IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Barbara M. Hamilton
Madam Justice Jennifer A. Pfuetzner
Madam Justice Karen I. Simonsen

B E T W E E N :

	)	***A. R. Hodge***
HER MAJESTY THE QUEEN	)	*for the Appellant*
	)	
	)	***L. M. Perron*** *and*
Respondent	)	***J. A. Hyman***
	)	*for the Respondent*
- and -	)	
	)	*Appeal heard:*
ELI ZACHARY LEWIN	)	***November 26, 2019***
	)	
(Accused) Appellant	)	*Judgment delivered:*
	)	***February 6, 2020***

Corrected Judgment: A corrigendum was issued on March 24, 2020; the corrections have been made to the text and the corrigendum is appended to this judgment.

HAMILTON JA

[1] The accused appeals his convictions for possession of methamphetamine (meth) for the purpose of trafficking and possession of proceeds obtained by crime.

[2] During a search incidental to the accused's arrest for breaching a probation order, the police seized a small amount of meth in a small plastic baggie found in a pocket of the accused's shorts. They also seized several empty plastic baggies, $80 cash, a cellphone and a knife. Later at the police station, the police discovered 14.35 grams of meth in a plastic bag stuffed in

the shaft of the seat of the bicycle the accused was riding at the time of his arrest.

[3] The accused's main ground of appeal is that the trial judge did not correctly apply the third step of the credibility analysis set out in *R v W(D)*, [1991] 1 SCR 742 (at p 758):

> [E]ven 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.

[4] I am of the view that the trial judge erred in law in this aspect of her analysis as to whether the Crown had proved beyond a reasonable doubt that the accused possessed the meth for the purpose of trafficking. I would allow the appeal and order a new trial.

Background

[5] Two police officers arrested the accused after stopping him to check on his well-being when they saw him, in the evening, on a bicycle, stopped in the middle of a busy roadway blocking traffic. The police could see a knife clipped to a pocket of his shorts. When they checked his name in the police computer system, they learned that the accused was subject to the probation order that prohibited him being in possession of weapons.

[6] The bicycle showed up as stolen in the police database. The police discovered the 14.35 grams of meth when they were checking the bicycle for return to its owner.

[7] An expert testified that, in his opinion, the meth, along with the items seized, was indicative of street-level trafficking and the $80 found on the accused was consistent with proceeds of crime in that context. In cross-examination, he conceded a number of possibilities that were consistent with an addict possessing the meth for personal use.

[8] The accused acknowledged that he possessed the meth in his pocket for personal use and that he was in breach of his probation order. He testified at trial that he did not know about the meth hidden in the bicycle, that he had borrowed the bicycle from his drug dealer to do personal errands and that he carried the knife because he had an emotional attachment to it.

Trial Judge's Reasons

[9] After reviewing the expert's evidence and the accused's evidence, the trial judge referred to the well-known credibility test set out in *W(D)*. She stated:

> Even if I don't particularly believe him, [the accused] is entitled to be acquitted if his testimony leaves me in reasonable doubt. And further, even if I'm not left in doubt by [the accused's] evidence, in order to convict [the accused] on the charges he is facing, the Crown must establish beyond a reasonable doubt, based on the evidence I do accept, all of the elements of the offences, namely; that [the accused] was in possession of [meth], that the possession was for the purpose of trafficking and that the $80 was proceeds of crime.

[10] The trial judge noted that this was a circumstantial case and cited *R v Villaroman*, 2016 SCC 33.

[11] She did not make specific findings as to what evidence of the accused she believed. However, when I read her reasons as a whole, it is evident that she accepted his evidence that he is an addict, as well as much of his evidence about what transpired that day, including that he borrowed the bicycle from his drug dealer, with whom he has a close relationship. She specifically rejected his evidence that he did not know about the meth in the bicycle and his explanation for why he carried the knife, and she stated that this evidence did not raise a reasonable doubt.

[12] The trial judge concluded that the Crown proved beyond a reasonable doubt that the accused possessed the meth, stating, "The circumstantial evidence viewed logically and in light of human experience supports the conclusion that [the accused] knew of the half ounce of [meth] hidden in the bicycle seat shaft."

[13] She found the expert's evidence to be "reliable and credible." After setting out her reasoning, she concluded, "Based on the totality of the evidence, both direct and circumstantial, adduced at trial, the only logical conclusion is that [the accused] possessed the [meth] for the purpose of trafficking." I will say more about her reasoning in a moment.

[14] As for the $80 being proceeds of crime, she stated that, "Having found that [the accused] possessed the [meth] for the purpose of trafficking, I also find that the $80 is proceeds of crime. . . . The denominations found on [the accused] are consistent with trafficking at the street level".

Analysis

[15] When addressing the issue of possession, the trial judge appropriately focussed on whether the accused had knowledge of the meth hidden in the bicycle. In my view, she was entitled to find that the only reasonable inference to be drawn from the evidence that she did accept was that the accused knew about the meth hidden in the bicycle. This evidence included that: the accused had control of the bicycle for about 12 hours prior to his arrest; he was the only person riding the bicycle; he had arranged to take the bicycle from his drug dealer a week in advance; the meth in the bicycle was within inches of his person; and a smaller amount of meth was in a pocket of his shorts. Furthermore, she considered, and rejected, the other proposed inferences argued by the accused, in keeping with the analytic approach to circumstantial evidence articulated in *Villaroman*.

[16] However, her reasoning with respect to whether the accused possessed the meth for the purpose of trafficking is problematic. In this regard, she stated:

> Although [the expert] indicated it would be highly unlikely in his experience that a user would be able to secure access to a half ounce of meth, [the accused] testified that he had both the monetary means and long-term relationship with dealers that might result in his ability to secure this quantity of meth for his personal use. The problem, of course, with this alternate theory is that [the accused] testified in both direct and cross-examination that the meth found in the bicycle was unequivocally not his. He denied knowing of its existence. Defence counsel in his closing arguments acknowledged that if [the accused] were to concoct a story, it would have made more sense for him to say that the half ounce for his personal use, but he didn't. And because of this, including his denial that the meth in the bike was his, when put to him on cross-examination, I find that the Crown negated what

> might otherwise might have been a plausible theory. Based on the totality of the evidence, both direct and circumstantial, adduced at trial, the only logical conclusion is that [the accused] possessed the [meth] for the purpose of trafficking.
>
> [emphasis added]

[17] The accused asserts that the trial judge's statements highlighted in the previous paragraph demonstrate that she erred in law by misapplying the third step of *W(D)*. He says that her impugned statements must be assessed in the context of the fact that this was a circumstantial case that only allowed an inference of guilt if that inference was the only reasonable inference to be drawn from the evidence (see *Villaroman* at para 30).

[18] I agree with the accused, as he asserts, that the trial judge erred.

[19] At the third step of the analysis, the trial judge was required to consider the evidence that she did accept to determine whether or not the Crown had proved beyond a reasonable doubt that the accused possessed the meth for the purpose of trafficking. She was also entitled to consider the absence of evidence.

[20] The trial judge acknowledged that there may have been a plausible theory of personal use to be drawn from the evidence. In my view, the trial judge erred in relying on the accused's denial of knowing about the meth—evidence she had previously rejected—to find that possession for personal use was not a reasonable alternative inference.

[21] I do not read the trial judge's reference to the accused's denial of knowing about the meth as simply a reference to the absence of evidence that he possessed the meth for personal consumption, as argued by the Crown. In

my view, the trial judge relied on the accused's denial, that she did not believe, as positive evidence of guilt to conclude that the Crown had met its onus. In doing so, she erred in law.

[22] I agree with the accused that the effect of these errors was to shift the burden of proof from the Crown to the accused to demonstrate that he possessed the meth for his personal use (see *R v WRB*, 2011 MBCA 17 at para 2). The lack of credibility of an accused does not equate to proof of guilt beyond a reasonable doubt (see *R v JHS*, 2008 SCC 30 at para 15; and *WRB* at para 2).

[23] The conviction for possession of proceeds of crime is also based on the same errors of law, given that it was essentially premised on the conviction for possession for the purpose of trafficking.

[24] The accused also argues that the verdicts were unreasonable. Given the evidence adduced at trial and that the two counts are so intertwined, I cannot conclude that the verdicts were ones that a properly instructed jury could not reasonably have rendered (see *R v Biniaris*, 2000 SCC 15; and *Villaroman* at para 55). As for the other grounds of appeal, I need not address them given my conclusions as noted above.

[25] The accused asks this Court to set aside his convictions and enter acquittals. In my view, given the nature of the trial judge's errors and my conclusion that the verdicts cannot be said to be unreasonable, the appropriate remedy is for this Court to set aside the verdicts of guilt and order a new trial.

Decision

[26] For the above reasons, I would quash the convictions for possession of meth for the purpose of trafficking and possession of proceeds of crime (as well as the related conviction for breach of probation) and I would order a new trial on these three counts.

Hamilton JA

I agree: Pfuetzner JA

I agree: Simonsen JA

COURT OF APPEAL
PROVINCE OF MANITOBA
WINNIPEG
R3C OP9

CORRIGENDUM

March 19, 2020

TO WHOM IT MAY CONCERN:

Re: *R v LEWIN*
2020 MBCA 13
Docket No. AR19-30-09299
Released: February 6, 2020

The attached decision replaces the previous decision which was released February 6, 2020. Paragraph 26 in the previous decision is to be replaced with the following:

> For the above reasons, I would quash the convictions for possession of meth for the purpose of trafficking and possession of proceeds of crime (as well as the related conviction for breach of probation) and I would order a new trial on these three counts.