PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Naser*, 2022 NSPC 46

Date: 20221013
Docket: 8489605
Registry: Truro

Between:

His Majesty the King

v.

Ali Naser

Judge:	The Honourable Judge Alain Bégin
Heard:	August 9, 2022 in Truro, Nova Scotia
Decision:	October 13, 2022
Charge:	5(2) Controlled Drugs and Substances Act
Counsel:	Jillian Hartlen for the Crown Mark Bailey for the defendant

By the Court: (My emphasis added)

[1] This was a criminal trial. The Crown had the onus of establishing beyond a reasonable doubt that Ali Naser committed the offense of Possession of Cocaine for the Purpose of Trafficking contrary to s. 5(2) of the Controlled Drugs and Substances Act. This is an Indictable matter.

[2] There is absolutely no dispute that over 10 grams of cocaine was found in Mr. Naser's residence, along with $1,050 found on Mr. Naser and another $550 on the living room table. There was also a scale, baggies, packaging materials, and a cellphone twice referring to "Ali" that contained multiple messages over several days indicative of drug trafficking. The uncontradicted expert evidence was that the quantity of cocaine, and the other items seized, were indicative of trafficking versus personal consumption. What is in dispute is whether Mr. Naser possessed the cocaine that was found in his residence. This is a case based on circumstantial evidence.

[3] Can this Court infer based solely on circumstantial evidence that Mr. Naser possessed the items seized in his residence? Further, Mr. Naser did not testify, as is his right, but can his failure to testify in a purely circumstantial case be at his own peril with regards to this Court then not having the necessary evidentiary foundation to accept the proposition (of a third party being responsible) put forward by his lawyer in argument, and not in evidence?

[4] The onus of proof never switches from the Crown to the accused. Proof beyond a reasonable doubt does not involve proof to an absolute certainty. It is not proof beyond any doubt. Nor is it an imaginary or frivolous doubt. In ***R. v. Starr*** (2000) 2SCR 144, the Supreme Court of Canada held that this burden of proof lies much closer to absolute certainty than to a balance of probabilities. Mere probability of guilt is never enough in a criminal matter.

[5] The Supreme Court of Canada in ***R. v. Lifchus*** [1997] 3 SCR 320 noted at paragraph 39:

> Instructions pertaining to the requisite standard of proof in a criminal trial of proof beyond a reasonable doubt might be given along these lines:
>
> The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the Crown has on the evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty.
>
> What does the expression "beyond a reasonable doubt" mean?
>
> The term "beyond a reasonable doubt" has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think that it needs no explanation, yet something must be said regarding its meaning.

> A reasonable doubt is not an imaginary or frivolous doubt. It must not be based on sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.
>
> Even if you believe the accused is probably guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the Crown has failed to satisfy you of the guilt of the accused beyond a reasonable doubt.
>
> On the other hand, you must remember that it is virtually impossible to prove anything to an absolute certainty and the Crown is not required to do so. Such a standard of proof is impossibly high.
>
> In short, if based on the evidence before the Court, you are sure that the accused committed the offence, you should convict since this demonstrates that you are satisfied of his guilt beyond a reasonable doubt.

[6] In ***R. v. W.D.*** the Supreme Court of Canada indicated the manner in which a trial court should assess the evidence of an accused who testifies. The accused's evidence is treated in a way different from other evidence. I must consider whether I believe the accused's evidence, and if so, then he is entitled to be acquitted on a charge where I believe his denial. Even where I do not believe the accused's evidence, if it serves to raise a reasonable doubt in relation to his guilt for any of the occurrences, then he is entitled to the benefit of the doubt and he is entitled to be acquitted of the charges relating to that occurrence.

[7] Even where I do not believe the accused, and his evidence fails to raise doubt, I must still consider whether on the evidence I do accept, if the Crown has proved the essential elements of each offense beyond a reasonable doubt. I may only convict the accused of offenses proven beyond a reasonable doubt. Proof beyond a reasonable doubt also applies to issues of credibility.

[8] If I am left in doubt where I don't know who or what to believe, then I am, by definition, in doubt and the accused is entitled to the benefit of the doubt. Having said that, however, the accused's evidence is not considered in isolation. It is part of the whole of the evidence that I have heard and must consider.

[9] Further, I adopt the recent restatement of these principles by the Nova Scotia Court of Appeal in **R. v. N.M, 2019 NSCA 4** where the Court adopted a reframed statement of the ***WD*** factors as expanded by the Supreme Court of Canada in the case of ***R. v. JHS*****, 2008 SCC 30**. The restatement was as follows:

> First, if you believe the evidence of the accused, obviously you must acquit.
>
> Secondly, if you do not know whether to believe the accused or a competing witness, you must acquit.
>
> Thirdly, if you do not believe the testimony of the accused but you are left in a reasonable doubt by it, you must acquit.

> Fourthly, even if you are not left in doubt by the evidence of the accused, that is that his or her evidence is rejected, you must ask yourself whether, on the basis of the evidence that you accept you are convinced beyond reasonable doubt by that evidence of the guilt of the accused.

[10] The process I must follow is first to determine whether I believe the Defendant's evidence or, if I do not believe it, whether it raises a reasonable doubt as to his guilt. If I am left in either of those states of belief by his evidence, I must acquit him. If I do not believe his evidence and it does not raise a reasonable doubt, I must go on to consider whether on the whole of the evidence, and considering the application of the ***Villaroman*** principles, the Crown has proven his guilt beyond a reasonable doubt.

[11] A criminal trial is **not** a credibility contest.

[12] On the issue of credibility, I am guided by the case of ***Faryna v. Chorny*** [1952] 2 DLR 34 where the Court held that the test for credibility is whether the witness's account is consistent with the probabilities that surrounded currently existing conditions. The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. **In short, the real test of the story of the witness in such a case must be how it relates and compares with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.**

[13] Or as stated by our Court of Appeal in ***R. v. D.D.S.*** [2006] NSJ No 103 (NSCA),

> **Experience tells us that one of the best tools to determine credibility and reliability is the painstaking, careful and repeated testing of the evidence to see how it stacks up. How does the witness's account stand in harmony with the other evidence pertaining to it, while applying the appropriate standard of proof in a …criminal trial?**

[14] With respect to the demeanour of witnesses, I am mindful of the cautious approach that I must take in considering the demeanour of witnesses as they testify. There are a multitude of variables that could explain or contribute to a witness' demeanour while testifying. As noted in ***D.D.S.***, demeanour can be taken into account by a trier of fact when testing the evidence but standing alone it is hardly determinative.

[15] Credibility and reliability are different. Credibility has to do with a witness's veracity, whereas reliability has to do with the accuracy of the witness's testimony. Accuracy engages consideration of the witness's ability to accurately observe, recall and recount events in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point.

[16] Credibility, on the other hand, is not a proxy for reliability. A credible witness may give unreliable evidence. Reliability relates to the worth of the item of evidence, whereas credibility

relates to the sincerity of the witness. A witness may be truthful in testifying, but may, however, be honestly mistaken.

[17] The relationship between reliability and credibility was explained in ***Cameco Corporation v. The Queen***, 2018 TCC 195:

> The reliability of a witness refers to the ability of the witness to recount facts accurately. If a witness is credible, reliability addresses the kinds of things that can cause even an honest witness to be mistaken. A finding that the evidence of a witness is not reliable goes to the weight to be accorded to that evidence. Reliability may be affected by any number of factors, including the passage of time. In ***R. v. Norman***, 1993 CanLII 3387 (ON CA), [1993] O.J. No. 2802 (QL), 68 O.A.C. 22, the Ontario Court of Appeal explained the importance of reliability as follows at paragraph 47:
>
> > …The issue is not merely whether the complainant sincerely believes her evidence to be true; it is also whether this evidence is reliable. Accordingly, her demeanour and credibility are not the only issues. The reliability of the evidence is what is paramount...

[18] As well, the Ontario Court of Appeal in ***R. v. G(M)*** [1994] 73 OAC 356 stated at paragraph 27:

> Probably the most valuable means of assessing the credibility of a crucial witness is to examine the consistency between what the witness said in the witness box and what the witness has said on other occasions, whether on oath or not. Inconsistencies on minor matters or matters of detail are normal and are to be expected. They do not generally affect the credibility of the witness…**But where the inconsistency involves a material matter about which an honest witness is unlikely to be mistaken, the inconsistency can demonstrate a carelessness with the truth. The trier of fact is then placed in the dilemma of trying to decide whether or not it can rely on the testimony of a witness who has demonstrated carelessness with the truth.**"

[19] And at paragraph 28:

> …it is essential that the credibility and reliability of the complainant's evidence be tested in the light of all of the other evidence presented……. **While it is true that minor inconsistencies may not diminish the credibility of a witness unduly, a series of inconsistencies may become quite significant and cause the trier of fact to have a reasonable doubt about the reliability of the witness's evidence.** There is no rule as to when, in the face of inconsistency, such doubt may arise, but at least the trier of fact should look to the totality of the inconsistencies in order to assess whether the witness's evidence is reliable. This is particularly so when there is no supporting evidence on the central issue…

[20] In the case of ***R. v. Reid*** (2003) 167 (OAC) the Ontario Court of Appeal stated that although the trial judge is at liberty to accept none, some, or all, of a witness' evidence, this must not be done arbitrarily. When a witness is found to have deliberately fabricated criminal allegations against the accused, the trial judge must have a clear and logical basis for choosing to accept one part of that witness' testimony while rejecting the rest of it.

[21] A credibility assessment is not a science. As noted in ***R. v. Gagnon***, 2006 SCC 17 (S.C.C.), para.20, it is not always possible to,

> …articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events...

[22] And in ***R. v. M. (R.E.),*** 2008 SCC 51 (S.C.C.), para. 49 the Court noted that

> … Assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization.

[23] There is no principle of law that requires a trier of fact to believe or disbelieve a witness's testimony in its entirety: ***Novak Estate, Re***, 2008 NSSC 283 (N.S.S.C.). On the contrary, a trier may believe none, part or all a witness's evidence, and may attach different weight to different parts of a witness's evidence.

[24] A trier of fact is entitled to believe all, some, or none of a witness' testimony. I am entitled to accept parts of a witness' evidence and reject other parts. Similarly, I can afford different weight to different parts of the evidence that I have accepted.

[25] It is important to remind myself of my role, and duty, as the trial judge. The Nova Scotia Court of Appeal in ***R. v. Brown*** [1994] NSJ 269 (NSCA) confirmed at paragraph 17 that:

> …There is a danger that the Court asked itself the wrong question: that is which story was correct, rather than whether the Crown proved its case beyond a reasonable doubt.

[26] And at paragraph 18 of that same ***Brown*** case the Nova Scotia Court of Appeal referred to paragraph 35 of the BC Court of Appeal case ***R. v. K.(V.)*** which stated:

> I have already alluded to the danger, in a case where the **evidence consists primarily of the allegations of a Complainant and the denial of the accused, that the trier of fact will see the issue as one of deciding whom to believe.** Earlier in the judgement I noted the gender-related stereotypical thinking that led to assumptions about the credibility of Complainants in sexual assault cases which we have at long last discarded as totally inappropriate. It is important to ensure that they are not replaced by an equally pernicious set of assumptions about the believability of Complainants which would have the effect of shifting the burden of proof to those accused of such crimes.

[27] In the case of ***R. v. Mah*** 2002 NSCA 99, the Court stated:

> The **W.D.** principle is not a "magic incantation" which trial judges must mouth to avoid appellate intervention. Rather, **W.D.** describes how the assessment of credibility related to the issue of reasonable doubt. **What the judge must not do is simply choose between alternative versions and, having done so, convict if the complainant's version is preferred. W.D. reminds us that the judge at a criminal trial is not attempting to resolve the broad factual question of what happened. The judge's function is the more limited one of deciding whether the essential elements of the charge have been proved beyond reasonable doubt** ….the ultimate issue is not whether the judge believes the accused or the complainant or part or all of what they each had to say. The issue at the end of the day in a criminal trial is not credibility but reasonable doubt.

[28] The ***Mah*** case makes it clear that my function as a judge at a criminal trial is **not** to attempt to resolve the broad question of what happened. My function is more limited to having to decide whether the essential elements of the charges against the accused have been proved beyond a reasonable doubt. The onus is always on the Crown to prove the elements of the offenses beyond a reasonable doubt. The onus is **not** on the Defence to disprove anything.

Judicial Treatment of Circumstantial Evidence

[29] I have already noted that the evidence in this case was circumstantial evidence. How do I treat this evidence?

[30] In ***R. v. Griffin*** 2009 SCC 28 (S.C.C.) Charron J. set out the proper approach for assessing a case based upon this type of evidence at para. 34:

> The trial judge repeatedly made clear to the jury that **a guilty verdict can only be rendered if guilt is the sole rational inference to be drawn from the circumstantial evidence** … It is argued that the impugned language had the potential to engage the jury in an abstract comparative exercise, **assessing the qualitative reasonableness of one inference against another when the mere existence of any rational, non-guilty inference is sufficient to raise a reasonable doubt.**

[31] In ***Bowlin v. R***. 2010 NBCA 90 (N.B.C.A.) Deschenes J.A. restated an important principle from ***Griffin*** at paragraph 8:

> …The essential component of an instruction on circumstantial evidence is to instill in the jury that **in order to convict, they must be satisfied beyond a reasonable doubt that the only rational inference that can be drawn from the circumstantial evidence is that the accused is guilty…**

[32] In ***R. v. Moose*** 2015 ABCA 71 (A.C.A.) the court said this about circumstantial evidence at paragraph 12:

> When the Crown relies on circumstantial evidence to prove its case, the Crown does not need to prove beyond a reasonable doubt each fact which is said to support the inference of guilt…It seems to us that the contrary must also be true when there is exculpatory evidence. One piece of exculpatory evidence might not be sufficient to raise a reasonable doubt but the cumulative effect of a number of pieces of exculpatory evidence may well do so.

[33] In ***R. v. Smith*** 2016 ONCA 25 (O.C.A.) the court said at paragraphs 79 to 82:

> Two brief principles that govern proof by circumstantial evidence merit brief mention.
>
> The first has to do with the standard of proof required in cases involving circumstantial evidence. There is no legal requirement for a special self-instruction on circumstantial evidence. **To convict, a trial judge must be satisfied beyond a reasonable doubt that the only rational inference that can be drawn from the circumstantial evidence is one of guilt**: ***R. v. Griffin***, 2009 SCC 28, [2009] 2 S.C.R. 42, at para. 33.
>
> The second principle assumes particular significance when, as here, arguments are advanced that individual items of circumstantial evidence are explicable on bases other than guilt. **It is essential to keep in mind that it is the cumulative effect of all the evidence that must satisfy the criminal standard of proof, not each individual item which is merely a link in the chain of proof: *R. v. Morin***, [1988] 2 S.C.R. 345, at p. 361; ***R. v. Uhrig***, 2012 ONCA 470, at para. 13.
>
> Often, individual items of evidence adduced by the Crown examined separately lack a very strong probative value. But it is all the evidence that a trier of fact is to consider. Each item is considered in relation to the others and to the evidence as a whole. **And it is all the evidence taken together, often greater than the sum of individual pieces, that is to be considered and may afford a basis for a finding of guilt**: ***Uhrig***, at para. 13. See also: ***Côté v. The King*** (1941), 77 C.C.C. 75 (S.C.C.), at p. 76.

[34] In other words, it is the cumulative weight of the facts that must prove the accused guilty beyond a reasonable doubt and not each individual fact examined separately as confirmed in ***R. v. Morin*** (1988), 1988 CanLII 8 (SCC), 44 C.C.C. (3d) 193 (S.C.C.).

[35] In ***R. v. Villaroman*** 2016 SCC 33 (S.C.C.) the court made this statement about what the jury should be told about the handling of circumstantial evidence at paragraphs 37 and 30:

> **When assessing circumstantial evidence, the trier of fact should consider "other plausible theor[ies]" and "other reasonable possibilities" which are inconsistent with guilt: *R. v. Comba*,** [1938] O.R. 200 (C.A.), at pp. 205 and 211, per Middleton J.A., aff'd [1938] S.C.R. 396; *R. v. Baigent*, 2013 BCCA 28, 335 B.C.A.C. 11, at para. 20; ***R. v. Mitchell***, [2008] QCA 394 (AustLII), at para. 35. **I agree with the appellant that the Crown thus may need to negative these reasonable possibilities, but certainly does not need to "negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused": *R. v. Bagshaw*,** [1972] S.C.R. 2, at p. 8. "Other plausible theories" or "other reasonable possibilities" must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation.

[36] The Supreme Court of Canada in ***Villaroman*** indicated that the distinction between direct and circumstantial evidence must be recognized. It suggested that in cases involving juries the following instruction would be appropriate (at paragraph 30):

> It follows that in a case in which proof of one or more elements of the offence depends exclusively or largely on circumstantial evidence**, it will generally be helpful to the jury to be cautioned about too readily drawing inferences of guilt...Telling the jury that an inference of guilt drawn from circumstantial evidence should be the only reasonable inference that such evidence permits will often be a succinct and accurate way of helping the jury to guard against the risk of "filling in the blanks" by too quickly overlooking reasonable alternative inferences...**

[37] In ***Villaroman*** the court stated that inferences consistent with the evidence do not have to arise from proven facts. The trier must consider other "plausible explanations" but those must be based on logic and experience applied to the evidence, or absence of evidence, and **not** based on speculation.

[38] And as noted by the Nova Scotia Court of Appeal in ***R. v. Lee*** 2020 NSCA 16:

> In ***R. v. Villaroman***, *supra*, Cromwell, J., at para. 20 referenced Charron, J., in ***R. v. Griffin,*** 2009 SCC 28 citing with approval ***R. v. Fleet***, (1997) 1997 CanLII 867 (ON CA), 120 C.C.C. (3d) 457 at para. 20. In a circumstantial case, the question for a jury will be whether **it is satisfied beyond a reasonable doubt that the guilt of the accused is the only rational inference to be drawn from the proven facts.** He was careful not to shift the burden to an accused in circumstantial evidence cases saying:
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> > [35] … In assessing circumstantial evidence, inferences consistent with innocence do not have to arise from proven facts: ***R. v. Khela***, 2009 SCC 4, at para. 58. … Requiring proven facts to support explanations other than

> guilt wrongly puts an obligation on an accused to prove facts and is contrary to the rule that whether there is a reasonable doubt is assessed by considering all of the evidence. The issue with respect to circumstantial evidence is the range of reasonable inferences that can be drawn from it. If there are reasonable inferences other than guilt, the Crown's evidence does not meet the standard of proof beyond a reasonable doubt. (My emphasis added).

[39] As well, in ***R. v. Roberts***, 2020 NSCA 20:

> If reasonable inferences other than guilt can be drawn from circumstantial evidence the Crown has not met the standard of proof beyond a reasonable doubt. Reasonable doubt can be logically based on the evidence or lack of evidence, must be reasonable given that evidence or lack thereof, and assessed logically in light of human experience and common sense

[40] At the end of the day, the question for the trial judge is whether the circumstantial evidence viewed logically, and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty. The fundamental question is whether the circumstantial evidence, assessed in light of human experience, excludes any other *reasonable* alternative. Put another way, the alternative inferences sought to be drawn must be reasonable and rational in the circumstances of the matter — not merely possible. For Mr. Naser, the proposed 'reasonable and rational' alternative is that the cocaine and drug trafficking paraphernalia belonged to the second person in the residence who was visiting at the time of the arrest/search. The cocaine and various items seized could have belonged to this second person.

<u>The Failure of the Accused to Testify in A Purely Circumstantial Case</u>

[41] In ***R v Oddleifson (JN)***, 2010 MBCA 44, two people were located in a truck containing 46 kilograms of cocaine in a sophisticated secret compartment. One accused testified that he had no idea the truck had cocaine hidden in it. The other accused did not take the stand. The Manitoba Court of Appeal found that **there must be an evidentiary foundation which, if accepted, could have precluded the inferences drawn from the Crown's evidence**:

> 25 What use can be made of the accused's failure to testify when the Crown's case cries out for an explanation? In this case, because the Crown was relying on expert and circumstantial evidence with respect to the element of possession, it had to satisfy the trial judge that the only reasonable or rational inference that could be drawn from the proven facts was that the accused had knowledge of and control over the cocaine (see ***R. v. Griffin,*** 2009 SCC 28, [2009] 2 S.C.R. 42 at para. 33; ***R. v. Guiboche,*** 2004 MBCA 16, 180 Man.R. (2d) 276 at paras. 108-10; ***R. v. Fleet (1997)***, 1997 CanLII 867 (ON CA), 120 C.C.C. (3d) 457 (Ont. C.A.) at para. 20; and ***R. v. Cooper,*** 1977 CanLII 11 (SCC), [1978] 1 S.C.R. 860).

> 26 In the case at hand, **once the Crown had closed its case, it had, in my view, met this burden. It cried out for an explanation.** At that point, the accused had a choice. As was stated by L'Heureux-Dubé J. in ***R. v. Cook***, 1997 CanLII 392 (SCC), [1997] 1 S.C.R. 1113 at para. 39, ".... **Once this threshold has been surpassed, however, it is up to the accused to call evidence or face conviction**. ...." Unlike the co-accused, the accused chose not to lead evidence. It is trite to say that the accused's failure to testify cannot be used as a sword: it cannot be used to infer guilt. However, as a practical matter, that failure to testify equates to an absence of evidence, evidence which could have been used to help support the accused's argument that the Crown has not met its burden and that the accused, like the co-accused, may have also been a dupe. **Although the accused had the right not to testify, that decision carried the risk of not providing the trial judge with the necessary evidentiary foundation which, if accepted, could have precluded the inference of possession from being drawn.** Arbour J.A. stated in ***R. v. Johnson* (1993)**, 1993 CanLII 3376 (ON CA), 79 C.C.C. (3d) 42 (Ont. C.A.), ".... **It is not so much that the failure to testify justifies an inference of guilt; it is rather that it fails to provide any basis to conclude otherwise**...." (at para. 27). The Manitoba Court of Appeal in ***R v Banayos and Banayos,*** 2018 MBCA 86 (leave to appeal to SCC refused February 14, 2019) held at para 24:
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> An accused is under no obligation to present an evidentiary foundation to raise a reasonable doubt or to prove their alternative inferences. An accused may choose to present evidence or not. **However, when an accused chooses not to testify or to call evidence, that decision carries the risk of not providing the trial judge with the necessary evidentiary foundation which, if accepted, could have precluded the impugned inferences from being drawn** (see ***R v Oddleifson (JN),*** 2010 MBCA 44 at para 25, leave to appeal to SCC refused, 33756 (28 October 2010)).

[42] And in **R. v. Lazzaro,** 2016 ABCA 353**,** the Alberta Court of Appeal stated at para 11,

> … The failure to call any evidence to support an innocent inference is a factor that the appellate court may consider in determining whether the verdict is unreasonable.

[43] Mr. Naser chose not to testify, as is his right, but in a case that relies solely on circumstantial evidence, he did so at his peril with regards to this Court not having the necessary evidentiary foundation to accept the proposition put forward by his lawyer in argument, but not in evidence.

<u>Inference of Possession in a Residence</u>

[44] It is incumbent on the Crown to prove knowledge and control of the drugs to make out the element of possession.

[45] In ***R v Lehner***, 2020 ABCA 248, the police executed a search warrant at Residence A (a basement suite with one bedroom, one bathroom, living area and kitchen). When the police arrived to execute the warrant, Ms. Lehner was inside, along with another woman. One of the officers heard Lehner say that the other woman did not live at the residence and had nothing to do with it. Approximately 3 ounces of cocaine were found in various locations in the kitchen, along with a scale, plastic baggies and other drug paraphernalia. The search also turned up a purse containing a wallet and Lehner's ID. Lehner had been seen in possession of the purse during surveillance. The trial judge was asked to infer that Lehner resided in Residence A, that she resided there alone, that she knowingly possessed the items found in Residence A, including the cocaine, and that she possessed the cocaine for the purpose of trafficking. The trial judge concluded that Lehner was in constructive possession of the cocaine found in Residence A. The correctness of this decision was the issue at appeal. In ***R v Lehner*** the Alberta Court of Appeal stated (the Court also decided a related appeal at the same time – ***Schellenberger***):

> [10] Having referenced the principle rearticulated in ***R v Villaroman***, 2016 SCC 33 regarding circumstantial evidence, and noting that **the inference of guilt drawn from the evidence must be the only reasonable inference**, the trial judge made the following inferences and drew the following conclusions with respect to each appellant:
>
> > a. With respect to Lehner, the trial judge concluded that there was **more than enough circumstantial evidence** arising from the police surveillance, including Lehner's pre-arrest spontaneous comment, to infer that Lehner resided at Residence A. Lehner was seen at the residence numerous times, she had a dog there, she and the dog were present when the warrant was executed, she was seen carrying food into the residence, she was seen arriving late in the evening and leaving in the morning, no other person was observed routinely coming and going from that address, and there was only one bedroom. **The trial judge concluded Lehner was the sole occupant of Residence A, and had control over the premises and knowledge of what was contained in the apartment**. On the issue of trafficking, **the trial judge found beyond a reasonable doubt that the amount of cocaine, its street value, and the presence of the score sheet, the unused drug packaging and the scales, left no other reasonable inference other than the appellant was trafficking in cocaine**.
> >
> > b. With respect to Schellenberger, the trial judge concluded that he had control over the master bedroom of Residence B and knowledge of the items found there. She noted his presence at the residence during the execution of the search warrant, and found that the surveillance demonstrated he had access to the garage and the residence unaided. **She found the presence of a box of Schellenberger's personal documents in the master bedroom and his personal driver's license in the ensuite bathroom to be compelling.** The trial judge noted the guns were found laying on the floor of the master bedroom in a hockey bag, and were not secured or hidden. **She concluded there was no reasonable inference**

> **other than that Schellenberger had access to Residence B and knowledge and control over the items in the master bedroom. It would not be reasonable to suggest that the appellant, who inhabited the bedroom, had no idea there were four guns in an open bag on the floor at the foot of the bed.**

Where the Crown's case depends on circumstantial evidence, **the question is whether the trier of fact, acting judicially, could reasonably be satisfied that the accused's guilt was the only reasonable conclusion available on the totality of the evidence**: ***Villaroman*** at para 55; ***R v Biniaris***, 2000 SCC 15.

Constructive possession requires proof of knowledge, consent, and a measure of control on the part of the person deemed to be in possession. It is established where it is proved that the accused (1) had knowledge of the object, (2) knowingly put or kept the object in a particular place, and (3) intended to have the object in that place: ***R v Morelli,*** 2010 SCC 8 at para 17. There must be knowledge which "discloses some measure of control over the item to be possessed": ***R v Pham (2005),*** 2005 CanLII 44671 (ON CA), 77 OR (3d) 401, 204 OAC 299 at para 16, aff'd 2006 SCC 26. **Knowledge can be inferred from a multitude of factors, including but not limited to occupancy, proximity, access and visibility.**

As was the case here, **constructive possession is generally established through circumstantial evidence**. Both appellants submit that the trial judge failed to consider the totality of the exculpatory evidence and failed to consider whether possession was the only reasonable inference permitted by the evidence. They submit she engaged in impermissible reasoning by filling in the gaps in the circumstantial evidence.

The Supreme Court's guidance in ***Villaroman*** makes clear that the trial judge must consider if the inference urged by the Crown is the only reasonable inference that may be drawn from the circumstantial evidence. The Crown has to negative other "reasonable possibilities"; it does not, however, need to negative "every possible conjecture ... which might be consistent with the innocence of the accused": ***Villaroman*** at para 37. The Supreme Court also noted that "inferences must be reasonable given the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense": para 36.

This Court made a similar observation in ***R v Lazzaro***, 2016 ABCA 353, citing ***R v Dipnarine,*** 2014 ABCA 328: "Alternative inferences must be reasonable and rational, not just possible."

Lehner says the trial judge erred in finding that she was the sole occupant of Residence A, and that there was insufficient evidence that she had knowledge and control of the cocaine located in the kitchen cabinet. She also says there was insufficient evidence to support a conviction of trafficking, arguing the cocaine could have been for personal use.

The trial judge noted facts that tend to support the inferences urged by the Crown: **ownership of or residence in premises or a vehicle; whether others resided at or had access to the premises; documentation tying a person to a place; the presence of the person during the warrant search; whether the contraband was hidden or in plain view; and the physical proximity of the contraband to the occupation of the accused**. The trial judge found the Mercedes was Lehner's vehicle, noting that the police saw her drive the car on every occasion for which surveillance was reported, and the keys to the car were found in the kitchen of Residence A, in a purse that contained Lehner's identification. The trial judge reviewed the surveillance evidence, including that Lehner was seen arriving at and leaving Residence A late in the evening and early in the morning, that she had a dog there, that she was seen carrying food into Residence A, and that no other person was observed coming and going regularly from the residence. The surveillance evidence, combined with Lehner's spontaneous pre-arrest statement and the fact that Residence A had only one bedroom, led the trial judge to reasonably infer that Lehner was its sole resident and had knowledge and control of its contents.

Likewise, the **trial judge's inference that the possession of the drugs was for the purpose of trafficking was based on the evidence before her. In particular, she accepted expert evidence that the amount of cocaine found was inconsistent even with heavy use and found that the drug paraphernalia, including the score sheet and scales and packaging, all gave rise to the only reasonable inference that the possession was for the purpose of trafficking.**

On appeal, Lehner argues that the **trial judge failed to eliminate inferences other than sole occupancy, including the possibility that another individual was using Residence A, that the appellant shared the residence, or that the appellant was a mere visitor. <u>While all those possibilities exist in theory, nothing in the record supports any of them</u>.** It is worth repeating the instruction from ***Villaroman*** that "inferences must be reasonable given the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense". Given the evidence before the trial judge, Lehner's sole occupancy of the one-bedroom apartment was the only reasonable inference to be drawn. Other possible inferences, including those put forward by Lehner, would have been speculative based on the record at trial.

Lehner did not call any evidence that might have supported an innocent or other inference in this case. The appellant, of course, was not obliged to do so. However, on appeal, "the failure to call any evidence to support an innocent inference is a factor that the appellate court may consider in determining whether the verdict is unreasonable": ***Lazzaro*** at para 11. As was noted recently by the Manitoba Court of Appeal in ***R v Banayos and Banayos***, 2018 MBCA 86 (leave to appeal to SCC refused February 14, 2019) at para 24:

> An accused is under no obligation to present an evidentiary foundation to raise a reasonable doubt or to prove their alternative inferences. An

> accused may choose to present evidence or not. However, when an accused chooses not to testify or to call evidence, that decision carries the risk of not providing the trial judge with the necessary evidentiary foundation which, if accepted, could have precluded the impugned inferences from being drawn (see ***R v Oddleifson (JN),*** 2010 MBCA 44 at para 25, leave to appeal to SCC refused, 33756 (28 October 2010)).

Having reviewed the record, we see no error in the trial judge's conclusion that there was no factual basis to support another rational inference.

In his appeal, Schellenberger submits that the evidence with respect to his occupation of Residence B left open multiple reasonable inferences inconsistent with his possession of firearms and controlled substances, and that the trial judge erred in her application of the test for constructive possession. He submits that the trial judge failed to consider that the police did not conduct static surveillance, so there was no evidence of how many persons accessed or occupied the residence, that there were three bedrooms in the residence that appeared occupied and no evidence as to who occupied those bedrooms, that the appellant was only seen at the residence twice and other targets were also seen there, and that there was no evidence as to who accessed the residence for the seven days prior to the execution of the warrant.

Schellenberger says the following reasonable inferences arise from the evidence: the registered owner of Residence B occupied the master bedroom; the appellant was a guest and had no control over the contents of the residence; **an unknown resident or guest put the hockey bag of guns into the residence;** others under surveillance placed the items in the residence; the appellant moved out of the residence and forgot his old documents; and there was a new resident who had just taken over the master bedroom.

The surveillance established Schellenberger's presence at Residence B on two occasions prior to the execution of the search warrant. On one occasion, he was seen leaving the house and getting into a red truck; on the second occasion he accessed the garage unaided at 9:30 pm, parked a vehicle inside the garage, shut the garage door, exited the back of the garage and entered the residence. The appellant also arrived at the residence while the warrant was being executed. **Personal documents of Schellenberger's, containing personal information and including his unexpired driver's licence, were found in the master bedroom and bathroom. The firearms were in an open bag in that same bedroom.**

As with Lehner's appeal, **there was no evidence at trial that might have supported the inferences now urged by the appellant**. Those arguments would have required that the trial judge accept some other explanation for the presence of the appellant's personal documents in the master bedroom of Residence B, where the open bag of firearms was also found. **There was no evidence on the record to support such an explanation, and the trial judge considered that theory and rejected it. She was entitled to do so. The evidence in its totality**

> **does not give rise to the appellant's suggestions as reasonable exculpatory inferences.**
>
> The appellants have failed to satisfy us that there is a reviewable error in the verdict. ***Villaroman*** is an excellent reminder to a trier of fact about too readily drawing inferences of guilt by overlooking reasonable alternative inferences. The trier of fact is mandated to consider other plausible theories and other reasonable possibilities that are inconsistent with guilt. The Crown may need to negative those reasonable possibilities, but certainly does not need to negative every possible conjecture which might be consistent with the innocence of the accused.
>
> Although the line between plausible theory and speculation is not always easy to draw, the basic question is whether the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than the guilt of the accused. In this case, the theories posited by the appellants as other reasonable inferences cannot be so generously characterized. It was noted in ***Villaroman*** that "'[c]ircumstantial evidence does not have to totally exclude other conceivable inferences'; that the trier of fact should not act on alternative interpretations of the circumstances that it considers to be unreasonable; and that alternative inferences must be reasonable, not just possible": at para 42, citing ***R v Dipnarine*** at paras 22 and 24-25. (My emphasis added).

The Evidence

[46] I have reviewed all the evidence, including the Exhibits, that was presented at the trial. It is not my function as a trial judge when rendering a decision to act as a court reporter and recite all of the evidence that I have heard and considered. It suffices for me to highlight the pertinent parts. Further, any quotes that I attribute to a witness may not be an exact quote but will paraphrase and capture the essence of their testimony.

Cst. Whidden

[47] Cst. Whidden is a member of the Truro Police Service, and he was involved in the search authorized by a warrant on Mr. Naser's residence, as confirmed by Defence counsel, on January 17, 2021. Cst. Whidden confirmed that the following items were seized as part of the search:

- 8.1 grams of cocaine concealed in a matchbox on the living room table
- 2.4 grams of cocaine in a dish in the living room
- $1,050 cash found on Mr. Naser
- $550 cash found on the living room table
- Small baggies with white powder
- Packaging material
- Scale in the living room
- Cell phone in the living room

[48] Cst. Whidden conducted a rudimentary search (not sent to tech crime lab) of the cell phone to extract the messages. Defence counsel acknowledged the existence of the messages on the phone, but not the ownership of the phone by the accused. Exhibit 13 contained the text messages, and some of the messages of note are as follows:

- "I have good stuff" (1/4/2021 @ 2:52:27)
- "**That stuff was garbage Ali**" (1/10/2021 @ 3:15:39)
- "I'll give you two" (1/10/2021 @ 3:26:55)
- "I have new stuff tonight" (1/10/2021 @ 3:34:24)
- "A new bag of fire" (1/10/2021 @ 3:49:05)
- "**Not really Ali. Same as last stuff**" (1/11/2021 @ 7:06:49)
- "Next week I have a new bag" (1/11/2021 @ 7:08:08)
- "about you for two" (1/11/2021 @ 7:08:28)
- "You need 20?" (1/14/2021 @ 11:34:07)
- "Good stuff" (1/14/2021 @ 11:34:31)
- "Need to try first" (1/14/2021 @ 11:39:06)
- "You have scale?" (1/1/2021 @ 11:59:54)
- "No pizza showed up yesterday lol" (1/2/2021 @ 11:53:37)
- "How much money you have?" (1/6/2021 @ 12:51:31)
- Multiple messages on 1/7/2021 about someone owing "me" money and "me" wanting their money
- "Ya but if I don't pay you in can only hope I'm on a banana boat" (1/9/2021 @8:59:00)
- "I have someone wanting and this guy I can sell 1-2 a day too. Up to you but it will help me make my money back" (1/11/2021 @ 8:06:35)
- "From 11pm until 7 am this morning he bought 4 that I got for him through someone else…I could have just made $120 in a few hours" (1/12/2021 @ 9:35:20)
- "How much you need" "120 each" (1/14/2021 @ 8:15)
- "Hi boss I have $1000 Monday I need more stuff I still have stuff Monday have money for government and I will give you more money" (1/7/2021 @2:35:14)
- "What's your total bill?" (1/7/2021 @ 3:00:11)
- "$9,300" (1/7/2021 @ 3:02:34)
- "Could I grab a few to sell till I get my bag" (1/4/2021 @ 11:11:46)
- "I might later yea I still got 6 left or so I'll see if I sell it all" 1/5/2021 @3:53:17)
- "Tomorrow I need some cash" (1/10/2021 @5:18:26)
- "Got 5" "Meet at Roops" (1/11/2021 @ 6:27:53)
- "You need five more?" (1/12/2021 @ 3:50:05)
- "No I still got 3" (1/12/2021 @ 3:50:17)
- 'Hopefully I'll sell these 3 before the end of day" (1/12/2021 @ 3:50:57)
- "I got money for ya too" (1/13/2021 @ 8:15:29)
- "How much cash you have for me?" (1/14/2021 @ 11:59:17)
- "I had to buy 2.5 back from someone lol they showed up mad they did a gram in a line and didn't even get a buzz lol" (1/14/2021 @ 12:02:03)
- "U got ur money" (1/16/2021 @ 1:35:47)

- "You have 10?" (1/14/2021 @11:22:31)
- "I need 30" (1/14/2021 @ 11:25:58)
- "My bill $8,300" "Not 9,300" (1/14/2021 @ 11:27:22)
- "You really nice person I want front with you forever" (1/16/2021 @ 1:29:03)
- "Thanks brother. I just really need 15000" (1/16/2021 @ 1:31:06)
- "How much cash you have?" (1/16/2021 @ 2:10:40)
- "Somebody else 120 for you 80" (1/16/2021 @ 2:19:01)
- "Never say my name" (1/16/2021 @ 2:26:09)
- "Never, We will say I don't know it" (1/16/2021 @ 2:27:13)

[49] This Court notes that the owner of the phone does not correct the person sending texts when they are twice referred to as "Ali."

[50] Cst. Whidden confirmed that Mr. Naser was found in the residence along with another individual, Neil Burris. It is a small residence. He testified that everything that was in the living room was accessible to anyone who was in the residence.

[51] Cst. Whidden acknowledged that it was possible that Mr. Burris had brought the cocaine to the residence, and it was also possible that the cell phone belonged to Mr. Burris. Cst. Whidden could not tell us who owned the cell phone.

Cst. Seebold

[52] Cst. Seebold was qualified, by consent of Defence counsel, to give expert opinion in relation to the packaging, pricing, quantities, drug paraphernalia, distribution, usage, purchasing, availability, sale and value of cocaine. His Expert Opinion Report is marked as Exhibit 15, and in it Cst. Seebold states that the amount of cocaine seized would be indicative of a low-to-mid-level drug trafficker. He concludes that "this case is consistent with a person being in possession of cocaine for the purpose of trafficking."

[53] Cst. Seebold also testified that:

- If Mr. Naser was a heavy drug user, then he would not have had that amount of cash lying around as it would have been used to purchase drugs
- Users don't weigh their drugs so the scale is indicative of trafficking
- The language in the texts (as noted above) is guarded and indicative of drug trafficking
- His opinion is based on the cumulative effect of the evidence seized (phone, texts, scale, money, packaging materials)

[54] Defence did not call any evidence.

[55] There was no expert evidence to contradict the testimony of Cst. Seebold. I accept that whoever possessed the cocaine seized at Mr. Naser's residence did so for the purpose of

trafficking based on the expert opinion of Cst. Seebold, and also in taking an independent view of the evidence and Exhibits at the trial.

Summary/Decision

[56] As noted, to convict based on circumstantial evidence, I must be satisfied beyond a reasonable doubt that the only rational inference that can be drawn from the circumstantial evidence is one of guilt (***Griffin).*** And, pursuant to ***Morin*** and ***Uhrig***, the cumulative effect of all the evidence must satisfy me to the required criminal standard of proof, not each individual item which is merely a link in the chain of proof.

[57] The circumstantial evidence, assessed in light of human experience, excludes any other *reasonable* alternative than that Mr. Naser possessed the cocaine in his residence (for the purpose of trafficking). Put another way, the alternative inferences sought to be drawn must be reasonable and rational in the circumstances of the matter — not merely possible. That is not the case with the alternative scenario advanced by Mr. Naser that someone other than him possessed the cocaine that was found in his residence.

[58] The failure by Mr. Naser to provide any evidentiary foundation, either through himself or Neil Burris, for the alternative inference advanced by his counsel was at his peril (***Oddleifson, Cook, Banayos and Bayanos, Lazarro***).

[59] I reject the alternative scenario proposed by Defence counsel. Inference of possession by Mr. Naser based on the evidence before the court is the only rational and reasonable inference to be drawn based on the circumstantial evidence and proven facts before this Court. There is more than enough circumstantial evidence to make this inference:

- 8.1 grams of cocaine concealed in a matchbox on the living room table
- 2.4 grams of cocaine in a dish in the living room
- $1,050 cash found on Mr. Naser
- $550 cash found on the living room table
- Small baggies with white powder
- Packaging material
- Scale in the living room
- Cell phone in the living room with texts indicative of drug trafficking, and specifically referring to “Ali”
- The close proximity to these items by Mr. Naser, in <u>his</u> residence.

[60] This Court also considers the occupancy, proximity, access and visibility of the drugs and drug paraphernalia (***Pham, Morelli***) to Mr. Naser when making the inference of constructive possession by Mr. Naser.

[61] Is the circumstantial evidence of possession of the cocaine by Mr. Naser, viewed logically, and in light of human experience, reasonably capable of supporting an inference other than that Mr. Naser is guilty? No.

[62] **Mr. Naser is guilty of the offense of Possession of Cocaine for the Purpose of Trafficking contrary to s. 5(2) of the Controlled Drugs and Substances Act.**

Judge Alain Bégin, JPC