NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Power*, 2017 NSCA 85

Date: 20171130
Docket: CAC 464605
Registry: Halifax

Between:

Lonnie Power

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	Fichaud, Bryson and Bourgeois, JJ.A.
Appeal Heard:	October 4, 2017, in Halifax, Nova Scotia
Held:	Appeal allowed, per reasons for judgment of Bourgeois, J.A.; Fichaud and Bryson, JJ.A. concurring
Counsel:	Kenneth C. Greer, for the appellant Angela Caseley, for the respondent

Reasons for judgment:

[1] In September 2015, the appellant was charged with two counts under the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 ("the *CDSA*"): possession of cannabis for the purpose of trafficking contrary to s. 5(2), and production of cannabis contrary to s. 7(1). The charges flowed from a search of property located at Highway 12, Blue Mountain, Kings County, Nova Scotia.

[2] A trial was held over four days (November 14, 2016, January 11, 2017, January 25, 2017 and February 21, 2017) before Judge Jean Whalen of the Provincial Court. On April 5, 2017, the learned trial judge rendered an oral decision in which she acquitted the appellant of the production charge, but found him guilty of possession for the purpose of trafficking.

[3] At the outset of her oral decision, the trial judge advised she had prepared a draft written decision which she did not intend to read in its entirety, but would "hit the highlights". She promised to provide her written reasons to counsel in the days to follow. There is no signed decision from the trial judge. What appears in the Appeal Book, in addition to the certified transcript of her oral reasons, is an unsigned decision noted to be "UNREPORTED, RESERVE THE RIGHT TO FURTHER EDIT".

[4] Both parties base their arguments on what they acknowledge to be the trial judge's written decision. It is certainly more extensive than the brief oral reasons contained in the transcript. Because there is no dispute that the written document contained in the Appeal Book does contain the reasons forwarded to counsel by the trial judge, I am prepared to consider it as such.

[5] The appellant challenges his conviction, submitting, amongst other grounds, that the trial judge's conclusion of guilt was unreasonable. For the reasons that follow, I would allow the appeal and enter an acquittal in relation to the charge under s. 5(2) of the *CDSA*.

Background

[6] A review of the evidence provided at trial is of assistance in understanding the appellant's complaints of error.

[7] On September 29, 2015, police executed a Warrant at premises located at Highway 12, Kings County. The appellant was found in the home on the property.

[8] The police also found materials, identified as being cannabis marihuana, at several locations during the search. There is no issue that all of the materials seized were cannabis in various states of production. As such, I will simply refer to all materials as "marihuana".

[9] Three ziplock plastic bags were found in the freezer compartment of the home refrigerator. A padlocked outbuilding, referred to as a barn by various witnesses, was entered by police. Once inside, the police discovered a substantial amount of marihuana, spread out on two tarps in the process of being dried and prepared for consumption. The search of the barn also disclosed a freezer in which a plastic bag, two Scotian Gold apple boxes and a blue plastic bin, all containing marihuana, were located.

[10] The property specified in the Warrant is rural. The house and barn are located on cleared land; however, it is surrounded by substantial wooded areas. The police searched in the adjacent wooded areas and made further discoveries. Constable Benjamin Gravel testified that while walking the treeline behind the house, he noted a narrow trail leading through dense woods. After approximately 100 metres, the path branched into two. The Constable testified he followed each path further into the woods and, in turn, found two separate clearings, each having 10 marihuana plants growing in black garbage bags. He estimated the clearings were approximately 300 metres into the woods from the treeline.

[11] Two other officers, Constables Michael Morrison and Christopher Burke, testified to carrying out a search of the wooded area behind the barn. Described as being in dense brush, with no discernible trail leading to it, Constable Burke testified he found two plastic blue bins, each containing dried cannabis. He estimated the bins were located 300 to 400 metres into the woods from the edge of the treeline.

[12] At trial, the police witnesses were cross-examined on their knowledge of the boundary lines of the property. All testified they had no knowledge of the boundaries of the property, nor made inquiries to determine them. Further, none of the police witnesses were able to say whether the plants and bins found in the woods were within the boundaries of the property specified in the Warrant and, if not, on whose property or properties the marihuana was found.

[13] The Crown called expert evidence in relation to the materials found and seized by police. Constable Richard Collins provided a written report and gave *viva voce* evidence at trial. As part of the foundation for his opinion that the amount of marihuana seized was indicative of a trafficking enterprise, Constable Collins outlined the quantity of marihuana found in various locations.

[14] Quoted substantially by the trial judge, the expert report breaks down all of the materials seized, including the following:

- 2270 grams of bud found on a green tarp on the right side of the barn next to the motorcycle;
- 2100 grams of bud found on a green tarp on the left side of the barn;
- 550 grams of bud found in a white bucket in the barn;
- 3760 grams of bud found in 1 blue Tupperware container in the freezer in the barn;
- 180 grams of bud found on a blue Tupperware lid on top of a generator in the barn;
- 2025 grams of shake found in 1 black garbage bag, and two Scotian Gold apple boxes in the freezer in the barn; and
- 11747.99 grams of bud found in two blue Tupperware containers in the woods.

[15] The defence called evidence from several of the appellant's family members. His brother, sister and son all testified that the appellant had once lived at the searched property at Highway 12 with his spouse, Cindy, but following their separation, he left to reside nearby with his mother. At the time of the alleged offences, family members testified the home was occupied by Cindy Power and her adult son, Randy Power, Jr.

[16] The evidence did suggest that the appellant frequently visited the property, assisting with maintenance and utilizing the barn for storage of his motorcycle. Utterances made by the appellant on September 29, 2015 to police, and admitted following a *voir dire*, suggested he was at the property that day to do laundry. The police search disclosed numerous articles belonging to the appellant in the house, as well as his motorcycle and various parts in the barn.

[17] The appellant's brother, Randy Power, Sr., testified that he and his girlfriend each possessed a license to produce marihuana. Although the face of the licenses indicated that each were entitled to produce 675 grams, Randy Power testified that based on subsequent communications with Health Canada, he understood that both licenses permitted production of 3040 grams, for a total of 6080 grams.

[18] Randy Power further testified that the marihuana found in the house freezer was his, as he had given it to his sister-in-law to make brownies for him. More significantly, he testified that all of the marihuana found in the barn, including on the tarps and in the containers, was his. He also acknowledged that several of the blue plastic bins shown in photographs of the barn were his, and that he had transported the marihuana from his home in them. He testified that he had been at the barn the day before the Warrant was executed, as well as the morning thereof, where, aided by his sister, he was processing the marihuana he had grown. Randy Power advised the court that he had placed the padlock on the barn door and had possession of the key.

[19] Randy Power further testified that he had requested and received permission from his sister-in-law, Cindy, to use her barn for processing his marihuana, as it was drier than the shed at his home. He testified to having no knowledge of either the plants or the bins discovered in the woods. He acknowledged that the two bins found in the woods were very similar to the ones he was using in his own production.

[20] The appellant's sister, Joy, gave similar evidence; identifying the marihuana in the barn as belonging to Randy, Sr. She testified she knew nothing about the bins and plants found in the woods.

Issues

[21] In his Amended Notice of Appeal, the appellant sets out five grounds of appeal. In his factum, they are condensed to the following:

1. Are the reasons for the trial judge's decision sufficient?
2. Does the verdict of acquittal for the 7(1) *CDSA* offence and the conviction for the 5(2) *CDSA* offence result in an unreasonable, inconsistent verdict or concern for a miscarriage of justice?

[22] At the hearing, counsel for the appellant clarified that the argument relating to unreasonable and inconsistent verdicts should be viewed as standalone grounds

of appeal. In my view, the only ground required to dispose of the appeal is whether the appellant's conviction constitutes an unreasonable verdict.

Standard of review

[23] The parties are in agreement that the appellant's conviction was grounded entirely on circumstantial evidence. They further agree that the appropriate standard of review is as set out by this Court in *R. v. Henderson*, 2012 NSCA 53:

> [17] The standard of appellate review on a question of law is correctness. Factual issues are reviewed for any palpable and overriding error. A trial judge's application of the law to the facts is reviewed as a question of fact unless an extricable error of law is identified. See for example, **R. v. C.J.**, 2011 NSCA 77.
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> [18] The standard of review of verdicts based on circumstantial evidence is whether a properly instructed jury, acting judicially, could have reasonably concluded that the guilt of the accused is the only rational conclusion to be reached from the whole of the evidence. Within such an inquiry, the standard of review for error is correctness. The standard of review of possible inferences that may be drawn from the evidence is palpable and overriding error. See, for example, **R. v. Shea**, 2011 NSCA 107.

And further:

> [35] The reasonableness of the verdict must be judged on the basis of the test set forth in **R. v. Biniaris**, 2000 SCC 15. The question is whether on the basis of the evidence presented at trial, Judge Tax's verdict was a reasonable one in the sense that it was one a properly instructed jury, acting judicially, could reasonably have reached. Further, in the context of this case, where the verdict was based on circumstantial evidence, the test is that which this Court adopted in **R. v. Barrett**, 2004 NSCA 38. Cromwell, J.A. (as he then was) said:
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> > [19] I would conclude that while the test for whether a verdict is reasonable is the same in all cases, where the Crown's case is entirely circumstantial, the reasonableness of the verdict must be assessed in light of the requirement that circumstantial evidence be consistent with guilt and inconsistent with innocence: see **Yebes** at page 185 where this formulation was said to be the equivalent of the requirement that the circumstantial evidence be inconsistent with any rational conclusion other than guilt. This was summed up by Low, J.A. in **R. v. Dhillon** (2001), 158 C.C.C. (3d) 353 (B.C.C.A.). At para 102, he stated that where the Crown's case is entirely circumstantial, the appellate court applying the unreasonable verdict test must determine "... whether a properly instructed jury, acting judicially, could have reasonably concluded that the only

> rational conclusion to be reached from the whole of the evidence is that the appellant..." was guilty.

The trial judge's reasons

[24] After reviewing the evidence of the witnesses, the trial judge proceeded to consider the two charges against the appellant. As noted earlier, the appellant was acquitted of production contrary to s. 7(1) of the *CDSA*. It is helpful to review the trial judge's reasons for the acquittal:

> [44] I'll begin with count #2, s. 7(1) CDSA, the crown argues that it was Randy Sr.'s grow site and that the accused can be convicted as a party to the offence. Even if I don't believe Randy Power Sr. when he says he knows nothing about the plants found the crown bares [*sic*] the burden of proving the accused's guilty beyond a reasonable doubt. First of all, what evidence is there that Randy Power Sr. was "producing" marijuana on the site found by the RCMP. It's obvious that the plants were sown and placed by someone. They are in garbage bags. Mr. Randy Power Sr. says he grows his plants like this but these are not his plants and he knows nothing about them.
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> [45] There was no fingerprint or DNA analysis because the plants were outdoors and the bags would not yield a proper sample. The hose was not examined either.
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> [46] There is no evidence of surveillance by police officers or a 3rd party witness putting Mr. Randy Power Sr. at the site. There is no evidentiary connection between the plants found and the bud or shake found in the barn, or the tarp or in the woods.
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> [47] Certainly the amount of marijuana found at 310 Highway 12 is in excess of Randy Power Sr.'s licence x 2 = 7500 grams[1] but is it his grow site: It is not a sophisticated operation, its [*sic*] in the woods in garbage bags approximately 300 metres from 310 Highway 12 and no other defence witness knows anything about the site.
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> [48] As stated earlier, to produce is defined as "cultivating, propagating or harvesting". This requires labor and attention, not mere drying or curing of marijuana plants. Based on all the evidence or lack thereof, I cannot say with certainty that Randy Power Sr. was producing marijuana at the grow site. While it is very suspicious that is not the test. The test is proof beyond a reasonable doubt. I am not satisfied beyond a reasonable doubt that Mr. Lonnie Power was a principal or party to the offence of producing marijuana, therefore I find him not guilty of count #2.

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[1] The evidence at trial was that the licenses held by Randy Power, Sr. and his girlfriend totaled 6080 grams.

[25] The trial judge's reasons for finding the appellant guilty of possession for the purpose of trafficking contrary to s. 5(2) of the *CDSA* are as follows:

> [49] Regarding count #1, no one; that is Randy Sr., Joy Power or the accused's nephew [*sic*]; knows anything about the 20,658 grams of marijuana found on the property save and except the marijuana that Randy Sr. and Joy Power trimmed and that was in the barn and on the tarps.
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> [50] I calculate that to equal 8,860 grams based on the experts report. If I accept his testimony, where did the other approximately 12,000 grams come from? There's no suggestion it's Cindy Power's or some unknown person dropped it off and it didn't just fall out of the sky.
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> [51] What is Mr. Lonnie Power's relationship to the location where the marijuana was found? This was once the accused's home he shared with Cindy Power but now they are separated. Yet, he has clothes in a bedroom closet. There were numerous documents found in the bedroom in a box with his name and address on it including a receipt dated September 25, 2015 from a motel and a birthday card found on the bedroom dresser. His snowmobile, motorcycle and motorcycle clothing are at this house. He stores his motorcycle and snowmobile in the shed.
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> [52] On the date in question, the police knocked on the door but when no one answered they forced open the door. Mr. Lonnie Power was found in the bedroom in a state of undress, only wearing jeans.[2]
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> [53] His son stated his father was to meet him at the house, then they were to go repair a car. There is no indication he received permission or needed permission from his son or ex-wife to be in the home and if I accepted the son's evidence his father was there once a week. It appears that the accused comes and goes as he pleases.
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> [54] Based on all of the evidence before me, there is no other rational explanation or conclusion other than that I am satisfied beyond a reasonable doubt and fine [*sic*] the accused guilty of count #1, s. 5(2) CDSA.
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> [55] I accept that Randy Power Sr. had a licence x 2 = 7500 as that was not rebutted by the crown.[3] The total amount attributed to the accused is the remainder: 20,658.99 – 7500 = 13,158.99 grams.

[26] The parties are in agreement that the trial judge appeared to accept the evidence of Randy Power, Sr. that the marihuana found in the barn was his, or at

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[2] All of the evidence at trial, including that of the Crown police witnesses, was that Lonnie Power was found in the kitchen.

[3] See footnote 1.

least it gave rise to a reasonable doubt that it was in the possession of the appellant. They are also in agreement that the appellant's conviction relates solely to the marihuana found in the blue bins located in the woods.

Analysis

Did the appellant's conviction under s. 5(2) of the CDSA constitute an unreasonable verdict?

[27] Section 5(2) of the *CDSA* provides:

> (2) No person shall, for the purpose of trafficking, possess a substance included in Schedule I, II, III or IV.

[28] The central issue at trial, and in this appeal, relates to whether the appellant possessed the marihuana found in the bins in the woods. Section 2 of the *CDSA* directs that "possession" means possession as defined in s. 4(3) of the *Criminal Code*. It provides:

> 4(3) For the purposes of this Act,
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> (a) a person has anything in possession when he has it in his personal possession or knowingly
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> (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; and
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> (b) where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them.

[29] There is no question that the allegation against the appellant, as it relates to the marihuana found in the woods, is one of constructive possession. The principles relating to constructive possession were set out in *R. v. Pham*, [2005] O.J. No. 5127, aff'd 2006 SCC 26, where the majority noted:

> 15 In order to constitute constructive possession, which is sometimes referred to as attributed possession, there must be knowledge which extends beyond mere quiescent knowledge and discloses some measure of control over the item to be possessed. See *R. v. Caldwell* (1972), 7 C.C.C. (2d) 285 (Alberta Supreme Court, Appellate Division); *R. v. Grey* (1996), 28 O.R. (3d) 417 (C.A.).

> 16 In order to constitute joint possession pursuant to section 4(3)(b) of the Code there must be knowledge, consent, and a measure of control on the part of the person deemed to be in possession. See *R. v. Terrence*, [1983] 1 S.C.R. 357 (S.C.C.); *R. v. Williams* (1998), 40 O.R. (3d) 301 (C.A.); *R. v. Barreau*, 9 B.C.A.C. 290, 19 W.A.C. 290 (B.C.C.A.) and *Re: Chambers and the Queen* (1985), 20 C.C.C. (3d) 440 (Ont. C.A.).
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> 17 The element of knowledge is dealt with by Watt J. in the case of *R. v. Sparling*, [1988] O.J. No. 107 (Ont. H.C.) at p. 6:
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> > There is no direct evidence of the applicant's knowledge of the presence of narcotics in the residence. It is not essential that there be such evidence for as with any other issue of fact in a criminal proceeding, it may be established by circumstantial evidence. In combination, the finding of narcotics in plain view in the common areas of the residence, the presence of a scale in a bedroom apparently occupied by the applicant, and; the applicants apparent occupation of the premises may serve to found an inference of the requisite knowledge.
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> The court of appeal decision in *R. v. Sparling*, [1988] O.J. No. 1877 upheld the above passage as being sufficient evidence to infer knowledge.
>
> 18 The onus is on the Crown to prove beyond a reasonable doubt, all of the essential elements of the offence of possession. This can be accomplished by direct evidence or may be inferred from circumstantial evidence. In *Re: Chambers and the Queen*, *supra* at 448, Martin J.A. noted that the court may draw "appropriate inferences from evidence that a prohibited drug is found in a room under the control of an accused and where there is also evidence from which an inference may properly be drawn that the accused was aware of the presence of the drug."

[30] To be convicted of constructive possession of the marihuana in the bins, it must have been proven that the appellant knew it was there and had some measure of control over it. In her review of the relevant law, the trial judge appears to recognize the necessity of these elements. She wrote:

> In *R. v. Francis*, 2010 N.S.P.C. 10[4], Judge Hoskins, at para 37 discusses the concept of "constructive possession" stating:
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> > Constructive possession arises when an accused person knowingly has the illicit substance in a place for the use or benefit of the accused person or of another person. The accused person must know that he or she has control over the illicit substance. Often the court is required to examine the relationship between the accused person and the location in which the

[4] The correct citation is 2010 NSPC 102.

> illicit substances were discovered. In addition to having knowledge the crown must also establish that the accused person had some measure of influence or authority over the illicit substance.

[31] As noted at the outset, I am satisfied that the appellant's conviction under s. 5(2) of the *CDSA* is unreasonable. In short, I am not satisfied that a trier of fact could reasonably conclude, based on the whole of the evidence at trial, that the only rational conclusion was the appellant had knowledge and control of the marihuana in question.

[32] In his argument before this Court, counsel for the appellant stresses the lack of direct evidence supporting the appellant had knowledge or control of the two bins in the woods. He submits that many of the trial judge's conclusions giving rise to an acquittal on the production charge are also problematic for a finding of guilt in relation to the s. 5(2) charge. In particular, he says the trial judge clearly considered the location of the discovery (300 metres in the woods) as significant, and the lack of surveillance placing the appellant or his brother at the grow sites, as significant. Counsel says the same considerations ought to apply to the two bins of marihuana.

[33] The Crown submits that the trial judge relied on two key factors to tie the appellant to the bins found 300 to 400 metres in the woods, and to properly infer his knowledge. Firstly, the trial judge properly noted that the appellant could come and go from the property as he pleased, including the barn. Secondly, the Crown contends that the two bins discovered in the woods were very similar to those found in the barn, and the trial judge properly considered this evidence as indicative of the appellant's knowledge of the bins in the woods.

[34] In my view, neither of these factors is adequate to establish the appellant had knowledge and control of the bins in the woods, or that such a determination was the only rational conclusion to be drawn from the whole of the evidence. There were several possible scenarios, plausible on the evidence, which refuted the appellant's guilt as the only rational conclusion.

[35] The trial judge had a reasonable doubt that the appellant or his brother had involvement with the plants found growing in the woods behind the house. Implicit in that finding is that the plants may have been placed there by someone else. Having reached such a conclusion, it is equally plausible that the bins were also placed behind the barn by someone else. As brought out effectively by the appellant's counsel at trial, there was no evidence that the plants or bins were

within the boundaries of the property identified in the Warrant. There was no evidence of the legal title owner of the property or properties where the plants and bins were found. There was no evidence that the appellant had exclusive access or control over these locations.

[36] The appellant was the only person charged in relation to the search conducted on September 29, 2015. There did not appear to be a dispute that the property was occupied by Cindy Power and her son, Randy Power, Jr. Although the trial judge was clearly suspicious about the appellant's living arrangements, noting his personal belongings were found at the property, she was only prepared to conclude that he was able to come and go as he pleased.

[37] There are cases where knowledge and control has been inferred from the existence of drugs in a conspicuous location in the accused's home. However, there is a vast difference in inferring knowledge and control where drugs are located in conspicuous circumstances in a home where an accused lives or frequents, and bins found in dense brush 300 to 400 metres in the woods. In my view, the appellant's ability to access the house and barn does not give rise to the conclusion that he must have known about, and exercised control over, the bins of marihuana in the woods.

[38] I also fail to see how the nature of the bins themselves are conclusive evidence of the appellant's knowledge and control of those found in the woods. Although similar to those found in the barn, nothing in the evidence suggested that they were in any way unique. Further, Randy Power, Sr. testified that the empty bins found on the floor and in the freezer in the barn belonged to him. The trial judge accepted his evidence that he had been processing his own marihuana in the barn.

[39] In my view, it is entirely plausible that the bins in the woods were placed there by Randy Power, Sr. The quantity of marihuana in the barn and claimed by him was well in excess of the limit allowed under the two licenses (a total of 10,885 grams according to the expert report). It is entirely plausible that he hid more of his production in the woods behind the barn to avoid detection in the event of a search. I make this point not to cast aspersions on Mr. Randy Power, but to highlight that the evidence at trial supported rational conclusions other than the appellant knowingly possessing the bins of marihuana. As a consequence, he could not be found guilty for possession of cannabis for the purpose of trafficking.

Conclusion

[40] There is no direct evidence that the appellant had knowledge and control of the marihuana found in the bins on September 29, 2015. The entirety of the Crown's case against him was based upon circumstantial evidence. As such, to sustain the conviction, the appellant's guilt must be the only rational conclusion to be drawn from the whole of the evidence.

[41] I am not satisfied that other rational conclusions are foreclosed in these circumstances. Based on the reasons above, I would set aside the appellant's conviction under s. 5(2) of the *CDSA* and enter an acquittal.

Bourgeois, J.A.

Concurred in:

Fichaud, J.A.

Bryson, J.A.