inculpatory statement can be fully determined.

[40] In his ruling on voluntariness, the trial judge relied on this court's decision in *R. v. Moore-McFarlane* (2001), 56 O.R. (3d) 737 (C.A.) and made the following specific findings:

- the appellant was in custody when the statement was made;
- recording facilities were readily available;

- the police deliberately set out to interrogate the appellant without giving any thought to the making of a reliable record;

- the context inevitably makes the resulting non-recorded interrogation suspect; and no sufficient substitute for an audio or a videotaped record has been provided to satisfy the onus on the Crown to prove voluntariness beyond a reasonable doubt.

[41] These findings belie the Crown's general assertion that the trial judge excluded the appellant's statement solely because it was not recorded. Moreover, given the trial judge's finding on voluntariness, it was unnecessary that he address the appellant's *Charter* application.

[42] Under s. 686(2) of the *Criminal Code*, where this court allows an appeal from conviction it may direct an acquittal or order a new trial. As this court noted in *R. v. Harvey* (2001), 57 O.R. (3d) 296 (C.A.), at paras. 30 and 34, where the Court of Appeal allows a conviction appeal on the ground that the verdict is unreasonable it will usually order an acquittal. Nonetheless, the Crown is entitled to raise alleged errors that it claims inured to the benefit of the appellant to support an order for a new trial.

[43] Based on *Harvey*, it would appear that it is customary for any issues raised by the Crown to be fully argued and decided in this court. In this case, I am not persuaded that the Crown has identified even an arguable ground of appeal in relation to the trial judge's ruling on the admissibility of the appellant's statement.

[44] Accordingly, based on the foregoing reasons, I would allow the appeal and set aside the appellant's convictions. I would order a new trial on the grow operation charges and enter acquittals on the firearms charges.

Released:

"RJS"
"AUG 29 2014"

"Janet Simmons J.A."
"I agree Robert Sharpe J.A."
"I agree G. Pardu J.A."