Date: 20021015
Docket: CAC 178674

NOVA SCOTIA COURT OF APPEAL

[Cite as: *R. v. Cameron*, 2002 NSCA 123]

Freeman, Bateman and Oland, JJ.A.

BETWEEN:

BRADLEY JUDE CAMERON

Appellant

\- and -

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

Counsel:	Stanley W. MacDonald for the appellant Timothy A. McLaughlin for the respondent
Appeal Heard:	October 2, 2002
Judgment Delivered:	October 15, 2002
THE COURT:	Appeal allowed per reasons for judgment of Freeman, J.A.; Bateman and Oland, JJ.A. concurring.

FREEMAN, J.A.:

[1] The appellant Bradley Jude Cameron was one of three persons found by police acting under a search warrant who burst into an apartment where marijuana was being processed. He was convicted before a judge of the Supreme Court of Nova Scotia under the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, of possession for the purpose of trafficking contrary to s. 5(2) and of producing marijuana contrary to s. 7(1).

[2] He has appealed his convictions on grounds that the trial judge erred in applying the burden of proof, in interpreting and applying the law of possession and that the verdict was unreasonable and unsupported by the evidence.

[3] The evidence was concisely summarized and analyzed by the trial judge, Justice Glen G. McDougall, and I will set forth that portion of his decision at full length:

> The accused acknowledged that he was found in the apartment at 57 Renfrew Street, Dartmouth, on the night that the police raid was carried out. He readily admits that he was aware of the existence of the cannabis (marihuana) in the living room. He was familiar with the smell emitted by the substance and in any event it was plainly visible to the eye. There was really no effort to conceal the substance. It was spread out on the coffee table and on the floor of the living room.
>
> Police photographs clearly show that "freshly cut" marihuana laid out in the living room, obviously having been recently worked on when the raid occurred.
>
> Mr. Cameron does not deny or attempt to refute any of this. He does, however, deny having any involvement with the production of the cannabis (marihuana) and possession of it. His story is that he came to the apartment that evening to collect a debt owed to him by one of the occupants namely, John Keeping, a childhood friend.
>
> According to his testimony he had visited the apartment earlier that day but could not gain entry. He was told by a neighbour that Mr. Keeping was working 7:00 a.m. to 7:00 p.m., so he decided to come back later that evening.
>
> Mr. Cameron indicated that he was dropped off at the apartment later that day at around 6:40 p.m. or 6:45 p.m., when he knocked at the door and Mr. Robert Ferguson, who he knew from a prior meeting, let him in. The only other person in the apartment at that time was Mr. James Nimchuck.

Mr. Cameron's stated intention was to wait for Mr. Keeping to come home so that he could discuss the repayment of the money he was owed, some $50.00. He also indicated his wife left to go shopping, but would return around 7:30 p.m. to pick him up.

Mr. Cameron said he waited in the kitchen, not in the living room, for Mr. Keeping to arrive home. In the meantime, he consumed a beer and just before the police raid took place he had gone to the bathroom. When walking down the hallway from the bathroom towards the living room, he noticed Mr. Ferguson look around the curtain on the living room window and kind of "freeze". That is about the time the police breached the front door of the apartment and rushed into the room.

Mr. Cameron's testimony was that he had nothing to do with the cannabis (marihuana) at any time. He simply was in the wrong place at the wrong time.

The case against Mr. Cameron really hinges on the definition of "possession" contained in s. 4(3) of the *Criminal Code*, which is incorporated in the *Controlled Drugs and Substances Act* under the definition s. 2(1). It reads as follows:

> (a) a person has anything in "possession" when he has it in his personal possession or knowingly
>
> > (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
>
> (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.

The defence argued that there is no evidence linking Mr. Cameron to the apartment. He, at the time, was living with his wife and child at 160 Braemar Drive, Dartmouth. Also, there was nothing found on Mr. Cameron directly linking him with the grow operation that was obviously in existence at the 57 Renfrew Street, Dartmouth apartment. Mr. Cameron was not observed cutting or pruning or in any other way participating in the processing of the marihuana plants. There were no fingerprints taken, nor did anyone notice evidence of plant residue on Mr. Cameron's fingers or hands. His story, if believed, is that he

simply exercised bad judgment in staying at the apartment waiting for Mr. Keeping to come home, instead of leaving as soon as he realized what was in the apartment and what the other two occupants were doing. In his words, he thought that Messrs. Ferguson and Nimchuck "were stupid" to be doing what he observed them to do. I think, Mr. Cameron, that you will agree that by staying you might not have done the smartest thing that you have ever done in your life either.

I have reviewed the evidence of all the Crown witnesses. In particular, I have listened to the testimony of Sergeant James Butler again, as recommended by defence counsel, Mr. MacDonald.

Sergeant Butler was in charge of the ram that was used to force entry into the apartment. He was first into the dwelling. His testimony states that when he screamed at the two persons in the living room, who were Messrs. Ferguson and Cameron, they sat down. He said "I believe it was a couch and a chair." He then followed after Mr. Nimchuck who had gone into the kitchen area.

All of the other officers who entered the apartment closely on the heels of Sergeant Butler were clear in their recollection that both Mr. Ferguson and the accused were in the living room seated by the time they got into the room. I find that this whole process took just a matter of seconds and <u>if Mr. Cameron, as he contends, was not in the living room then I do not accept his version of events. I do accept the version of events as stated by Sergeant Butler, which is corroborated by the various other police officers</u> who participated in this operation, including: Constable Colin Brien, Constable Blair Hussey and Constable Peter Nixon.

There was only one other entrance or exit to the apartment at 57 Renfrew Street. Sergeant Larder, accompanied by another Constable, kept this side door under surveillance. No one went into or exited from this door once the raid began.

<u>All</u> of the evidence indicates that all three occupants participated in this illegal operation. The photos show three different work areas: two chairs and the couch or sofa were used. There were only three people in the apartment that evening.

I find that Mr. Cameron was a full and active participant in this illegal enterprise.

The cannabis (marihuana) was found being produced and processed in a place that Mr. Cameron was in. He might not have resided there, but he certainly was there with full knowledge of what was going on and as stated earlier, I find that he was a full participant based on the evidence submitted [by] the Crown.

I find that although the cannabis (marihuana) might not have been in Mr. Cameron's hands or on his person when the police entered the apartment, he had

> actual possession along with the other two occupants. He had the requisite control over the substance to establish beyond a reasonable doubt that he had possession.
>
> [Emphasis added.]

[4] The trial judge correctly identified the need for proof of some measure of control over the marijuana by Mr. Cameron as the key element in issue in the two charges. Control is not referred to in the statutory definitions, but they have been interpreted in the jurisprudence to require evidence of control.

[5] The British Columbia Court of Appeal stated, citing authority, in *R. v. Coull and Dawe* (1986), 33 C.C.C. (3d) 186:

> It is well established that possession under the *Narcotic Control Act* must include both knowledge and some act or measure of control . . .

[6] The appellant admitted knowledge but denied control. His version of events, if believed, was consistent with his innocence.

[7] The first ground of appeal is that the trial judge erred in law in his application of the burden of proof as set out in *R. v. W.(D) [D.W.]*, [1991] 1 S.C.R. 742 (S.C.C.). Justice Cory's comments on instructing a jury apply equally to a judge's instructions to himself or herself:

> . . . A trial judge might well instruct the jury on the question of credibility along these lines:
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>> First, if you believe the evidence of the accused, obviously you must acquit.
>>
>> Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
>>
>> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[8] While in the case of a judge alone the formula need not be expressly stated in the decision, a similar analysis must be performed. In *R. v. Gushue* (1993), 117 N.S.R. (2d) 152 Justice Chipman stated for this court:

> A review of the record and of this decision persuades us that the trial judge clearly regarded the case as a matter of choice between the evidence of the complainant and her mother on the one hand and that of the appellant on the other. No reference was made in the decision to the obvious fact that the burden was on the Crown to prove the charge beyond a reasonable doubt. While we are satisfied that the trial judge must have been well aware of this requirement, the failure to refer to the third alternative in the credibility contest – namely that without believing the appellant, the court might be left with a reasonable doubt – is in these circumstances fatal to the conviction. There is a danger here that the court asked itself the wrong question: that is which story was correct, rather than whether the Crown had proved its case beyond a reasonable doubt.

[9] More recently, in *R. v. D.C.S.*, [2000] N.S.J. No. 144 Roscoe, J.A. writing for this court, expressed the principle as follows:

> Although as stated in **Brown**, supra, [*R. v. Brown*, (1994)132 N.S.R. (2d) 224, per Matthews, J.A.] the failure of the trial judge to use the language of Cory, J. in **R. v. W.(D.)**, is not, in itself, fatal, the trial judge's reasons must demonstrate that he did not simply determine which version of events was more plausible or probable. It must be clear that the entire three-step approach of assessing the evidence was followed and that he did not simply make a finding of credibility in favour of the complainant, and against the appellant and conclude, therefore, that the appellant was guilty.

[10] It is clear from the language of the decision in the present case that the trial judge did not follow up on his statement that he accepted the Crown's evidence rather than Mr. Cameron's with an analysis similar to that expressed by Justice Cory in *R. v. W.(D.) [D.W.]*. The last two questions were left unasked and unanswered. Indeed, a further question is raised, whether the trial judge simply preferred the Crown evidence where it was in actual conflict with Mr. Cameron's as to where he was located in the apartment when the police entered, or whether the entirety of Mr. Cameron's evidence was rejected on that basis.

[11] When Sergeant Butler entered a porch way of the apartment after breaching the door he says he saw three persons in the living room, one, later identified as Nimchuck, as he was leaving it and going toward the kitchen. He burst in screaming "Police!" and "Search warrant, get on the ground!" He testified:

> I proceeded past the two people in the living room, screaming at them. They sat down. I believe there was a couch and a chair.

[12] It is clear from this passage that Mr. Cameron was not seated at any of the work stations when the police entered the apartment, but sat down in response to Sergeant Butler's order.

[13] No other adverse finding was made as to the whole or other specific parts of Mr. Cameron's evidence. The appellant's counsel points out in his factum that the trial judge does appear to accept many elements of the appellant's testimony, in particular that he was only a transient visitor to 57 Renfrew Street where the illegal marijuana activities were being carried out.

[14] The appellant submits:

> The trial judge does not consider whether, short of accepting Mr. Cameron's testimony, it might reasonably be true or raise a reasonable doubt.
>
> . . .
>
> At no time did the trial judge state that he disbelieved Mr. Cameron's innocent explanation for his presence at 57 Renfrew Street when the police arrived.

[15] In the absence of a finding, based on the proper analysis of Mr. Cameron's testimony, of guilt beyond a reasonable doubt, the appeal must be allowed. The appellant's version might reasonably have been true, and it is therefore capable of raising a reasonable doubt. Had the whole of the evidence been subjected to the third question posed by Cory, J. it cannot be concluded that Mr. Cameron would have been found guilty beyond a reasonable doubt. The appeal must be allowed.

[16] The two remaining grounds of appeal, lack of proof of possession and unreasonable verdict, will be considered to determine whether the appropriate remedy on appeal is to acquit the accused or to order a new trial. These grounds were argued together.

[17] The appellant submits there is a real and substantial threat of a miscarriage of justice having occurred because of the misapplication of legal principles and the misapprehension of significant evidence. In these circumstances the court's duty to review and to some extent reweigh the evidence was stated by Hallett, J.A. in *R. v. Miller,* [1999] N.S.J. No 17 at ¶ 8:

> On an appeal from a conviction for a criminal offence on the ground that the guilty verdict is unreasonable, the appellate court judge is required to review, and to some extent, reweigh the evidence to determine if the verdict is unreasonable.

Assessing whether a guilty verdict is unreasonable engages the legal concept of reasonableness. (**Yebes**, supra at p. 427). Thus, the appellate review, on the grounds set out in s. 686(1)(a)(i) of the **Code** entails more than a mere review of the facts. The appellate court has a responsibility, to some extent, to do its own assessment of the evidence and not to automatically defer to the conclusions of the trial judge which is what the appellate court judge seems to have done in this appeal.

[18] The appellant submits:

It is respectfully submitted that the trial Judge's error in the application of the burden of proof is compounded when considered in the light of the law of possession. The Crown had the burden of proving all of the elements of possession, beyond a reasonable doubt. Those elements are: knowledge, consent and control. Clearly, the Crown proved that Mr. Cameron knew that there was a controlled substance in the residence. He readily admitted having seen it. However, it is submitted that there was simply no evidence of consent or control on the part of Mr. Cameron.

. . .

It is submitted that there are several problems with the trial Judge's analysis:

> Not **all** of the evidence indicated that all three occupants participated in the illegal operation. In fact, there was a large body of evidence to the contrary. As the trial Judge acknowledged in various parts of the decision, Mr. Cameron did not reside at 57 Renfrew Street. Mr. Cameron was at the residence for a short time prior to the arrival of the police. There was no evidence of Mr. Cameron's fingerprints on any of the exhibits or furniture. There was no evidence of any residue on Mr. Cameron's hands. There were no drugs or drug paraphernalia found on Mr. Cameron. There was no money found on Mr. Cameron. There were no documents linking him to the apartment. There was no evidence that Mr. Cameron tried to flee when the police entered. Most importantly, Mr. Cameron testified and denied any involvement in these offences. Obviously, Mr. Cameron's testimony was evidence. Consequently, it is respectfully submitted that the trial Judge's statement that "all of the evidence indicates that all three occupants participated in this illegal operation" was a serious and obvious error.

[19] The appellant submits that the photographs tendered by the Crown do not necessarily show three different work areas, but might easily support the conclusion there were only two. If there were three work areas, there is "absolutely no evidence Mr. Cameron was one of the people working in those areas." Nor was there anything in the evidence to suggest the work might have been performed before Mr. Cameron arrived some 35 to 40 minutes before the police.

[20] In our respectful view, upon reviewing and to some extent reweighing the evidence, the verdict is unsafe and cannot be allowed to stand. The evidence of Mr. Cameron's possession of the marijuana and participation in its preparation is dangerously weak, if not nonexistent as he submits. Control cannot be inferred from mere knowledge and opportunity. Apart from a blanket acceptance of the Crown's evidence, there was no attempt to show what there was in the Crown's evidence to establish that the element of control had been proved beyond a reasonable doubt. The evidence cannot safely sustain a conviction, so the proper remedy is to acquit the appellant rather than submit the matter for a new trial.

[21] For the above reasons we would allow the appeal, set aside the conviction, and enter an acquittal on both counts.

Freeman, J.A.

Concurred in:

Bateman, J.A.

Oland, J.A.