PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R v. Kennedy*, 2022 NSPC 9

Date: 20220328
Docket: 8501514
8501525
8501526
Registry: Port Hawkesbury

Between:

HER MAJESTY THE QUEEN

v.

DANIEL WALTER KENNEDY

REASONS FOR DECISION

Judge:	The Honourable Judge Peter Ross
Heard:	March 7, 2022, in Port Hawkesbury, Nova Scotia
Decision	March 18, 2022
Charges:	s.5(2) CDSA, s.92(1) and 86(1)CC
Counsel:	Wayne MacMillan, for the Crown Patrick MacEwan, for the Accused

By the Court:

[1] Daniel Walter Kennedy stands charged with one count of possession of unlicensed firearms under s.92(1) of the *Criminal Code*, two counts of careless storage of firearms under s.86(2) of the *Criminal Code*, and one count of possession of cocaine for the purpose of trafficking under s.5(2) of the *Controlled Drugs and Substances Act*.

[2] On March 26, 2021 members of the RCMP performed a warranted search of a mini-home (trailer) at 1040 Highway #105 at Lexington, near the town of Port Hawkesbury. Cocaine, firearms and other items were seized and the accused was charged with the foregoing offences.

[3] The accused was not present when the premises were searched. There was no surveillance connecting him to the residence. The Crown's theory that he was in possession (which is to say had knowledge of and control over the drugs and firearms) is based entirely on circumstantial evidence (which is to say the various things found inside).

[4] Two of the police officers involved in the execution of the search warrant testified at trial, and an expert witness. The accused did not testify. Defence did not call any other evidence.

The evidence obtained

[5] I do not propose to review the evidence in its entirety. Besides the cocaine and firearms a number of other items were observed, photographed and seized. I will restrict my comments to those I consider most important, including those upon which Crown and Defence focused their arguments.

[6] Police entered the residence at 8:00 a.m. by prying the lock. Although nobody was home, a stovetop had been left on, and a television. The home was somewhat cluttered and untidy. At one end of the long, narrow trailer was a master bedroom and bath. At the other end were two rooms, one of which was used for storage, the other appearing to be a child's bedroom. In the middle was a kitchen and living area.

[7] Clothing was strewn all over the master bedroom. Atop one pile, beside the bed, was a semi-automatic long rifle. It was unlocked and it was loaded, one round in the chamber and one in the magazine. Another rifle was found on the floor by the closet, in two pieces, stock and barrel.

[8] In the bathroom, atop a toy jeep, was a shotgun with a shell clearly visible in the chamber.

[9] Seven loose .22 calibre rounds were sitting on top of the 'tall' dresser in the master bedroom, and a box of assorted ammunition was located on the 'long' dresser in the same room.

[10] Four digital scales were located, one on a nightstand at the foot of the bed in the master bedroom, three others in the kitchen.

[11] Two air pistols (pellet guns) were found – one in the dresser drawer in the master bedroom, another in a cupboard in the kitchen/living-room area.

[12] A paper with some handwritten notations was found in a dresser drawer in the master bedroom.

[13] A number of documents were seized from the master bedroom which, on their face, belonged to the accused. These include (i) a Nova Scotia driver's licence bearing the accused's name, photograph and the 1040 H/W 105 Lexington address, (ii) an invoice made out to "Daniel Kennedy" from Ellsworth Investments, again showing the address of the trailer which was searched, (iii) a Government of Canada cheque in the amount of $924 made out to "Daniel Kennedy", and (iv) a Statement of Employment Insurance and Other Benefits, again bearing the accused's name and that same address, which shows that $16,420 was paid to him in 2020.

[14] Along with the government cheque to Mr. Kennedy and the black-handled air pistol, in the lower drawer of the dresser in the master bedroom, was a government cheque made out to "W.A.H." in the amount of $900 (I am using only the initials of the name). As with the cheque payable to the accused, it bore no address.

[15] A framed photograph of what appears to be the accused hugging two children was found on a bench in the living room area. A 2017 "school photo" of a young girl was noted on the door of the refrigerator. There were some children's toys and games found in the child's bedroom.

[16] Quite a sizable amount of cannabis was found, in three separate bags, one on a chair by the kitchen table and two inside the washing machine. The accused was not charged in regard to these. Some syringes and a rubber band were also located in the master bedroom.

[17] Most notably, a plastic bag containing 29.6 grams - slightly more than one ounce - of cocaine was found in the 'second' or lower dresser drawer in the master bedroom. In the same dresser was a small bag of boric acid.

[18] Cpl. David Lane of the RCMP was qualified to give expert opinion evidence on the possession and trafficking of cocaine, pricing and distribution of the drug, and methods used to avoid detection. He indicated that he formulated his opinion based on a review of the items seized and other fruits of the investigation, without knowing anything about the background of the accused and without providing any advice to investigators.

[19] After explaining the general hierarchy of the illicit trade in cocaine, Cpl. Lane focused on the street-level sale of the drug to "end users." He said that users typically purchase cocaine in one-half or one gram amounts, which are normally packaged in "dime baggies". Occasionally a person might purchase an "8-ball", being 1/8th ounce, or 3.5 grams. Commonly the drug is "cut" at each level of the supply chain, enabling more profit for the seller.

[20] Cpl Lane said that other items are often found during seizures of cocaine at "drug houses". These include digital scales, not required if one is selling illicit drugs in pill form, but needed to measure out and sell cocaine, which is in powder form. Quantities of cash are often found given that it is normally a cash business, although the drugs can also be traded for a good or service. Weapons are commonly found, given that trafficking is an inherently dangerous business. Being robbed is a hazard of the trade, and traffickers often have weapons to defend themselves in such an event, and to act as a deterrent to being robbed in the first place. Score sheets, or debt lists, often are used to keep track of monies owing. Increasingly these are kept on digital devices.

[21] Of prime importance is the quantity of drug allegedly in a person's possession. A given amount can lead to an inference that it was possessed for the purposes of sale.

[22] Cpl. Lane formed the opinion that the cocaine found at #1040 H/W 105 was being held for sale. He based this primarily on the quantity, just over one ounce, which to him was indicative of street-level trafficking. The multiple scales located in the residence were also a factor, as were the various firearms, air pistols and ammunition located there. Although he said that Ex#5, a cigarette package with a series of numbers on it, was not particularly helpful, he did say, at trial, that "it could be a score sheet" given the presence of initials, amounts, numbers crossed out, and diminishing balances.

[23] Cpl. Lane was carefully and closely cross-examined on his conclusions. He acknowledged that there were advantages to a heavy user purchasing the drug in bulk, at the ounce level. The user would have less interaction with his supplier, thus decreasing the risk of detection. It also is more economical to purchase at the higher level because it could avoid the usual mark-up which occurs when the drug is divided up for sale in smaller amounts. It appears a person might have saved approximately $600 to buy this ounce of cocaine in bulk as opposed to separate one-gram purchases. It is also more likely that the user will get a purer form, with less cutting agent and a higher percentage of the desired substance, if buying in bulk.

[24] Three things make it less likely that a user would purchase at the ounce level. One is the risk of keeping such a quantity, given its value, given the strong motivation others have to procure it by violent means. Another is affordability – despite the savings noted above an ounce of cocaine requires a considerable outlay of cash. A third is the difficulty of finding a willing seller, because the person selling an ounce in bulk foregoes the considerable profit to be made by dividing it up and selling in smaller amounts. People who sell drugs are in it for the money.

[25] The witness acknowledged, and I have noted, that scales can be used to weigh food or indeed to weigh cannabis in making "edibles". Cpl. Lane said that in formulating his opinion he considered the fact that no "dime baggies" were located in the residence, typically used to package cocaine for sale. He also acknowledged that people in rural communities are more likely to possess long-guns.

[26] Cpl. Lane said that it would have been "helpful" if the scales had been swabbed and tested for the presence of drugs. They were not. The possibility that a drug dealer might use a

friend's home to stash or sell drugs, if they knew that the friend "was going to be away for a few days", was posited to the witness. Cpl Lane said that if such a person had access, "it would be dirty, but it would be smart."

[27] In redirect, Cpl. Lane pointed out that even air pistols can afford a measure of self-protection, since they resemble handguns – "even having a replica to flash around can be useful to a trafficker . . . as a deterrent".

Knowledge and control / constructive possession

[28] A consideration of the evidence outlined above leaves me with no doubt that this trailer was Mr. Kennedy's residence, and that he had knowledge and control of its contents, including the cocaine, weapons, scales and other items noted. That others lived there with him does not detract from this conclusion, given that the items were readily accessible - in a master bedroom dresser with many other personal items, or in plain view in various parts of the residence.

[29] Three separate documents connect the accused's name with the address where the search took place. A recently-issued Government of Canada cheque bore his name.

[30] The items are widely dispersed around the trailer. There are indications that this was not simply Mr. Kennedy's home, but his family's home, containing food, clothing, personal items, etc. The trailer was clearly being used and occupied; appliances were running when the police entered.

[31] Although a cheque made out to W.A.H. was located in the dresser, nothing is known about this person. It seems quite possible that for one reason or another the accused came into possession of W.A.H.'s cheque. It seems fanciful to think Mr. H. was occupying the accused's residence, or that W.A.H. (or anyone else) stashed the cocaine in the dresser drawer without the accused's knowledge and consent. (It is for this reason that I think it prudent to refer to W.A.H. by his initials; the full name was contained on the actual cheque).

The firearms

[32] Section 2 of the *Criminal Code* defines a firearm as a "barrelled weapon from which any shot, bullet or other projectile can be discharged and that is capable of causing serious bodily injury . . . " The phrase "can be discharged" connotes that the device must be in working order, and "capable of causing" means that it has the potential to inflict serious injury.

[33] Defence has argued that there is insufficient proof that the weapons seized are in fact operable firearms. No certificate of any sort was tendered. The items were not test-fired to determine muzzle velocity, or to measure effects. Crown made few, if any, submissions on this point, and no cases were mentioned. In the little time available I have read a few decisions where this issue arose.

[34] In R. v. Osiowy, 113 C.C.C. (3d) 117 (Alta C.A.) the court said, at par. 20:

> There are a number of ways in which the Crown can establish this, and the cases cited above contain several of these ways. For example, the simplest way of proving it was an operable firearm is to establish that it was fired during the offence. Where it was not fired, but is available for expert examination, the Crown may adduce expert evidence that at the time of the offence the weapon was operable and if fired was capable of causing bodily injury or death. Even if the weapon is not available for examination, a witness who is knowledgeable about guns may be able to satisfy the Court that the weapon used was an operable firearm. There may be other witnesses, such as the gun's owner in the Sibbeston decision, who give evidence that the gun was operable. The judge is entitled to draw the inference that the weapon was operable, and thus within the definition of "firearm", if sufficient evidence is presented.

[35] In that case (a charge under s.84 of the *Code*) the object was not put into evidence and nobody could testify about its condition. The victim, against whom the weapon was used, knew little about firearms, did not get a good look at it, and did not give any evidence (such as loading or cocking) from which operability could be inferred.

[36] I do not take the possible means of proof mentioned by the Alberta Court of Appeal in par. 20, above, to be an exhaustive list.

[37] Firearms are not rare objects. Most members of the public are familiar with firearms. They often read, see and hear about the use of handguns, rifles, shotguns in one context or another. There is general awareness of what firearms are, what they are used for, and what they look like. Police officers in this line of work train in the use of firearms and use them on the job.

[38] The items alleged to be firearms were tendered into evidence. What is described in the police exhibits as a Remington rifle and a Cooey shotgun give every appearance, to me, of being firearms. Cst. Beatty, who was present during the search and catalogued the exhibits, referred to both items as “loaded firearms”.

[39] Cst. MacIntyre said that the alleged firearm found in the master bedroom was a “semi-automatic long rifle”. He observed that it was loaded, with a round in the chamber and another in the magazine. He described the other as a “.410 shotgun”. It too was loaded. Photographs of both items clearly show that both were readied for use.

[40] The evidence here serves to prove beyond a reasonable doubt that the two loaded weapons were in fact “firearms”. Additionally, they were, to say the least, carelessly stored. Indeed they were hardly stored at all, but were easily accessible to anyone who happened by. The fact that they were loaded adds to the risk they presented. The accused is found guilty of the charges of careless storage under s.86(1).

The licensing requirement

[41] S.91 of the *Criminal Code* creates an offence of unlicensed possession of a firearm. The s.92 then creates an offence of possession of a non-restricted firearm without being the holder of a license. "Non-restricted firearm" is defined in s.84. Section 92 seems to bump up the *mens rea* requirement. The possible punishment is also increased, compared to s.91.

[42] S.117.11 imposes a reverse onus on an accused to prove that they were the holder of a license in any proceedings under s.91, et al. However this section does not apply to s.92, leaving Crown with the onus of proving the absence of a license, and knowledge of such. Here the Crown has not done so. As a result, Mr. Kennedy is found not guilty on the charge under s.92(1).

The 'personal use' issue

[43] The argument that this ounce of cocaine was held only for personal use finds an evidentiary basis in the answers given by Cpl. Lane to questions about price and affordability, the generally higher quality of cocaine purchased at the ounce level, and the limitation of a person's "exposure" by doing one transaction rather than a series of separate deals.

[44] However, the foregoing runs contrary to the general nature of the drug trade, convincingly explained by Cpl Lane, whereby profit arises from taking a given quantity and then breaking it into smaller aliquots – often cutting the drug in the process – and selling these smaller amounts at a profit. In other words, someone in the drug trade who sells one ounce of cocaine foregoes the opportunity to make considerable profit on it by selling it at the ½ to 1 gram level. The buyer may be getting a deal, but the seller is not. It is not beyond the realm of possibility that a hard user might buy an ounce of cocaine, but as Cpl Lane said "you need that source to get it from." He said "this would be very rare." He said that an "8-ball", or $1/8^{th}$ of an ounce, is what he would consider the limit on what a user would buy for personal use, and even that would be "unusual". He pegged the street price at approximately $100 per gram.

[45] An ounce would have cost from $1300 to $2200, a substantial sum. This accused was in receipt of EI benefits. The statement of employment insurance benefits (T4E) paid to Daniel Kennedy does not fit neatly with the idea that this accused would be able to afford the purchase of one ounce of cocaine purely for personal use. His residence was a very modest affair. By all appearances he did not lead a lavish lifestyle. It seems unlikely he had much disposable income.

[46] Defence has argued that some common features of trafficking are not found in the evidence led against this accused. This, it submits, should give the court pause when considering the question of *mens rea,* the purpose for which the cocaine was possessed.

[47] One can envisage situations where the fact that something is *not* found has significance, where the absence of something may undermine the theory of the Crown's case. I have considered whether there are features often associated with street-level drug trafficking which are absent from the picture which emerges here, from which absence I should have reasonable doubt about the accused's purpose for possessing this drug. No "dime baggies" were found, no

cellphone analysis or evidence was obtained, no large quantity of cash was uncovered. Cpl. Lane was well aware of this when he formulated his opinion. I do not interpret his evidence to mean that such features are indispensable indicators of trafficking, necessary to drawing the conclusion which he did. I do not think the absence of these things is as conspicuous and significant as Defence has argued.

[48] While a large amount of cannabis was located, no opinion was offered in regard to it. It is possible that someone in the house smoked a lot of dope, perhaps the accused. The syringes can also be indicative of illicit drug use - although usually sniffed, cocaine is sometimes injected. However, the cannabis is of no importance to the ultimate conclusion here. The syringes, while they may indicate that the accused was a user, do not serve to negate the theory that Mr. Kennedy was selling as well. The two are not mutually exclusive.

[49] If the only evidence against the accused was the bag of cocaine, there might be some reason to doubt whether it was held for resale. A slight possibility that it was solely for personal use might arise. However, the other evidence located in the residence dispels any lingering doubt I might otherwise have about why Mr. Kennedy possessed this quantity of cocaine. Needless to say I am not bound to accept the evidence and conclusions of Cpl. Lane, but I find that his opinion is amply supported by the evidence. Given the presence of the firearms, air pistols, scales and what could be a ‘score sheet’, I am left with no reasonable doubt on the “purpose” element of the s.5(2) offence, the *mens rea*. It is quite possible that the accused used cocaine. But I am also convinced on the criminal burden of proof that he trafficked in it and was holding this ounce of the substance for sale.

Possession / The absence of evidence from the accused

[50] Defence suggested in argument the possibility that someone other than the accused was inhabiting the trailer and is responsible for the presence of the drugs. I addressed this in par.28 to 31, above, and will add here the additional comment that the argument finds no real footing in the evidence, all of which came from the Crown.

[51] This case is reminiscent of one that was before this court many years ago. Some extracts from the appeal of that decision seem *a propos* here.

[52] In R. v. Brogan [1993] N.S.J. No. 232 (NSCA), the court said:

> 41 This last comment is of particular relevance because the appellant in this case, submits that the learned trial judge wrongly drew a negative inference from the appellant's failure to testify.
>
> 42 The appellant refers to the following comments of the trial judge:
>
> "Obviously the accused has the right to remain silent and cannot be compelled to testify and no negative inference can be drawn from that. But, there can be evidence of such persuasion led by

> the Crown that in the absence of an explanation emerging from the evidence, a conviction seems inevitable. Here, there was a theory proposed by the defence, but in looking at the evidence as objectively as I can there is really little evidence to support the proposition and no evidence, not sufficient evidence to create a reasonable doubt as to the guilt of the accused."

43 It is appropriate, however, to point out that the trial judge also stated:

> "Referring to a publication, Canadian Charter of Rights by Tarnopolsky, the following section was adopted:
>
> > 'The accused need only respond once. The Crown must present its evidence at an open trial. The accused is entitled to test and attack it. If it does not reach a certain standard, the accused is entitled to an acquittal. If it does reach that standard, then, and only then, is the accused required to respond or to stand convicted.'"

44 The trial judge referred to an article by Professor Ratushny, (The Canadian Charter of Rights and Freedoms, Beaudoin and Ratushny, (1982) at pp. 358-359), and his reference to the comments of Lamer, J. on behalf of the majority in Dubois v. R., [1985] 2 S.C.R. 350 at p. 357:

> "In many ways, it is the principle of a "case to meet" which is the real underlying protection which the "non-compellability" rule seeks to promote. The important protection is not that the accused need not testify, but that the Crown must prove its case before there can be an expectation that he will respond, whether by testifying himself, or by calling other evidence. However, even where a "case to meet" has been presented, the burden of proof remains upon the Crown to the end."

45 Reading the decision of the trial judge as a whole, in my opinion, he was simply following the dictates of Irving, J. in R. v. Jenkins (1908), 14 C.C.C. 221 at p. 230:

> "It is true that a man is not called upon to explain suspicious things, but there comes a time when, circumstantial evidence having enveloped a man in strong and cogent network of inculpatory facts, that man is bound to make some explanation or stand condemned."

[53] In R.v. Kotio, 2021 NSCA 76 the court stated:

> 72 Next, the legal principles as to the appellant's right to remain silent and refuse to cooperate with police--the right to remain silent is constitutionally protected and linked to the presumption of innocence. In *R. v. Noble*, [1997] 1 S.C.R. 874, Justice Sopinka for the majority recognized the link between the right to silence and the presumption of innocence under section 11(d). He concluded it would be an error of law for a trier of fact to use an accused's silence in the reasoning process to convict (at para. 53). As Justice Sopinka explained, doing so would impermissibly shift the burden of proof to the accused:
>
> [76] The presumption of innocence, enshrined at trial in s. 11(d) of the *Charter*, provides further support for the conclusion that silence of the accused at trial cannot be placed on the evidentiary scales against the accused. Lamer J. (as he then was) stated in *Dubois v. The Queen*, 1985 CanLII 10 (SCC), [1985] 2 S.C.R. 350, at p. 357, that:
>
> > Section 11(d) imposes upon the Crown the burden of proving the accused's guilt beyond a reasonable doubt as well as that of making out the case against the accused before he or she need respond, either by testifying or calling other evidence.
> >
> > If silence may be used against the accused in establishing guilt, part of the burden of proof has shifted to the accused. In a situation where the accused exercises his or her right to silence at trial, the Crown need only prove the case to some point short of beyond a reasonable doubt, and the failure to testify takes it over the threshold. The presumption of innocence, however, indicates that it is not incumbent on the accused to present any evidence at all, rather it is for the Crown to prove him or her guilty. Thus, in order for the burden of proof to remain with the Crown, as required by the *Charter*, the silence of the accused should not be used against him or her in building the case for guilt. Belief in guilt beyond a reasonable doubt must be grounded on the testimony and any other tangible or demonstrative evidence admitted during the trial. [Emphasis added.]

It is well to remember that these fundamental principles - the right to silence and the presumption of innocence - stand alongside and must be understood together with the important admonition, often given to juries, that they should not speculate about what additional evidence might have been called.

<u>What the police did not do</u>

[54] While a police investigation may be perceived as wanting in some respect, the purpose of a trial is not to render a verdict on the investigation. In extreme cases police neglect may give rise to an abuse of process under s.7 of the *Charter*, but there is no such application before me. At the end of a proceeding the trier of fact may wish that more evidence had been obtained and put before it. Here, for instance, it might have been useful to have some surveillance to corroborate occupation of the residence by the accused. However, it can be difficult to conduct surveillance. Cpl Lane said it "would have been helpful" for the investigators to have swabbed the scales to determine whether cocaine could be detected. Defence counsel submitted that police might have sent some items for forensic analysis to determine the presence of DNA or fingerprints. However, police may well have to consider limitations on resources. There is not an unlimited testing capacity; indeed, wait times for some of these steps are already quite long.

[55] Whether from tactical or economic considerations, or neglect, the failure of the police to provide more evidence does not, in and of itself, create reasonable doubt. Reasonable doubt must emerge from a consideration of whatever evidence has been put before the court. Of course, there may be gaps which detract from the strength of the Crown's case. Reasonable hypotheses and inferences favourable to the accused may be argued for. But the trier of fact must not stray into the realm of speculation. The trier of fact owes a duty to the Crown to fully consider the inculpatory effect of the evidence it has led.

Conclusion

[56] In conclusion I find the accused guilty on both charges of careless storage under s.86(1), not guilty on the charge under s.92(1), and guilty on the charge under s.5(2) CDSA.

Dated at Port Hawkesbury this 18th day of March, 2022.

A. Peter Ross, JPC