QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2014 SKQB 174**

Date: **2014 06 27**
Docket: Q.B.J. No. 26 of 2012
Judicial Centre: Battleford

BETWEEN:

HER MAJESTY THE QUEEN

- and -

[redacted]

Counsel:

Denis I. Quon — for the Crown
Patrick C. Fagan, Q.C. — for the accused

JUDGMENT
June 27, 2014

GABRIELSON J.

INTRODUCTION

[1] The accused, [redacted] (hereafter "Mr [redacted]"), is charged with two offences:

> 1. THAT on or about the 23rd & 24th day of June, 2010, at or near Springwater, in the Province of Saskatchewan, did unlawfully produce cannabis marihuana, a controlled substance included in Schedule II of the *Controlled Drugs and Substances Act*, [S.C. 1996, c. 19], contrary to section 7(1) of the said *Controlled Drugs and Substances Act*.
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> 2. That on or about the 24th day of June, 2010, at or near Springwater, in the Province of Saskatchewan, did unlawfully possess cannabis marihuana, a controlled substance included in Schedule II of the *Controlled Drugs and Substances Act*, in an

amount exceeding 3 kilograms for the purpose of trafficking, contrary to section 5(2) of the said *Controlled Drugs and Substances Act*.

[2] The trial in this matter commenced March 10, 2014. The accused pled not guilty to both counts. As counsel for the accused had provided a *Charter* notice [*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982 c. 11] (the "*Charter*"), alleging that the Royal Canadian Mounted Police ("RCMP") had not fulfilled their informational and implementational duties with respect to facilitating the accused's s. 10(b) *Charter* rights, the court entered into a *voir dire* to consider the *Charter* application. Five witnesses were called by the Crown in the course of the *voir dire*. Defence counsel called no evidence on the *voir dire*. Following the *voir dire*, I rendered a decision, *R. v.* [redacted] 2014 SKQB 145, in which I held that the accused's s. 10(b) rights had been violated and that pursuant to s. 24(2) of the *Charter*, a certain statement made by the accused was not admissible.

[3] Following this ruling, counsel for the Crown and the defence agreed that the evidence heard on the *voir dire* with the exception of that ruled inadmissible as set out in my decision referred to above would be applied to the trial proper and the Crown closed its case. The defence counsel indicated that the defence would be calling no evidence. Counsel then asked to submit written arguments and the matter was reserved for my decision on the trial proper.

BACKGROUND

[4] The background facts are contained in my judgment on the *voir dire* dated May 16, 2014, 2014 SKQB 145. Suffice it to say that the RCMP obtained a search warrant to search a residence in Springwater, Saskatchewan, based upon information that

the residence might be being used as a drug grow-op. On June 24, 2010, at approximately 3:15 p.m. they entered the residence pursuant to the search warrant. In the residence they found the accused, Mr. [redacted] and two other parties, [redacted] and [redacted]. All were arrested and charged with the offences currently before the court. I am advised that Mr. [redacted] pled guilty to these offences and Mr. [redacted] was acquitted both in separate trials.

[5] Acting pursuant to the search warrant, the RCMP found a large marihuana grow-op. According to an expert report, the value of the marihuana found was between $83,700 and $416,640.

POSITION OF THE CROWN

[6] Crown counsel submitted that the evidence was clear there was a grow-op (production of marihuana) at the residence and that the amount of marihuana found was sufficient to establish possession for the purposes of trafficking. Crown counsel submitted that the issue is whether the accused had knowledge and control or was otherwise in possession of the marihuana which was being produced in the residence. Crown counsel submitted that the RCMP surveillance had established that the accused had been in the residence for at least 24 hours prior to the search warrant being executed and that no innocent explanation for the accused's presence at the residence had been offered. Counsel submitted that but for some sleeping accommodations, the entire residence was dedicated to the production of marihuana on a commercial scale and that this should have been apparent to the accused. Finally, counsel submitted that when the RCMP entered the residence pursuant to the search warrant, they were greeted by three aggressive dogs that were restrained by the accused and Mr. [redacted] which showed that the accused had control over the dogs. The control over the dogs gave him control over

the premises similar to if he had a key to the premises. Crown counsel referred to the cases of *R. v. Jackson*, 2007 SCC 52, 226 C.C.C. (3d) 97; *R. v. McLean* (7 March, 2012) Swift Current (Sask. Q.B.); *R. v. Bryan*, 2013 ONCA 97, [2013] O.J. No. 673 (QL); *R. v. Fisher*, 2005 BCCA 444, 200 C.C.C. (3d) 338; and *R. v. Pittiman*, 2006 SCC 9, [2006] 1 S.C.R. 381, as authorities which confirm that when the circumstantial evidence is overwhelming, as it was in this case and there is no other rational conclusion for his presence, the accused should be found guilty of the offences with which he is charged.

POSITION OF THE ACCUSED

[7] Defence counsel submitted that the Crown has not proven beyond a reasonable doubt that the accused had the requisite knowledge, consent and control of the cannabis marihuana to establish that the accused was either a principal or a party to the offences. Defence counsel submitted that mere presence at the scene of a crime does not prove culpable participation in its commission. The cases cited by Crown counsel are easily distinguishable based upon their facts. Defence counsel also submitted two cases which he states were illustrative of the general approach adopted by the courts in their consideration of the positions of persons found in a marihuana grow-op: *R. v. Coull* (1986), 33 C.C.C. (3d) 186, [1986] B.C.J. No. 1338 (QL) (B.C.C.A.); and *R. v. Black* (1996), 32 W.C.B. (2d) 407, [1996] B.C.J. No. 3148 (QL) (B.C.C.A.). Defence counsel therefore submits that the Crown has not proven that the accused is guilty beyond a reasonable doubt and he must therefore be acquitted.

ISSUES

[8] The sole remaining issue in this case is whether the Crown has proven beyond a reasonable doubt whether the accused was a principal or a party to the offences

charged.

ANALYSIS

[9] There is no question that the Crown has proven that there was a grow-op being carried on at the Springwater residence and that the amount of marihuana found there was of sufficient quantity to establish possession for the purposes of trafficking. The Crown has further proven that the accused was found in the residence and that he had been there for at least 24 hours. However, mere presence at a grow-op does not prove that the accused was either a principal or a party to the production or possession for the purposes of trafficking of the marihuana found in the residence. In the case of *R. v. Jackson*, *supra*, Fish J. stated at para. 3:

> 3 The appellant relies for the success of his appeal on the proposition that mere presence at the scene of a crime does not prove culpable participation in its commission. That proposition is entirely sound. ...

In the *Jackson* case, however, the court went on to say:

> ... [The] conviction does not rest on his mere presence at the scene of the crime. It rests, rather, on the cumulative effect of his apprehension at the scene, the rejection of his explanation for being there, the particular nature of the offence, the context in which it was committed, and other circumstantial evidence of his guilt. ...

[10] The other evidence referred to by Justice Fish in the *Jackson* case included the accused's arrest at a secluded marihuana plantation in a remote area of the forest, the fact that there was no legitimate business enterprise, wilderness camping, or other recreational activities at that site, the fact that the appellant had been there for two days,

his relationship with the others present, his presence in a camouflaged tent on the site in which growing equipment was found, and the accused testifying and giving an implausible explanation of his presence at the marihuana plantation.

[11] While the *R. v. Jackson* case does have some similarity to the situation before the court in that it also dealt with a substantial marihuana grow-op, virtually all of the evidence in that case which the Supreme Court of Canada relied upon and referred to in upholding the appellant's conviction is not found in the case before me. In the case before me, rather than a secluded marihuana plantation in a remote area of the forest, this was an actual residence in a small Saskatchewan hamlet. The residence was not camouflaged. There was no evidence given at the trial that the accused had been there for more than one night based upon the RCMP surveillance. There was no evidence that the accused had any relationship with the other parties found in the residence. Finally, the accused in this case did not testify and therefore was not in a position of having had his explanation for his presence being rejected by the trial judge as was the case in *Jackson*.

[12] In the *Jackson* case, the court also referred to the case of *R. v. Dunlop,* [1979] 2 S.C.R. 881, 47 C.C.C. (2d) 93, a case in which that court also held that mere presence at the commission of an offence does not make a person a party to the offence unless the accused assumed a role which would qualify him or her as an aider or abettor in the commission of the acts necessary for the offence. In this case, there was no admissible evidence entered by the Crown to suggest that the accused rendered any aid, assistance or encouragement in respect to the production of the marihuana. Although fingerprints were taken at the site, expert analysis of the fingerprints did not establish that the accused had touched any of the grow-op equipment, the marihuana plants or the containers in which they were stored.

[13] Crown counsel's assertion that the size of the grow-op meant that more than one person would have been required to run the operation is not substantiated by any evidence before me. Even if it had been established that the size of the operation required more than one person to operate it, there was no admissible evidence provided at the trial to suggest that the accused was doing so.

[14] Crown counsel submitted that the accused's actions in controlling the three dogs found in the residence when the RCMP arrived at the residence could be said to establish that the accused was somehow in constructive possession or control of the residence. However, in my opinion, the evidence does not support such a conclusion beyond a reasonable doubt. Corporal MacDonald's evidence was that when he knocked on the door to the residence, the door opened by itself. He then noticed three dogs running around and two males trying to control them. He stated, "they were grabbing dogs and putting them into another room." The accused was one of the males Corporal MacDonald referred to and Mr. [redacted] was the other. There was no evidence as to who owned the dogs or that the accused was being anything other than co-operative in facilitating the RCMP in their search of the premises or protecting the dogs. In my opinion the interaction with the dogs does not constitute any control over the premises by the accused. It is not akin to having a key to the premises as suggested by Crown counsel. The evidence established that the only person who had a key to the premises was Mr. [redacted], who as I previously indicated pled guilty to the offences.

[15] The *R. v. McLean* case and the *R. v. Bryan* case cited by Crown counsel are also factually distinguishable since both involve the accused's presence in an automobile where drugs were found. The issue in each case was whether each accused could be said to be in possession of the drugs found in the motor vehicle. The factual difference of course is that the accused in those cases was the operator of the vehicles in question

rather than simply an occupant and was found to have been in constructive possession of the drugs by virtue of his control of the vehicle.

[16] In the case of *R. v. Pham*, 2006 SCC 26, [2006] 1 S.C.R. 940, the Supreme Court of Canada dismissed the appeal of an accused after a conviction for possession of cocaine for the purposes of trafficking for the reasons set out by the Ontario Court of Appeal in its decision *R. v. Pham* (2005), 77 O.R. (3d) 401, 203 C.C.C. (3d) 326 (Ont. C.A.). At para. 15 of the Court of Appeal decision, the court referred to constructive or joint possession as follows:

> **15** In order to constitute constructive possession, which is sometimes referred to as attributed possession, there must be knowledge which extends beyond mere quiescent knowledge and discloses some measure of control over the item to be possessed. See *R. v. Caldwell* (1972), 7 C.C.C. (2d) 285 (Alberta Supreme Court, Appellate Division); *R. v. Grey* (1996), 28 O.R. (3d) 417 (C.A.).
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> **16** In order to constitute joint possession pursuant to section 4(3)(b) of the Code there must be knowledge, consent, and a measure of control on the part of the person deemed to be in possession. ...
> ...
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> **18** The onus is on the Crown to prove beyond a reasonable doubt, all of the essential elements of the offence of possession. This can be accomplished by direct evidence or may be inferred from circumstantial evidence. In Re: Chambers and the Queen, supra at 448, Martin J.A. noted that the court may draw "appropriate inferences from evidence that a prohibited drug is found in a room under the control of an accused and where there is also evidence from which an inference may properly be drawn that the accused was aware of the presence of the drug."

[17] In this case, there was no evidence that the room in which the accused was found was under the control of the accused nor is there any evidence pursuant to which an inference can be drawn that the accused had knowledge or consent in respect to the

presence of the drugs. While I have a strong suspicion that the accused must have been aware of the presence of a grow-op due to the size of it and the distinctive odours that would have been present, I am not satisfied the Crown has proven beyond a reasonable doubt that the accused had any possession or control over the marihuana found in the house.

CONCLUSION

[18] In conclusion, I find the accused not guilty of both counts in the indictment.

J.
N.G. GABRIELSON