COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Knezevic, 2022 ONCA 721
DATE: 20221021
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Doherty, Benotto and Copeland JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Drago Knezevic

Appellant

Gerald Chan and Spencer Bass, for the appellant

Jennifer Lynch and Rick Visca, for the respondent

Heard: October 12, 2022

On appeal from the conviction entered on July 16, 2018 by Justice Christopher Bondy of the Superior Court of Justice.

Copeland J.A.:

Introduction

[1] The appellant appeals his convictions, following a retrial, for one count each of importing cocaine, contrary to s. 6(1) of the *Controlled Drugs and Substances Act* ("the *CDSA*"), S.C. 1996, c. 19, and possession of cocaine for the purpose of trafficking, contrary to s. 5(2) of the *CDSA*.

[2] The appellant is a truck driver. At the time of the offences he worked as an independent contractor who owned his own tractor (truck cab) and pulled trailers on behalf of a company called Scotlynn Commodities Inc.

[3] On June 10, 2011, the appellant crossed the Canadian border at the Ambassador Bridge towing a trailer loaded with raspberries. The raspberries had been loaded at a facility in Oxnard, California, a suburb of Los Angeles, and were destined for a Metro Food Company warehouse in Etobicoke.

[4] When agents from the Canada Border Services Agency ("CBSA") opened the trailer, they discovered two suitcases on top of the pallets of raspberries. There were 18 bricks of cocaine in one suitcase, and 21 bricks in the other, for a total of 39 bricks of cocaine. Each brick weighed between 930 g and 1 kg. It was agreed at trial that the approximate value of the drugs was $3.9 million, if broken down and sold on the street.

[5] The Crown's case was entirely circumstantial. I summarize the key elements of the Crown's circumstantial case below in the analysis of the submission that the verdict is unreasonable.

[6] In light of a number of admissions made at trial, the only issue in dispute at trial was whether the appellant had knowledge of the cocaine in the suitcases in the trailer.

[7] The appellant testified at trial. He said that he had no knowledge of the drugs in the trailer. The defence theory at trial was that the appellant was a blind courier.

[8] The trial judge recognized that the Crown's case was entirely circumstantial. He instructed himself on relevant legal principles, including the Crown's burden of proof beyond a reasonable doubt, how that burden applies when a defendant testifies, and how that burden applies in cases involving circumstantial evidence. He rejected the appellant's evidence. He considered the force of the totality of the evidence. He considered the availability of inferences other than guilt. He ultimately concluded that the only reasonable inference was that the appellant had knowledge of the cocaine in the trailer he was towing.

[9] The appellant raises four grounds of appeal. For reasons I explain below, I am not persuaded by any of the grounds of appeal. Overall, they rely on looking at portions of the reasons for judgment in isolation, rather than reading the reasons as a whole. I would dismiss the appeal.

The verdict is not unreasonable

[10] The appellant argues that the verdict is unreasonable. I would reject this argument.

[11] In considering an appeal based on the argument that a verdict is unreasonable, an appellate court must consider whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered. It is not

the role of an appellate court to simply substitute its view for that of the trier of fact. However, an appellate court considering the reasonableness of a verdict is entitled to review and re-examine the evidence, and to engage in a limited weighing of the evidence to consider whether it is reasonably capable of supporting the verdict: *R. v. Yebes*, [1987] 2 S.C.R. 168; *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, at paras. 36-37.

[12] In my view, there can be no question that the verdict of guilt is one that a properly instructed jury, acting judicially, could have rendered. The circumstantial evidence included the following:

- 39 bricks of cocaine, each weighing approximately 1 kg, found in the trailer that the appellant was towing when he crossed the Canadian border. He was the driver and only person with the truck when it crossed the border. The bricks of cocaine were in two suitcases – 18 bricks in one suitcase, and 21 in the other.
- A handwritten notation on a pad found on the passenger seat in the appellant's truck cab with the numbers 18 and 21, one above the other, with a line below and then the number 39, thus appearing to show adding 18 and 21 together to get 39. These numbers matched the number of bricks in each suitcase (18 and 21) and the total number between the two suitcases (39).
- A receipt for a TracFone purchased in Barstow, California on June 7, 2011 (shortly after the raspberries were loaded) found in the truck cab. However, that phone was not found in his truck (two other cellphones were found), permitting the inference that a phone had been purchased and disposed of for the purpose of making untraceable communications.
- A box of nitrile gloves in the truck cab behind the driver's seat.

- Handwritten directions to two locations outside the appellant's driving route, permitting an inference of a trip off-route to pick up the suitcases with the cocaine.

- The cocaine was worth approximately $3.9 million, permitting an inference that such a valuable quantity of drugs would only be entrusted to someone with knowledge of its presence: *R. v. Zamora*, 2021 ONCA 354, at para. 35; *R. v. Pannu*, 2015 ONCA 677, 127 O.R. (3d) 545, leave to appeal refused, [2015] S.C.C.A. No. 498, at paras. 157 and 173.

[13] The circumstantial evidence, of course, had to be weighed with the appellant's testimony denying knowledge of the drugs in the trailer, and considering whether aspects of the circumstantial evidence or absence of evidence could logically support inferences other than guilt. The trial judge did so. I note that the trial judge found the appellant not to be a credible witness. He rejected the appellant's explanations for some of the objective physical evidence listed above. The trial judge found that the appellant's evidence was internally inconsistent, often defied common sense, and that he had "a memory of convenience." The trial judge gave detailed examples from the evidence to support each of these conclusions.

[14] The appellant's unreasonable verdict argument focuses primarily on the trial judge's finding that it would have been possible for the drugs to be loaded at the warehouse in Oxnard, California without the appellant's knowledge, and to be unloaded at the arrival facility in Canada (had the appellant made it there) without his knowledge. The appellant argues that because the trial judge made this finding,

there were other available inferences besides guilt, rendering the guilty verdict unreasonable.

[15] I do not agree. The trial judge's discussion of the possibility of the drugs being loaded or unloaded without the appellant's knowledge was made while specifically considering the body of evidence relating to opportunities to load and unload the drugs at each end of the trip. This was before the portion of the reasons where the trial judge came to his final assessment of whether on the totality of the evidence, the Crown had met its burden. It was essentially a finding that, standing alone, the body of evidence relating to the loading and anticipated unloading of the trailer was equivocal. There were opportunities for drugs to be loaded and unloaded either with or without the appellant's knowledge. It is not unusual that a single piece of circumstantial evidence may be equivocal when considered in isolation.

[16] The trial judge's finding that a possibility existed to load and unload the drugs without the appellant's knowledge does not render unreasonable his ultimate conclusion, that considering the totality of the evidence, the only reasonable inference was that the appellant had knowledge of the cocaine in the trailer.

The trial judge did not err in his approach to circumstantial evidence and the burden of proof beyond a reasonable doubt

[17] The appellant argues that the trial judge erred in his application of the reasonable doubt standard to a case based on circumstantial evidence. In particular, the appellant argues that the trial judge erred in his application of the principles from *R. v. Villaroman*, 2016 SCC 33, [2016] 1 S.C.R. 1000, by requiring that inferences other than guilt arise from proven facts and not recognizing that they may also arise from a lack of evidence.

[18] The appellant bases this argument on two portions of the reasons for judgment that refer to "proven facts", and on aspects of the trial judge's treatment of the evidence. I would not accept this submission. I address each aspect of the submission in turn.

[19] In support of this submission, the appellant refers primarily to a portion of the reasons where the trial judge set out the law in relation to proof of possession, and circumstantial evidence. After summarizing the law with respect to possession, the trial judge stated:

> In crimes of unlawful possession it is not necessary for the prosecution to prove knowledge by direct evidence; it can be inferred from the surrounding circumstances (citations omitted). However, the law is clear that in order for me to base a guilty verdict on circumstantial evidence of knowledge and control, I must first be satisfied beyond a reasonable doubt that Mr. Knezevic's guilt on the particular count is "the only reasonable inference to be

> drawn from the proven facts": see *R. v. Villaroman* (citation omitted) at paras. 20-22; *R. v. Fleet*, 1997 CanLII 867, 36 O.R. (3d) 542 (C.A.), at p. 549. [Emphasis added]

[20] In the appellant's factum, counsel characterized this instruction as "manifestly incorrect." However, in oral submissions, counsel for the appellant agreed that it was an accurate statement of the Crown's burden in a case based on circumstantial evidence, though took issue with the trial judge's failure to expressly state that inferences other than guilt may arise from an absence of evidence.

[21] There is no error in the trial judge's statement of the law quoted above. Inferences of guilt must be based on proven facts. Indeed, the language the trial judge used for his self-instruction comes from one example in *Villaroman* of a model instruction to a jury on circumstantial evidence and the burden of proof beyond a reasonable doubt: *Villaroman*, at paras. 20-22. I note as well that this portion of *Villaroman* makes the point that jury instructions on circumstantial evidence are not required to follow a specific formula so long as the relevant principles are made clear to the jury – a principle that applies equally to a judge sitting alone.

[22] It is true that in this portion of the reasons for judgment the trial judge did not expressly instruct himself that reasonable inferences other than guilt may be based on an absence of evidence: *Villaroman*, at paras. 35-37; *R. v. Lights*, 2020 ONCA 128, 149 O.R. (3d) 273, at paras. 36-39.

[23] But he was not required to expressly instruct himself to that effect. What he was required to do was correctly apply the legal principles in relation to circumstantial evidence and the reasonable doubt standard in his analysis. In this case, we have the benefit of comprehensive reasons from the trial judge, which contain a detailed exposition of his reasoning process. In my view, reading the reasons as a whole, the trial judge applied the correct legal principles. This is clear both from other portions of the reasons where the trial judge discussed the legal principles in relation to the Crown's burden of proof beyond a reasonable doubt, and from the manner in which he considered the evidence.

[24] Earlier in the reasons, when the trial judge instructed himself on the Crown's burden of proof beyond a reasonable doubt, he correctly instructed himself that a reasonable doubt is one that logically arises from the evidence or the lack of evidence, referring to *R. v. Lifchus*, [1997] 3 S.C.R. 320, at para. 36. In addition, elsewhere in the reasons the trial judge specifically referred to his obligation to consider other possible theories and possibilities, citing *Villaroman*, at paras. 37-38.

[25] This brings me to the second aspect of the appellant's argument on this ground, the submission that the manner in which the trial judge assessed the evidence shows that he did not consider whether gaps in the evidence could give rise to reasonable inferences other than guilt.

[26] The difficulty with the appellant's argument in this respect is that it takes portions of the trial judge's analysis in isolation, without considering the reasons as a whole.

[27] In considering this argument, it is helpful to review the obligation of a trial judge in relation to assessing circumstantial evidence, and the structure of the reasons for judgment in this case.

[28] Trial judges are required to consider the cumulative force of circumstantial evidence in assessing whether a defendant's guilt is the only reasonable inference to be drawn from the evidence as a whole: *Lights*, at para. 37; *R. v. Smith*, 2016 ONCA 25, 333 C.C.C. (3d) 534, at paras. 81-82; *R. v. Hall*, 2015 ONCA 198, at para. 6.

[29] But the practical reality is that often the process of providing reasons involves addressing each body of evidence sequentially. Although a trial judge must consider the cumulative force of all of the evidence, it is not possible to speak or write about every piece of evidence simultaneously.

[30] In this case, the trial judge structured his reasons as follows. He first summarized the evidence of various witnesses (grouped by theme and chronology). He then considered the credibility and reliability of both Mr. Knezevic's testimony and the evidence led by the Crown. He then considered possible inferences that were available from the various bodies of evidence before

the court. Finally, he considered the cumulative force of the evidence and whether the Crown had met its burden to prove the charges beyond a reasonable doubt, such that there were no other reasonable inferences than guilt. This is not an uncommon structure for reasons in cases involving a significant amount of circumstantial evidence.

[31] I would not accept the appellant's submission that the manner in which the trial judge assessed the evidence shows that he failed to consider important areas where there was a lack of evidence or whether reasonable inferences other than guilt were available.

[32] As noted above, there was a substantial body of circumstantial evidence that supported the inference that the appellant had knowledge of the drugs in the trailer. In addition to considering the appellant's evidence, which the trial judge rejected, the trial judge considered various gaps in the circumstantial evidence.

[33] The trial judge considered evidence that the RCMP had been unable to obtain the surveillance video from the warehouse in California of the loading of the raspberries into the appellant's trailer because by the time the RCMP asked for it, it had been erased. The trial judge considered gaps in the evidence regarding the time that the trailer was loaded at the warehouse in California, which created the possibility of the drugs being loaded without the appellant's knowledge. The trial judge considered that the RCMP did not meaningfully investigate the participation

of anyone besides the appellant in the offences, including people who worked at the warehouses where the raspberries were loaded in California and intended to be delivered in Canada. The trial judge also considered evidence that both the shipping company and the receiving company had in the past had loads originate or terminate at their facility in which drugs were discovered.

[34] The trial judge accepted that there was an opportunity for someone to load the drugs at the California warehouse without the appellant's knowledge – a possibility. But when he subsequently considered the totality of the evidence, the trial judge was satisfied that the only reasonable inference was that the appellant had knowledge of the drugs in the trailer.

[35] The appellant points to the trial judge's treatment of the opportunity for someone else to have loaded the drugs onto the appellant's trailer at the warehouse in California as an example of the trial judge failing to consider a gap in the evidence that could have given rise to an inference other than guilt.

[36] Read as a whole, it is clear that the comments by the trial judge about the possibility of the drugs being loaded without the appellant's knowledge were made looking at that specific body of evidence, before he came to his final weighing of the cumulative force of all of the circumstantial evidence. The trial judge's reasons are clear that when he considered the cumulative force of all of the evidence, the only reasonable inference was that the appellant had knowledge and control of the

drugs. In other words, although there may have been an opportunity for the drugs to be loaded into the trailer of the appellant's truck without his knowledge, when that possibility was assessed in the context of all of the evidence, the trial judge was not left with a reasonable doubt.

[37] I am not persuaded that the trial judge failed to weigh gaps in the evidence in his overall assessment of whether the Crown had met its burden to prove the appellant's knowledge of the drugs beyond a reasonable doubt.

The trial judge did not err in his application of the principles from *R. v. W.(D.)*

[38] The appellant argues that the trial judge erred in his application of the principles from *R. v. W.(D).*, [1991] 1 S.C.R. 742, by not applying the second branch of the test and asking whether, even if he did not believe the appellant's evidence, it raised a reasonable doubt. The appellant bases this argument on two aspects of the reasons: (i) the fact that, although the trial judge said at various points in the reasons that he did not believe the appellant's evidence on a number of pivotal issues, he never expressly said that the appellant's evidence did not leave him with a reasonable doubt; and (ii) a portion of a sentence where the trial judge used the phrase "more likely than not" in relation to a particular piece of evidence.

[39] I would not accept this submission. The reasons as a whole show that the trial judge correctly understood and applied the burden of proof in relation to the appellant's testimony. The trial judge correctly instructed himself on the principles in *W.(D).* regarding applying the reasonable doubt standard to the assessment of credibility. He gave detailed reasons for why he did not believe the appellant's evidence in the context of the evidence as a whole.

[40] The trial judge also gave detailed reasons for why he found the circumstantial evidence sufficiently compelling to prove the appellant's knowledge of the drugs beyond a reasonable doubt, and to rule out any other reasonable inference. Although the trial judge used language in his credibility findings of not believing the appellant's evidence, reading the reasons as a whole, it is clear that the appellant's evidence did not leave him with a reasonable doubt.

[41] With respect to the specific paragraph where the trial judge used the phrase "more likely than not", this isolated reference does not undermine the conclusion that the trial judge correctly applied the principles from *W.(D).* It is in a portion of the reasons where the trial judge gave five distinct reasons for not believing the appellant's evidence about the explanation for the handwritten notation on the note pad in the cab of the appellant's truck that appeared to add the numbers 18 and 21 for a total of 39 (matching the amount of cocaine in each suitcase and the total of the two suitcases). The appellant's explanation was that these numbers referred

to tolls he had paid. Within the five distinct reasons for rejecting the appellant's explanation, the trial judge described the second reason as follows:

> The second reason that I do not believe those numbers represented tolls paid in Kansas and Colorado is that Ms. Carter testified that the truck driver is responsible for all tolls. While I approach her evidence with a great deal of caution, I find it illogical that a company would pay for some tolls and not others. Accordingly, I found her evidence on that specific point more likely than not correct. I gave that evidence weight corresponding with that finding. [Emphasis added]

[42] This one isolated reference to "more likely than not" within the context of giving five distinct reasons to reject the appellant's evidence on the issue of the handwritten numbers, itself within a portion of the reasons discussing one aspect of the evidence within the case as a whole, is not a basis to find that the trial judge erred in his application of the reasonable doubt standard. This is particularly so given his correct self-instruction about the principles from *W.(D.).*

There was not a material misapprehension of evidence that resulted in a miscarriage of justice

[43] Finally, the appellant argues that the trial judge misapprehended the evidence with respect to a box of nitrile gloves found in the cab of the appellant's truck when it was stopped at the border. According to the appellant, the trial judge incorrectly said all of the CBSA officers said they had never seen gloves like that in a truck cab, and were not aware of any use for them.

[44] There is no dispute between the parties about the applicable law in relation to misapprehension of evidence as a ground of appeal. The misapprehension must

of substance rather than detail; it must be material, rather than peripheral in the reasoning of the trial judge. In addition, it must not merely be part of the narrative of the judgment, but an essential part of the reasoning process resulting in conviction: *R. v. Morrissey* (1995), 22 O.R. (3d) 514 (C.A.), at p. 221; *R. v. Lohrer*, 2004 SCC 80, [2004] 3 S.C.R. 732, at para. 2; *R. v. C.B.*, 2019 ONCA 380, 146 O.R. (3d) 1, at para. 98.

[45] When the trial judge's reasons are read as a whole, I am not persuaded that the trial judge misapprehended the evidence. In one paragraph, he referred to the CBSA officers and Ms. Carter "all" testifying that they had never seen such gloves in the cab of a truck and could not think of good reasons for them being there. But earlier in his review of the evidence the trial judge noted that one officer acknowledged uses for such gloves, including medical reasons or food preparation.

[46] In any event, assuming for the sake of argument that the trial judge misapprehended the evidence in relation to the anecdotal evidence from some of the CBSA officers, I do not agree that a misapprehension regarding the gloves played a sufficiently important role in the trial judge's reasoning process that it led to a miscarriage of justice.

[47] The finding that the trial judge made in relation to the presence of the box of gloves went no further than that they could have been used to handle the suitcases without leaving fingerprints. The possibility of using the gloves for this purpose was

self-evident, with or without the anecdotal evidence of the border guards about their experience seeing such gloves in truck cabs in the past. The trial judge then weighed that possible use in the context of all of the evidence. The box of gloves was one piece of circumstantial evidence within the totality of the evidence. I am not persuaded that there was any misapprehension about the gloves that resulted in a miscarriage of justice.

[48] I note that I share the appellant's concern about the anecdotal nature of the evidence from the border guards about their experience seeing or not seeing gloves in truck cabs and possible uses for such gloves: *R. v. Sekhon*, 2014 SCC 15, [2014] 1 S.C.R. 272, at para. 50; *R. v. Burnett*, 2018 ONCA 790, 367 C.C.C. (3d) 65. But given the limited conclusion that the trial judge drew from the gloves, I see no prejudice to the appellant.

Conclusion

[49] I would dismiss the appeal.

Released: October 21, 2022 "D.D."

"J. Copeland J.A."
"I agree. Doherty J.A."
"I agree. M.L. Benotto J.A."