COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Menzies, 2015 ONCA 775
DATE: 20151113
DOCKET: C58533

Laskin, Hourigan and Pardu JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Lawrence Robert Menzies

Appellant

Lance Beechener and Eva Taché-Green, for the appellant

Kathleen Healey, for the respondent

Heard: August 24, 2015

On appeal from the convictions entered on March 12, 2013 by Justice Robert G. Bigelow of the Ontario Court of Justice.

ENDORSEMENT

[1] Mr. Menzies appeals his convictions on two counts of possession of a controlled substance for the purposes of trafficking and one count of possession of property obtained by crime. He argues that the verdicts were unreasonable, or in the alternative, that the trial judge's reasons for conviction on the count of possession of property obtained by crime were insufficient.

[2] The factual circumstances of the offences are as follows. The appellant was arrested during the execution of a search warrant in an apartment in which he was not a tenant. Moments prior to police entering the apartment, an officer stationed on the ground to observe the apartment's balcony saw the appellant walk from inside the apartment onto the balcony, bend down, and then re-enter the apartment. The officer could not observe what the appellant did when he bent down. Nor could the officer see the appellant's hands or observe whether the appellant was carrying anything when he re-entered the apartment.

[3] There were four men and one woman in the apartment when the police entered. The appellant was arrested as he re-entered the apartment from the balcony. He was holding approximately $1,740 in Canadian currency in one hand, which formed the subject matter of the count of possession of property obtained by crime, and a closed knife in his other hand.

[4] A search of the area of the balcony where the appellant bent down revealed a black burlap bag. Inside the burlap bag were two baggies that contained the 26 grams of ketamine and 7.9 grams of methamphetamine which formed the subject matter of the two counts of possession of a controlled substance for the purposes of trafficking. Two smaller baggies of white substances were also found outside of the burlap bag. The substances in the smaller baggies did not form the subject matter of any of the charges on which the appellant was tried.

[5] The trial judge found that the only reasonable inference based on all of the evidence was that the appellant had knowledge and control of the substances inside the burlap bag. He noted that the case was clearly circumstantial and stated that the key issue was whether there was any other reasonable inference that he could draw from the facts. In concluding that no other reasonable inference was available, the trial judge relied on the following facts: (i) the appellant was in the same location as where the drugs were found moments before police entered the apartment; (ii) the appellant had an unexplained and substantial amount of money in his hand at approximately the same time; and (iii) the appellant was in a location where narcotics were being used and likely trafficked. On this basis, the trial judge convicted the appellant of both counts of possession of a controlled substance for the purposes of trafficking.

[6] The trial judge also concluded that, although he had some concern regarding the proceeds of crime count as the trial was proceeding, he was "satisfied that the proceeds had to have been the proceeds of the commission of an offence." The trial judge's reasons for conviction on this count consist of only one sentence.

[7] The appellant submits that the trial judge failed to consider reasonable alternative inferences available on the evidence and, therefore, the verdicts were unreasonable. In addition, the appellant argues that the trial judge failed to provide sufficient reasons with respect to the proceeds of crime count.

[8] A verdict will be unreasonable where it could not reasonably have been rendered by a judge or a properly instructed jury: *R. v. P. (R.)*, 2012 SCC 22, [2012] 1 S.C.R. 746, at para. 9. Given that the evidence relied upon by the trial judge to establish the *actus reus* of the offences is entirely circumstantial, the issue on appeal is "whether the trier-of-fact, acting judicially, could be satisfied that the appellant's guilt was the only reasonable conclusion available on the totality of the evidence": *R. v. T. (D.D.)*, 2009 ONCA 918, 257 O.A.C. 258, at para. 13; *R. v. Griffin*, 2009 SCC 28, [2009] 2 S.C.R. 42, at para. 33.

[9] In considering the reasonableness of the convictions the following facts are important. First, the appellant was not the lease-holder of the apartment and there was no evidence that he had control over the apartment or the balcony. Second, there were illicit drugs located within the apartment which the lease-holder acknowledged were his. Third, the possession for the purpose of trafficking counts related only to the two baggies, containing ketamine and methamphetamine, which were contained in the burlap bag on the balcony, and not the two smaller baggies found outside of the burlap bag. Fourth, there was no other evidence linking the appellant to the burlap bag.

[10] In our view, the inference drawn by the trial judge regarding the drugs in the burlap bag was not the only reasonable inference available. The evidence of the police officer observing the balcony was equally consistent with the appellant's exiting the apartment to discard the two smaller baggies of white

powder. It is not fanciful or speculative, as the Crown suggests, to infer on the totality of the evidence that the appellant had no possession or control over the drugs in the burlap bag and that his intention was to rid himself of the substances in the small baggies before the police entered the apartment.

[11] We conclude, therefore, that the verdicts on the two counts of possession for the purposes of trafficking were unreasonable because the inference drawn by the trial judge was not the only reasonable inference available on the totality of the evidence.

[12] With respect to the conviction for possession of the proceeds of crime under $5,000, while the reasons of the trial judge are obviously brief, when they are considered in the context of the record they do not preclude meaningful appellate review. We are also not satisfied that the conviction is unreasonable. The appellant was found in an apartment that contained large quantities of narcotics that were likely being trafficked. He had in his possession a knife along with the cash. Unlike the possession for the purposes of trafficking counts, there is no other reasonable explanation for his possession of the cash which arises from the evidence. We note the appellant did not testify and thus offered no alternative explanation for his possession of the cash. In these circumstances, we are not persuaded that the verdict was unreasonable.

[13] In the result, the convictions for possession for the purpose of trafficking are set aside and acquittals on those counts are entered. The appeal is otherwise dismissed.

"John Laskin J.A."

"C.W. Hourigan J.A."

"G. Pardu J.A."