SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. LeBlanc*, 2009 NSSC 221

Date: 20090717
Docket: CRH 298345
Registry: Halifax

Between:

Her Majesty the Queen

v.

Jeremy Alvin LeBlanc

Judge:	The Honourable Justice Duncan R. Beveridge
Heard:	February 16, 17, 23; March 10, 27; April 9; May 19; and June 19, 2009, in Halifax, Nova Scotia
Final Submissions:	June 19, 2009
Written Decision:	July 17, 2009
Counsel:	Ronald Lacey, for the Crown Roger Burrill, for the defendant

By the Court:

INTRODUCTION

[1] A loaded semi automatic handgun was seized from a car driven by the accused. This led to seven charges of weapons related offences. At the commencement of trial, the accused applied to exclude the gun based on assertions that his rights guaranteed under the *Canadian Charter of Rights of Freedoms* had been infringed or denied. A *voir dire* was held to determine the issue. The Crown called most of its case in the *voir dire*. The accused did not testify. I made certain findings of fact and mixed fact and law. I concluded that the police officer who arrested the accused did not have reasonable and probable grounds to do so, and accordingly his right to be secure against unreasonable search and seizure had been infringed or denied. I nonetheless dismissed the application to exclude the gun (see 2009 NSSC 99).

[2] By prior agreement, the evidence from the *voir dire* was adopted on the trial proper without the necessity of repetition, with the caveat that it was only properly admissible evidence from the *voir dire* that would be adopted.

[3] The Crown tendered one additional exhibit, a Certificate from the Registrar of Motor Vehicles confirming the identity of the registered owner of the Honda. The Crown and defence also stipulated that the accused was driving the Honda with the permission of the registered owner. The accused testified. In addition to denying any knowledge of the gun, his evidence varied somewhat from the evidence of the police officers.

ISSUES

1. What is the required approach where findings are made based on the Crown's evidence during a *voir dire*, and the accused subsequently calls evidence that is contrary to those findings?

2. What is the evidence that is admissible to establish that the accused was in possession of the gun?

3. Has the Crown proven beyond a reasonable doubt the essential elements of the charges?

ANALYSIS

[4] Before discussing the issues I have framed, it is useful to refer to some general principles that can safely be said to apply to all criminal trials. First, it must never be lost sight of that in a criminal trial the burden is on the Crown to prove the charges against any accused. The requisite standard is proof beyond a reasonable doubt. Mr. LeBlanc is presumed to be innocent of the seven charges until the Crown has proved beyond a reasonable doubt, if it can, his guilt. The presumption means that Mr. LeBlanc does not have to testify, present any evidence or prove anything. The burden is on the Crown. It never shifts to Mr. LeBlanc.

[5] The concepts of the presumption of innocence and proof beyond a reasonable doubt are fundamental principles. The standard of proof beyond a reasonable doubt does not require the Crown to prove the allegations to an absolute certainty. Nonetheless the standard of proof beyond a reasonable doubt falls much closer to absolute certainty than on a balance of probabilities.

[6] A reasonable doubt is not a far-fetched or frivolous one. It is not one based on sympathy or prejudice. It is a doubt based on reason and common sense. It is sometimes said that it is a doubt that logically arises from the evidence or the lack of evidence. By this I mean there may be inherent frailties in the evidence presented by the Crown. Its evidence may be so vague, inconsistent or improbable or lacking in cogency as not to be of sufficient strength to constitute proof beyond a reasonable doubt. Obviously reasonable doubt can also arise from testimony by an accused or evidence tendered by the defence from other sources.

[7] The Crown need not prove beyond a reasonable doubt every fact that it seeks to establish in the course of presenting its case. It need only prove beyond a reasonable doubt the essential elements of the offenses charged.

[8] There is no need to set out in detail the essential elements of the seven counts in the indictment. Five of the counts allege possession of the handgun with attendant circumstances, one count is an allegation of carrying a firearm in a careless manner, and lastly a count that he was an occupant of a motor vehicle, knowing there was a firearm in it. The real issue, and the only one that the Crown

and defence have focussed on, is whether or not the Crown has proven that the accused had knowledge of the existence of the firearm in the vehicle.

Approach to Fact Finding

[9] At the conclusion of the *voir dire* I reserved my decision. The search of the accused was without warrant. Hence, the burden was on the Crown to establish on a balance of probabilities the reasonableness of the search. I subsequently provided written reasons. Based on the evidence adduced and the relevant legal principles, I found that the Crown had not established that Constable Fishe had the necessary reasonable and probable grounds to arrest the accused.

[10] For purposes of the *voir dire* there was really no basis not to accept the evidence of Constable Reeves concerning his conduct in stopping the accused for a suspected motor vehicle offence, and his observations of the accused during the traffic stop. It is at least implicit from my decision that I did accept his evidence. As noted earlier, by agreement of the Crown and defence it was anticipated that the evidence from the *voir dire* would be adopted, if necessary as evidence in the trial proper. This in fact occurred. However, the defence called evidence at the close of the Crown's case. The only witness was the accused.

[11] The evidence of the accused is, for the most part not a direct contradiction of the evidence led by the Crown in the sense of two diametrically opposed version of events, one inculpatory and the other exculpatory. This is no he said- he said scenario. The evidence of Constable Reeves and the accused is for the most part

consistent. However, the accused not only denied any knowledge of the gun, his evidence differed in some respects from the evidence of the police officers, in particular Constable Reeves. At trial the burden on the Crown is different. The Crown and defence could find no case law that has considered this scenario. I proposed, and they both agreed, that where it was necessary to assess the reliability and credibility of the evidence of the Crown I would do so afresh, without regard to any explicit or implicit findings from the *voir dire*. Factual findings would be made in the overall context of the Crown's burden of proving its case beyond a reasonable doubt and the presumption of innocence of the accused.

Admissibility of Evidence to Establish Possession

[12] In order to put into context the evidence the Crown says is admissible to help prove possession, it is first necessary to set out what the Crown must establish to make out possession and provide some overview of the facts.

[13] The accused was the driver and sole occupant of a two door red 1993 Honda Civic. Shortly after 11:00 p.m. on January 27, 2007 the accused was travelling southbound on Northwest Arm Drive. Constable Reeves was driving northbound in a marked police car, with his moving radar activated. He knew nothing about the southbound car when he clocked it doing 110 kph in an 80 kph zone.

[14] Constable Reeves turned his vehicle around and activated his emergency equipment. The accused stopped normally. Constable Reeves alerted dispatch of the vehicle stop and his location. During that process , and as he approached the

Honda, Constable Reeves says he noticed the driver moving around inside the vehicle, as if he was looking for something. Although he acknowledged that movement by a driver to locate relevant documents was not unusual, he felt that the degree or amount of movement was more than normal. He referred to the movements as sped up, anxious ones. In his opinion, it was highly irregular.

[15] Constable Reeves told the accused he was being stopped for travelling 110 kph in an 80 zone. The accused replied he did not think that was his speed. Constable Reeves offered to show the accused the radar reading. The accused replied, no that was fine, but he did not think he was going that fast. The usual documents, licence, registration and insurance were requested by Constable Reeves. The accused informed Constable Reeves that he had an expired insurance card. He explained that the vehicle belonged to a friend; he knew or at least believed there was a current insurance card as she had been ticketed for no insurance and had them cancelled by proving the existence of valid insurance.

[16] In the process of handing Constable Reeves documents that at least included the vehicle registration and licence, Constable Reeves says the registration document was flapping up and down. He could see no external factors that would cause such movement and concluded that the driver was nervous. The accused denies being nervous. He says at some point he became agitated. In any event Reeves and the accused agree that some part of the documents were dropped between the door and the driver's seat. The accused asked Reeves if he could open the door to retrieve the documents. Reeves agreed.

[17] During this process the accused's cell phone rang. It was the registered owner. After speaking with the accused, he passed the phone to Constable Reeves. Constable Reeves testified that this person told him she had received two tickets for no insurance, and the current insurance card was either in the centre console or in the glove box. Constable Reeves told the accused what the owner had said. The accused then looked in the console, pulled out documents and searched for the insurance card. He then closed the console, reached over and opened the glove box part way, but did not really look in the box and immediately closed it. Constable Reeves decided to return to his car. Before leaving, the accused asked permission to continue looking for the insurance card. Constable Reeves agreed. While returning to the police car, Constable Reeves kept one eye on the accused. He saw him still moving to the passenger side, and to the front of the car's compartment.

[18] As Constable Reeves started to fill out the first of two intended Summary Offence Tickets he developed a gut feeling. Eventually he looked at the driver's licence and saw that he had Jeremy LeBlanc stopped. This increased his sense of concern as the accused had a reputation as a drug trafficker, enforcer and known to be in possession of firearms. Reeves called for assistance.

[19] In the meantime, he says the accused was still looking around the inside of the vehicle, going over to the passenger side and back. Constable Reeves then approached the Honda again in order to interrupt the actions of the accused. He saw the accused in the driver's seat, but with the whole of his upper torso over on the passenger's seat as far as one could go. He found this very unusual. He knocked on the window, causing the accused to scream in surprise and sit back up.

Reeves asked the accused if he had found the insurance papers yet and he said he had not. Constable Reeves did not see what the accused had been doing. The accused had nothing in his hands and there was nothing on the floor. Constable Reeves said okay, keep looking and returned to his vehicle.

[20] Within a minute two units arrived to provide back up. The first was Constable Swallow. The second was a police van occupied by Constables Andrew Conrad and Derek Fishe. Had Fishe requested that they be put on the back up call. He made the request because he had spoken with a friend, and fellow officer, Constable Perry Astephen the previous night. It was meant to be a strictly social call, but during the course of it, Fishe says Astephen told him he had source information that the accused has a firearm on him at all times "due to what was going on in Spryfield".

[21] Constable Fishe decided that he had the requisite grounds to arrest the accused and proceeded to do so. There is some discrepancy between the evidence of the accused and that of the officers as to who had their guns drawn and where the taser was aimed, but the differences are immaterial.

[22] There is no dispute that Constable Fishe walked to the driver's side of the Honda with his firearm drawn, but down at his side. Once he could see LeBlanc's hands he re-holstered his firearm and identified himself. The accused knew who he was and asked, "What's up Fishe ?" The window was down approximately four inches with the door locked. He ordered LeBlanc to exit the vehicle. When LeBlanc asked why, Fishe told him because he had information that he had a

firearm, "I am going to take you out of the vehicle and you are going to be arrested for possession of a firearm and searched." LeBlanc protested that Constable Fishe could not do this and announced he was going to call Warren. Constable Fishe said “Warren who?”, even though he knew who he meant. LeBlanc began to use his cell phone. Constable Fishe directed Constable Reeves to move his patrol car to block the Honda as there was still nothing to prevent LeBlanc from trying to drive away.

[23] In the meantime, Constable Swallow was directly behind Constable Fishe with his taser drawn, charged and aimed through the open window. Constable Conrad was on the other side of the Honda with his firearm drawn and at the ready. Constable Fishe told LeBlanc that he was not leaving until he came out of the car and cautioned him "Don't make me have to break the window". LeBlanc reached over and unlocked the door. He was then pulled out of the car and taken to the rear of the Honda. Constable Fishe ducked his head into the Honda and checked under the passenger's seat, as this is both a common area for guns to be hidden, not to mention an area, he believed from Constable Reeves, that the accused had been reaching. His knuckles came into contact with a hard object. He retrieved the object. It was a loaded .22 Browning semi-automatic handgun.

Possession

[24] The *Criminal Code* defines what constitutes possession. Section 4(3) provides:

> 4.(3) Possession -- For the purposes of this Act,
>
> (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.

[25] The Crown concedes that the firearm was not in the actual personal possession of the accused. In any event, to establish personal, constructive or joint possession the Crown must establish knowledge, consent and control. As noted by Freeman J.A. in *R. v. Cameron* 2002 NSCA 123, (2002) 208 N.S.R. (2d) 349, control is not mentioned in the statutory definition, but case law has interpreted the *Code* section to require the Crown to establish control. There appears to be an obvious overlap between consent and control, since the requirement of consent means some measure of control. (see *R. v. Terrence* (1983), 4 C.C.C. (3d) 193 (S.C.C.))

[26] Absent an explicit admission by an accused about the nature and existence of the contraband alleged to be in his or her possession, knowledge must be inferred. If contraband is in the personal possession of an accused and in plain view, knowledge of its presence is an easy inference to draw. Where the contraband is

not in plain view, inferences about knowledge, consent and control may pose a more difficult task.

[27] Here the Crown argues that the only reasonable inference to be drawn from all of the evidence is that the accused knew there was a gun in the vehicle. The accused was under a prohibition order pursuant to s.109 of the *Code* as a result of his conviction on October 15, 2002 for the offence of possession of cannabis for the purpose of trafficking contrary to s.5(2) of the *Controlled Drugs and Substances Act*. The Crown argues the demeanour of the accused, his nervousness in his dealings with Constable Reeves in what appeared to be a routine traffic stop and his movements inside the vehicle leads to no other inference except his knowledge of the gun in the car.

[28] To bolster the drawing of this inference the Crown advocated that there was evidence of motive for the accused to be in possession of a firearm. This evidence consists of the criminal record of the accused showing him to have been involved in drug offences, and having been the victim of a shooting himself approximately seven months prior when another person was shot and killed. The Crown says I should take judicial notice of the link between violence, particularly violence involving guns, and drug activity - and hence the likelihood that the accused would have a gun in his possession on January 27, 2007.

[29] The defence takes the position that the criminal record of the accused is only relevant to the issue of his credibility as a witness. To admit it for any other purpose would constitute propensity evidence, violating the prohibition against the

Crown calling evidence of the bad character of the accused. It also says the evidence of the accused having been at the scene of a homicide and gun shot victim himself, seven months prior, is also bad character evidence.

[30] Unfortunately the suggested reception of this evidence came about in a rather haphazard or impromptu way. During the *voir dire*, the Crown was entitled, and did lead evidence, about the subjective knowledge of the officers involved in the arrest of the character of the accused in its attempt to establish reasonable and probable grounds to arrest. This evidence included hearsay and opinion evidence from both Constable Reeves and Fishe about the reputation of the accused as being a member of the Spryfield mob, a known drug trafficker and enforcer, and having been at the scene of the murder of one Wayne (Chop) Marriott.

[31] At the time of the adoption of the Crown evidence from the *voir dire* into the trial proper, I cautioned the Crown, that the adoption only extended to admissible evidence. No application or submissions were made by the Crown that any of the bad character evidence, hearsay or not, was admissible on the trial proper.

[32] As referenced earlier, the accused testified. He denied any knowledge of the gun. He admitted he dropped his licence in the course of passing the registration and licence to Constable Reeves. He denied being nervous, but admitted at some point during the traffic stop he became agitated. He was examined about his criminal record as an adult, both before and after January 27, 2007. The Crown cross-examined him on his record for convictions as a youth. The accused admitted having been convicted as a youth of mischief, common assault and two

charges of break enter and commit theft. As an adult he admitted convictions on March 31, 2001 for possession of a controlled drug for the purpose of trafficking under the *CDSA* (90 days intermittent); May 8, 2001, breach of an undertaking (30 days intermittent); July 24, 2002 robbery (29 months) and causing a disturbance (one month consecutive); October 15, 2002 possession of a controlled drug for the purpose of trafficking (12 months concurrent); September 25, 2007 failure to comply with a court order (21 days intermittent); October 30,2008 simple possession of a controlled drug ($ 250.00 fine); May 13 ,2009 failure to comply with a court order (21 days custody) and simple possession of a controlled drug (21 days concurrent).

[33] The accused acknowledged in cross-examination having been the victim of a shooting. He also admitted that it would be fair to say violence is part of the business of drug trafficking. He disagreed with the suggestion by the Crown that it would be reasonable for him to protect himself in some fashion. His convictions for possession for the purpose of trafficking were for marijuana. One of these was for only 15 grams. The accused was prepared to admit that being a drug trafficker is somewhat of a dangerous occupation, but that was not his occupation. He specifically denied that the incident where he was a victim of a shooting, was drug related.

[34] The issue of the use that could be made of such evidence came to the fore during oral submissions. Final submissions were adjourned to permit the filing of briefs on the issue of propensity evidence, including exactly what evidence, if any, the Crown was seeking to introduce from the *voir dire* with respect to "motive".

[35] When court reconvened on June 19, 2009 the Crown acknowledged that much of the evidence about a possible motive for the accused to be in possession of a firearm was hearsay and hence inadmissible. The Crown did argue that the evidence of Constable Fishe concerning a conversation with the accused fell within the exception of being a declaration against interest, and hence admissible. Constable Fishe testified:

> A. He had some minor offences when he was younger, some assaults and drug possession. The majority of the information on Mr. LeBlanc that I had at that time was – the main thing was that he was on scene of a murder, that he's known to be a member of an organized gang in Spryfield. I've been on scene before when he was arrested and he has tattoos on his person that states certain things that goes along with these gang members. And I've had conversations with him in the past when he's not under arrest, just when I've seen him, and he's told – you know, basically, because he's a pretty upfront person about what he does and how he makes money.

[36] The difficulty with this evidence is there is no context to the alleged conversation, nor is there any time frame. Without evidence as to currency of the alleged conversations, this evidence has no real probative value. I would note, the accused was not cross-examined as to whether he ever had such conversations with Constable Fishe, and if so, when and what was said.

[37] It is trite law that evidence as to the bad character of the accused is presumptively inadmissible. The prohibition is not because it is not relevant, it is because admission makes the trial unfair, distracting the trier of fact from the real issues in the trial: has the Crown proven beyond a reasonable doubt the specific allegations made against the accused. It runs the risk of the trier of fact convicting

because they may view the accused as having a propensity to engage in criminal acts or has in the past and punish him for such. There are exceptions. Three general ones were referred to by Cory J., in his majority judgment in *R. v. S.G.G.,* [1997] 2 S.C.R. 716; where the evidence is relevant to an issue in the case; where the accused puts her character in issue; and where it is adduced incidentally to proper cross-examination of an accused.

[38] Here the exception contended for by the Crown is the first, the evidence is relevant to an issue, that the accused had a motive to possess a firearm, hence making it more likely that he knew the handgun was under the passenger seat, since it was his. The motive they say is his involvement in drug trafficking, a known violent activity, including a need to be armed to protect himself.

[39] The case law on admission of evidence that puts the character of an accused in a bad light, but is said to provide context or familiarity or interest in such things as drugs (where the offence at issue is drug related) is at first blush not easy to reconcile. In *R. v. Cloutier*, [1979] 2 S.C.R. 709 the accused was charged with importation of 20 pounds of cannabis marijuana. It was concealed in a false bottom of a dresser drawer that the accused had asked his mother to store in her home. The police seized a manuscript by the accused extolling the virtues of marijuana, a scale, a marijuana cigarette butt, pipes, literature on marijuana and a pot containing a green substance (certified by analysis to be marijuana). The trial judge refused to admit any of this evidence. The accused was acquitted. The Quebec Court of Appeal ordered a new trial. On appeal to the Supreme Court of Canada the majority judgment re-instated the acquittal. The only issue was the

accused's knowledge of the marijuana in the dresser. Pratte J. wrote the majority judgment. He concluded that the evidence would offend the rule against the Crown calling evidence of bad character, and had no probative value in relation to the guilty knowledge that must be proved by the Crown. He viewed the evidence as having only one effect, that of raising suspicion against the accused solely for the reason that a marijuana user was more likely to import the substance illegally than someone who does not use the drug. Pratte J. wrote that it was precisely for this reason the evidence was inadmissible.

[40] However, in *R. v. Morris*, [1983] 2 S.C.R. 190 the court split 4-3 in upholding the trial judge's decision to admit a newspaper article found in an accused's apartment with respect to the heroin trade in Pakistan. The accused was charged with importation of heroin from Hong Kong. McIntyre J., for the majority, concluded that the clipping did not just go to disposition, but showed, absent an explanation, that the accused had an interest in and had informed himself on sources of supply of heroin, a subject necessarily of interest to one concerned with importing such a narcotic. Lamer J., as he then was, wrote a strongly worded dissent. He was of the view that the newspaper clipping was inadmissible, not because it was irrelevant. Rather inadmissibility flowed from its little probative value in comparison to its prejudicial effect.

[41] Evidence tending to demonstrate the bad character of an accused can be admitted to provide necessary context (*R. v. MacDonald*, [1990] O.J. No. 142 (C.A.) or to answer a question as to the unusual control an accused was said to have had over others (*R. v. S.G.G.*, [1997] 2 S.C.R. 716). However, merely

labelling the evidence as important to context or the theory of the Crown does not necessarily make it admissible (see *R. v. Smith*, [1992] 2 S.C.R. 74).

[42] The real difficulty with the Crown's argument about motive is that they did not seek to tender any evidence as part of its case. It is difficult to discern any real probative value in the alleged conversations between Constable Fishe and the accused. The theory of the Crown about motive only seemed to come about during the cross-examination of the accused. He emphatically denied being involved in drug trafficking. He denied that the June 2006 shooting incident was in any way drug related. The Crown did not seek to call rebuttal evidence. Convictions for possession of marijuana, (one of which was for 15 grams), for the purpose of trafficking in 2001 and 2002, more than four years prior to January 2007, do not demonstrate otherwise. It is not worthwhile to speculate on what view I may have taken had the Crown tendered otherwise admissible evidence on the issue of motive. The criminal record of the accused was admitted for purposes of challenging his credibility as a witness. It is not admissible for any other purpose.

[43] With respect to the Crown’s argument that the evidence that the accused was present at the scene of a homicide and was himself a victim of a gun shot, I accept that the evidence about this incident that was admissible, causes me to conclude it is not evidence of bad character or propensity evidence. It is therefore admissible. However, in the absence of evidence of any ongoing animosity between the accused and others it is of very little probative value.

Has the Crown Proven the Essential Elements

[44] As already discussed, the Crown in order to prove five of the seven counts must prove beyond a reasonable doubt knowledge, consent and some measure of control. The remaining two charges also require the Crown establish at least knowledge of the gun. Both the Crown and defence naturally focused their submissions on the question of knowledge.

[45] The case for the Crown was entirely circumstantial. At the end of the Crown's case I am of the view that it established a *prima facie* case. I use this term in the sense there was sufficient evidence that would permit, but not require, a trier of fact to draw the inference that the accused knew the gun was in the vehicle. The accused testified and denied any knowledge of the gun. He said he had never seen it before Constable Fishe brought it out of the Honda.

[46] Ordinarily where an accused testifies a trial judge should instruct the jury or herself along the lines articulated by Cory J., in *R. v. W.(D.)*, [1991] 1 S.C.R.. 742:

> [27] In a case where credibility is important, the trial judge must instruct the jury that the rule of reasonable doubt applies to that issue. The trial judge should instruct the jury that they need not firmly believe or disbelieve any witness or set of witnesses. Specifically, the trial judge is required to instruct the jury that they must acquit the accused in two situations. First, if they believe the accused. Second, if they do not believe the accused's evidence but still have a reasonable doubt as to his guilt after considering the accused's evidence in the context of the evidence as a whole. See *R. v. Challice* (1979), 45 C.C.C. (2d) 546 (Ont. C.A.), approved in R. v. Morin, supra, at p. 357.
>
> [28] Ideally, appropriate instructions on the issue of credibility should be given, not only during the main charge, but on any recharge. A trial judge might well instruct the jury on the question of credibility along these lines:

> 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.

[47] As Binnie J., in *R. v. J.H.S.*, [2008] 2 S.C.R. 152 pointed out, there may be some legitimate questions as to the ability of the *W.D.* formula to cover all situations. What the questions in the formula do accomplish is a basic explanation to a jury as to what reasonable doubt means in the context of conflicting testimonial accounts and to avoid the credibility contest error. It impresses on the jury that the burden never shifts from the Crown to prove every element of an offence beyond a reasonable doubt (see para. 9-13). Although useful for both judge alone and jury trials, the questions suggest a useful map, but not the only route (see *R. v. C.L.Y.*, 2008 SCC 2, [2008] 1 S.C.R. 5).

[48] With respect to the evidence of the accused I find it difficult to accept all of his evidence. I was not impressed by his demeanour as a witness. He has many convictions for offences of dishonesty. I therefore find it difficult to accept as true his bald denial of knowledge of the gun. Rejection of his denial does not mean the Crown has proven its case beyond a reasonable doubt.

[49] The Crown argues that I should find that the accused was not just nervous, but excessively so - and for no good reason. His demeanor, coupled with his movements inside the motor vehicle make knowledge of the gun the only rational or reasonable inference thereby justifying a finding of guilt.

[50] Neither the Crown nor the defence submitted any case law on the issue of drawing an inference of knowledge of contraband that is not in plain view. Although each case, including this one, must be decided on its own facts, courts should be guided by judicial experience where it is available. There are a host of cases where trial courts have declined to draw such an inference, and indeed appellate courts have quashed convictions as being unreasonable where inferences have been drawn concerning knowledge of contraband that is not in plain view.

[51] In *R. v. Douglas* (1974), 18 C.C.C. (2d) 189 the Ontario Court of Appeal quashed a conviction for possession of marijuana. The appellant was 17 years of age. He had a prior conviction for a similar offence. He was the driver and sole occupant of a truck, similar to one that he had been seen driving earlier. Under the floor mat on the driver's side of the truck was a cigarette containing marijuana. It was not observable until the mat was moved. There was no evidence that the appellant was the owner of the truck or had actually driven it before. The Court concluded that it may be permissible in some circumstances to draw an inference of possession, but nonetheless quashed the conviction and acquitted the appellant.

[52] In *R. v. Fong*, [1993] B.C.J. No. 1737 (C.A.) the appellants had been convicted of possession of an assault rifle in a judge alone trial. The police

observed five males enter an apartment building. Twenty minutes later three emerged. One was carrying an object, between two and four feet in length, wrapped in a blanket. There was some evidence that all three individuals stood at the rear of a Honda motor vehicle when the object was placed in the trunk. They then entered the car and drove away. A short time later the car was stopped and searched. An assault rifle was found in the trunk wrapped in a blanket. Two hand guns were found under the floor mat of the front passenger seat. The driver was Fong. He had borrowed the car from its registered owner earlier in the day to get groceries.

[53] The trial judge acquitted the accused on the charge relating to the hand guns under the front seat, but found all three in joint possession of the assault rifle. The Crown conceded that the conviction should be quashed and an acquittal entered due to a misapprehension of evidence by the trial judge. With respect to the charge of being occupants of a motor vehicle in which they knew there was a prohibited weapon, the Crown sought to uphold that conviction. Hutcheson J.A., for the majority reasoned that as the vehicle did not belong to any of the three individuals in the car, there was nothing to permit an inference to be drawn of knowledge of either the prohibited or restricted weapons and the conviction could not be supported by the evidence.

[54] Although the facts in the report are scarce, a similar result was arrived at in *R. v. Green and Rawlings*, [1993] O.J. No. 1346 (C.A.). The two accused appealed their convictions for being occupants of a motor vehicle knowing there is a restricted weapon in it. By endorsement, the court noted that there was no direct

evidence of knowledge, nor any facts from which it could reasonably be inferred they had such knowledge, even though the gun was loaded, cocked and easily accessible.

[55] In *R. v. Iturriaga*, [1993] B.C.J. No. 2901 (C.A.) the accused had been convicted of possession of cocaine for the purpose of trafficking and possession of marijuana. The accused did not testify. On appeal he argued the convictions were unreasonable. The appellant was driving a motor vehicle, with one passenger. The police stopped the vehicle as the plate belonged to a different vehicle. The police described the appellant as being visibly nervous during the traffic stop. A search of the car turned up a bag of cocaine under the passenger seat, some marijuana between the seats and papers for rolling cigarettes. Prowse J.A., for the court rejected the Crown's arguments that the jury could infer knowledge and control by reason of the appellant having slowed down on seeing the police, or being visibly nervous, particularly as the appellant did not have a licence. The fact that he was driving and the drugs were within arm's reach could not without further evidence justify a conviction. The facts simply could not establish beyond a reasonable doubt that the appellant had knowledge and control of the drugs.

[56] In *R. v. Grey*, [1996] O.J. No. 1106 (C.A.) the appellant had been convicted in a judge alone trial of possession of crack cocaine that was hidden in a bedroom of his girlfriend's apartment. The appellant's clothes and personal affects in the bedroom included a set of scales. At trial he testified that he planned to move in, but up to that point in time had maintained his own room elsewhere. He denied any knowledge of the drugs. He admitted the cash was his and the scale. The trial

judge rejected his evidence and convicted. The conviction was quashed as being unreasonable.

[57] Bouck J. was the trial judge in *R. v. Amado and Soulie*, [1996] B.C.J. No. 1943, a case with strong similarities to the one before me. Each accused were charged with possession of prohibited and restricted weapons and being occupants of a motor vehicle knowing there were such weapons in it. A challenge to the admissibility of the weapons was unsuccessful. The *voir dire* evidence was adopted at trial. The accused did not testify.

[58] The police testified that they stopped the vehicle the accused were in due to the suspicious actions of the accused. As they followed the accused, they appeared agitated. The police stopped the vehicle due to a minor traffic violation. Eventually they searched the vehicle. Behind the passengers seat was a black sports bag containing two handguns, two black balaclavas, sets of nylon straps used for handcuffs, and ammunition for the handguns. The accused lived together. They both exhibited anxious behaviour. There is no indication who was the registered owner. Bouck J. remarked there was no direct evidence that either accused knew what was in the nylon bag. Although the nervous and agitated conduct of the accused was circumstantial evidence from which one could infer that they did know what was in the bag, it was insufficient to conclude knowledge beyond a reasonable doubt.

[59] In *R. v. Brownridge*, [1999] B.C.J. No. 170 (C.A.) the accused was convicted of possession of marijuana for the purpose of trafficking. The accused

was driving a van. The registered owner was a woman who lived in the area. He was stopped for speeding. The police officer testified that he noticed a strong smell of raw marijuana. The accused replied that such a smell might be from some leftover marijuana from a previous user of the van - a member of the registered owner's family. The accused consented to the officer's request to check the interior of the van for marijuana. As the officer started to check duffel bags which were located directly behind the driver's seat, the accused became agitated and withdrew his consent to search. A considerable quantity of marijuana was found in the bags and plant growing paraphernalia. On appeal a new trial was ordered. Esson J.A., for the court commented:

> [17] I should mention that because the van, so far as the evidence shows, was not one which was normally in the control of the accused, there was an issue as to whether he had knowledge and control of everything in it. I should also say that the matter of agitation was not unambiguously evidence of guilt, even if it was proper to have regard to it. The agitation showed when the search was expanded from the original scope of what was clearly agreed to - that is, having a look in the front seat of the van - to rummaging in duffel bags in the rear. While it is a question of fact for the trier of fact, it is conceivable that the agitation was unrelated to knowledge that the constable was getting close to finding a quantity of drugs.

[60] *R. v Payen* [2005] O.J. No. 5167 (Sup.Ct.) is another case that has some distinct similarities to the case at bar. The accused was the driver of an SUV with three other occupants. The police conducted a routine traffic stop. The police testimony was to the effect that the accused fidgeted at his waist , turning to the centre of the vehicle on being stopped. The odour of fresh marijuana was observed. An open LCBO bag prompted a search of the vehicle. A loaded 25 calibre semi automatic handgun was found in the centre console, next to the driver. He was charged with four counts of possessing, carrying or transporting a

prohibited weapon. The police also testified that the accused appeared nervous and fidgety throughout. Gans J., considered the evidence to be equivocal at best regarding the actions of the accused, consistent with normal human responses at being stopped and questioned by the police, concerned perhaps over violating the liquor laws or the CDSA. He also noted he had heard no evidence about the ownership of the vehicle, other than it had been rented from Hertz. While suspicious, Gans J., concluded that the Crown had not proven knowledge of the gun beyond a reasonable doubt.

[61] In *R. v. Thomas,* [2005] O.J. No. 2104 (Sup. Ct.) the accused was charged with seven counts arising out of the discovery by the police of a loaded handgun under the driver's seat. The accused claimed he was a passenger in a vehicle with others on their way to a party. The group stopped to pick up an acquaintance. While waiting, he ended up in the driver's seat, to turn the vehicle off and change the music. He was in violation of strict bail conditions. He gave the police a false name and address. In addition to the police testimony of the accused's nervous and fidgety demeanor, they claimed to have observed hand movements by the accused that looked like the accused was trying to hide or reach something under the driver's seat. Himil J., concluded that the actions described by the police to have been ambiguous, and just as consistent with other explanations as they are of knowledge by the accused of the gun. He declined to draw the necessary inference as the gun was hidden and the accused had every reason to be nervous and fidgety quite apart from being aware of the presence of the gun.

[62] In *R. v. Freeman,* [2006] O.J. No. 1021 (C.A.), the accused appealed his conviction from a judge alone trial on charges of possession of a firearm and marijuana. The firearm was a handgun that was located under the passenger seat. The trial judge found that the appellant was the primary user of the car, but that it was used by others. He was the driver on the day the gun was found and had over $3,000 in his possession. Apparently it was conceded the money was to be used to buy a 'new used car'. The court, by endorsement, found the evidence could give rise to a high degree of suspicion, but that the conviction was unreasonable. An acquittal was entered.

[63] These cases should not be taken to suggest that a court cannot draw an inference of knowledge where contraband is not in plain view. Convictions have been entered in a number of cases where a gun was hidden (see *R. v. Marryshow*,[2003] O.J. No.1322 (Sup.Ct.); *R. v. Reid*, [2003] O.J. No. 117, overturned on other grounds [2005] O.J. No.5618 (Sup.Ct.); *R. v. Budden*, 2005 ABQB 757).

[64] As noted earlier, in the case at bar the Crown relies on the evidence of Constable Reeves as to the movements and nervous state of the accused. The Honourable Fred Kaufman in the Morin Inquiry voiced caution about the overuse and misuse and otherwise dubious probative value of demeanour evidence as compared to its potential prejudicial effect when tendered by the Crown to demonstrate consciousness of guilt. Here the evidence tendered by the Crown was about the conduct of the accused during the alleged commission of the offence, and hence may not have all of the potential pitfalls of evidence of post offence conduct

(see for example *R. v. Goulart-Nelson*, [2004] O.J. No. 4010 (C.A.) and *R. v. Morales* (2006), 81 O.R. (3d) 161 (C.A.). Nonetheless, it is demeanour evidence that involves a subjective opinion being offered.

[65] To say I am suspicious or even highly suspicious that the accused knew the gun was in the car would be an understatement. However, I cannot convict on suspicion. The Crown did not challenge the evidence of the accused that he had only ever driven the car on one prior occasion. The Crown's own evidence was the car was not owned by the accused, but by one Kristen Lawrence. The Crown did not call Ms. Lawrence or offer any explanation for why it did not do so. I have no direct evidence whatsoever that the gun is not hers. I have no circumstantial evidence making her ownership of it unlikely or that other individuals had access to the vehicle who may have placed the gun there. There was no burden on the accused to call such evidence. The burden remains on the Crown.

[66] The Crown also did not challenge the explanation of the accused that he had on the spur of the moment ended up borrowing the car to drive home, change and return to Ms. Lawrences' so that he could be picked up by his friend to go to a bar in Truro. The Crown did not challenge that the accused had in fact received a phone call from his friend Suds, and that there was an actual plan to go to a bar in Truro. The Crown's position seemed to be that since the accused was unfamiliar with the named bar in Truro, he picked up the gun at home as he would want it with him for protection. It seems quite unlikely that an accused, if he knew there was a gun in the car, would be doing 30 kph over the posted speed limit, virtually guaranteeing police attention if a patrol car was encountered.

[67] Constable Reeves said the accused was polite and cooperative throughout. His opinion about being nervous appears to be based on the shaking or movement of the registration papers when he says there was no wind effect coming *into* the car. He made no reference to anything about the accused's manner or content of speech, sweating, eye contact or any other indicia of anxiety. Constable Reeves acknowledged that the movement was noticeable because of the manner he says the accused was holding the document. The accused denies it flopped up and down. It was the end of January. The Honda was running. The evidence does not exclude air movement from the vehicle's heating system. It seems likely given the time of year that the system would be on. I attach no significance to the dropping of one or more of the documents as they were being passed to Constable Reeves.

[68] Constable Reeves also referred to the accused's movements within the car. However, on balance I find those movements to be equally consistent with his attempts to find the valid insurance card. In cross-examination Constable Reeves testified that given his previous experience in stopping vehicles, which was extensive, his movements did not fit into the general picture of what he would consider normal.

[69] I accept the evidence of the accused that the registered owner had guaranteed him that it was in the car. He asked permission of Constable Reeves to keep looking for the document. The accused described the areas he searched. He searched them more than once. One of the areas he described was the pocket in the passenger door. He testified that to open the pocket you had to press a button and

the lid popped up. At one point Constable Reeves described the accused as having leaned all the way over to the passenger side so that his torso was on the passenger seat. Constable Reeves did not see where his hands were. It would be speculation to conclude they were in the area of the underside of the passenger seat. It is just as likely he had or was in the process of examining the pocket on the passenger door. The Crown did not call any evidence to dispute the layout as described by the accused.

[70] The comments by Constable Reeves in no way dissuaded the accused from continuing his hunt for the valid insurance card. When Constable Reeves rapped on the window, and startled the accused, he asked him if he had found the insurance papers yet. When the accused said he had not, Constable Reeves testified "Okay, keep looking then". The accused did so. It could hardly be said that in the face of such endorsement, if not outright encouragement to keep looking, his continued movement within the car was unusual.

[71] If the accused knew there was a gun in the car, he apparently had ample opportunity to attempt to flee the scene and dispose of it. Nothing the accused said to the police that night or at trial has been affirmatively shown to have been false thereby demonstrating consciousness of guilt.

[72] I also note the Crown did not cross-examine the accused as to how the Honda came to be locked when Constable Fishe went to arrest the accused. I do find that it was locked when Constable Fishe arrested the accused. The Crown did not make any reference to this circumstance in support of a finding of knowledge

of the gun. I find the locked doors as troubling and can be viewed as an additional circumstance supporting an inference that the accused wanted to ensure the police could not gain easy access to the vehicle because he knew there was a gun present.

[73] Even if I accept that the accused was nervous, and there is no obvious alternate explanation for being nervous other than possible knowledge of the gun, I am not prepared to draw this inference. Quite simply, after considering all of the evidence, I find that I have a reasonable doubt about the guilt of the accused. This doubt arises both from the absence of evidence that could have been called by the Crown, the complete absence of any forensic evidence that links or even tends to link the gun to the accused, and from the evidence of the accused. My view is that the evidence adduced is simply not sufficiently strong to cause me to be satisfied beyond a reasonable doubt that he had knowledge of the gun. By law, I must extend the benefit of that doubt to the accused and I therefore find him not guilty of all the charges.

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Beveridge, J.