

*Case Name:*

**R. v. [REDACTED]**

**Between  
Her Majesty the Queen, and**

**[REDACTED]**

[2011] O.J. No. 6679

Ontario Superior Court of Justice

**L.A. Pattillo J.**

Heard: August 22, 2011.

Oral judgment: August 22, 2011.

(47 paras.)

**Counsel:**

M. Waby, For the Crown.

A. Stastny, For the Accused.

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**REASONS FOR JUDGMENT**

**1** L.A. PATTILLO J. (orally):-- Mr. [REDACTED] is charged with five counts relating to possession of a loaded 45 calibre semi-automatic handgun and careless storage of the gun and ammunition contrary to ss. 95(2) (a), 92(3), 91(3) (a) and 86(3) (a) of the *Criminal Code*.

**2** The facts are as follows: Early on the morning of August 31st, 2009, police from the Toronto Police Emergency Task Force, the Guns and Gangs Task Force and 23 Division executed a search warrant at [REDACTED], in the City of Toronto. On the evening of August 30th, 2009, the police received information concerning [REDACTED] and two persons of interest, Mr. [REDACTED]. Investigations were conducted on the two individuals. A telewarrant was applied for and received by the police at 2:05 a.m. on August 31st, 2009. The

telewarrant authorized the police to search apartment [REDACTED] for two firearms, ammunition and identification. There is no issue with respect to the validity of the warrant.

3 The Emergency Task Force entered the apartment at 3:42 a.m. and after they secured it and the people inside, officers from the Guns and Gangs Task Force and 23 Division entered the apartment at 3:48 a.m. and began the search.

4 The apartment has a kitchen, a large living room, dining room combined and three bedrooms and a washroom, which are located off a hallway running from the living room, dining room area.

5 The police located two individuals in the master bedroom at the end of the hall, [REDACTED]. There was also a female located in one of the bedrooms who was identified as [REDACTED]. There was no one in the third bedroom, which was the first bedroom on the left in the hallway.

6 Detective Constable Fitkin, a member of the Guns and Gang Task Force, searched the empty bedroom. There was a bed to the left and a dresser against the wall at the foot of the bed. He described the room as being very tidy. It was orderly and clean and the bed was made.

7 Officer Fitkin walked to the end of the bed furthest from the door and lifted the mattress. He saw two guns approximately six inches to one foot from the edge of the mattress and about the same distance apart. There was also a bag with bullets and further up a bundle of cash. One of the guns was a 45 calibre High Point semi-automatic handgun, serial number X472581, with a magazine in the gun containing nine rounds of 45 calibre ammunition. There was no bullet in the chamber of the gun. The other gun was a Marksman 177 calibre BB gun repeater. The bag contained 13 rounds of 45 calibre ammunition. The bundle of cash totaled \$2,000. Officer Fitkin seized the guns, ammunition and cash and turned them over to Constable Williamson.

8 Detective Constable Frederick entered the room immediately after Officer Fitkin and observed him find the firearms, ammunition and cash under the mattress. He ensured that the firearms were safe. He also observed awards and trophies on the wall with Mr. [REDACTED] name on it. He was impressed because they were both for academics and athletics. Officer Fitkin seized the guns, ammunition and cash and then they left the apartment and proceeded to another unrelated search.

9 Detective Constable McKenzie, who was the officer in charge that evening, on information from Officer Fitkin, went into the bedroom and viewed the two guns on the box spring at the foot of the bed. He too described the room as neat and orderly and that there was a bed, two dressers and a closet. On the dresser to the left as he entered the room, and on the wall behind it, he saw plaques. He also observed what he called trophies, later metals, which were on the dresser or leaning against the wall. In particular, he saw what he believed was a soccer plaque on the wall with the name of [REDACTED] on it.

10 Officer Sandhu entered the bedroom after Officer Fitkin and was detailed to search it and

seize any items that may identify the occupant. In the top right drawer of the dresser in the bedroom, he found 2007 and 2008 tax assessments addressed to [REDACTED], as well as a picture of an individual which one of the residents in the apartment identified as [REDACTED]. He also found in the drawer a pay slip addressed to Mr. [REDACTED], dated September 12th, 2008. There were also male clothes in the bedroom, none of which were seized.

11 Later, on August 31st, 2009, at 8:15 in the evening, the police returned to [REDACTED] in an attempt to locate Mr. [REDACTED]. At 8:45 p.m., one of the officers advised that a vehicle belonging to Mr. [REDACTED] was in the parking lot. It was a dark BMW, license [REDACTED]. The officers attended at apartment [REDACTED] and knocked. A female answered and told them that [REDACTED] was not there. The officers then left. At 9:09 p.m., a second target vehicle, a green BMW, license [REDACTED], pulled into the parking lot, parked in the corner with its lights on and then left the parking lot. It was stopped by police a short distance away. Mr. [REDACTED] was driving and [REDACTED] was a passenger in the vehicle.

12 On September 1st, 2009, the day after Labour Day, the police issued a warrant for Mr. [REDACTED] arrest. He subsequently turned himself in to police at 23 Division.

13 At 11:49 p.m. on August 30th, 2009, prior to the search warrant being issued, Officer McKenzie searched Mr. [REDACTED] name in the Ministry of Transportation database. That search showed that Mr. [REDACTED] had a valid driver's license and his address was [REDACTED], Brampton.

14 On November 30th, 2010, Officer McKenzie obtained a copy of the lease for apartment [REDACTED] at [REDACTED], the superintendent of the building. The lease is dated May 1st, 2006, and is for a term of one year. It indicates that [REDACTED] is the tenant. It also lists [REDACTED] and as occupants.

15 On May 25th, 2011, Officer McKenzie received additional information from Mr. [REDACTED] concerning parking for the building. He received a document entitled "Parking Change Notice" dated June 4, 2008, noting that outdoor parking space [REDACTED] was requested by [REDACTED], apartment 311, in respect of a [REDACTED]. A second document is an undated list of outdoor parking spots, showing, among other things, that [REDACTED], apartment [REDACTED], had allocated spots [REDACTED]. Spot [REDACTED] license number [REDACTED].

16 Mr. [REDACTED] is the superintendent for both [REDACTED]. He identified as living in apartment [REDACTED], along with his father, mother and sister. He said he saw him as he passed through the lobby on his way to work in the morning and he would say good morning.

17 Also on May 25th, 2011, Officer McKenzie obtained a copy of the lease for apartment [REDACTED] at

██████████. The lease, Exhibit 1, is dated April 22nd, 2009, and lists the tenants as ██████████. The application for tenancy is signed by ██████████ and lists one of his prior addresses in the last seven years as apartment ██████████. It lists ██████████ as emergency contacts and their relationship as parent.

**18** The superintendent of the building, ██████████, said she saw ██████████ almost every day at the building, and ██████████, who she knows as his brother, perhaps every week or every second week, she was unsure.

**19** ██████████ testified on behalf of the defence. He is 27 and is the stepbrother of Mr. ██████████. Mr. ██████████ mother is married to Mr. ██████████ father. Mr. ██████████ said that he was close to his brother and to his family generally. Mr. ██████████ said he lived there in the bedroom at apartment ██████████, when his parents first moved into the apartment in 2006. His name was not listed on the lease as occupant because it was a three bedroom apartment and he and Mr. ██████████ were going to share a room, which was not permitted. He said that he and his brother shared a room, but that his brother was at school in ██████████ for the period. He would come home weekends and holidays and either stay with his parents or his girlfriend. If he stayed at the apartment, ██████████ would stay elsewhere.

**20** Mr. ██████████ moved out of the apartment at the end of April 2009, to ██████████, ██████████ apartment ██████████. He took all his stuff with him, but he said that he may have left some stuff behind. He denied that the guns and ammunition were his or that he had any knowledge of them.

**21** Section 4(3) of the Criminal Code defines possession as follows:

"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 or 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."

22 The Crown submits that Mr. ██████ had constructive possession, set out in s. 4(3)(b) of the *Criminal Code*.

23 To constitute possession in criminal law, there must be both knowledge and some element of control: *R. v. Beaver* [1957] S.C.R. 531.

24 Control does not require the accused to exercise control over the objects in question, rather the Crown need only establish that the accused had power or authority over the objects in question: *R. v. Mohamad* (2004) 69 O.R. (3d) 481, 182 C.C.C. (3d) 97.

25 The real issue in this case, as agreed by both the Crown and defence, is whether the Crown has established beyond a reasonable doubt that Mr. ██████ had knowledge of the guns and ammunition in the bedroom of the apartment.

26 The defence concedes that if the Crown has established that Mr. ██████ had knowledge of the guns and ammunition, control would be established. There is no direct evidence before me that Mr. ██████ knew that the guns or ammunition were under the mattress in the bedroom. The Crown relies on circumstantial evidence.

27 In *R. v. Anderson-Wilson* [2010] O.J. No. 377, which concerned whether the accused was in possession of a firearm found in a vehicle, Hill, J. set out a detailed summary of what is necessary for the Crown to prove knowledge in crimes of unlawful possession. The learned judge states in paragraph 71 to 73:

"In crimes of unlawful possession, it is "not necessary for the prosecution to prove the required knowledge by direct evidence... it could be inferred from the surrounding circumstances": *R. v. Aiello* (1978), 38 C.C.C. (2d) 485 (Ont.C.A.) at 488 (affirmed [1979] 2 S.C.R. 15); see also *R. v. Pham* (2005) 203 C.C.C. (3d) 326 (Ont.C.A.) at para. 18 (affirmed [2006] 1 S.C.R. 940); *R. v. Anderson*, [1995] B.C.J. No. 2655 (C.A.) at para. 15-16. Frequently then, such cases are proven by circumstantial evidence: see *R. v. Meggo*, [1998] O.J. No. 2564 (C.A.) at para. 1. This includes proof of unlawful possession of a firearm: *R. v. Ali*, 2008 ONCA 741 at para. 3-7."

28 Paragraph 72:

"The essential component of self-instruction on circumstantial evidence is that the trier of fact must be satisfied that the only rational inference that can be drawn from the circumstantial evidence is that the accused is guilty: *R. v. Griffin*; *R. v. Harris* (2009) 244 C.C.C. (3d) 289 (S.C.C.) at para. 33. Circumstantial evidence must be viewed as a whole and not each piece individually: *R. v. Warkentin et al.* (1976) 30 C.C.C. (2d) 1 (S.C.C.) at 20. "The mere existence of any rational, non-guilty inference is sufficient to raise a reasonable doubt": *Ri. v.*

*Griffin; R. Harris, supra, at para. 34."*

**29** Paragraph 73:

"The Crown may seek to establish the existence of a fact in issue by submitting that an inference may reasonably and circumstantially be drawn from the primary facts - there exists an inferential gap between the primary fact and the fact to be proved: *R. v. Arcuri* (2001) 157 C.C.C. (3d) 21 (S.C.C.) at 31-2; *R. v. Cinous* (2002) 162 C.C.C. (3d) 129 (S.C.C.) at 172-3. Whether the inference is a reasonable one to draw usually involves an application of "human experience and common sense" (*R. v. Figueroa et al.*, [2008] O.J. No. 517 (C.A.) at para. 33; *U.S.A. v. Huynh* (2005) 200 C.C.C. (3d) 305 (Ont.C.A.) at 307). Circumstantial inferences are ones which "can be reasonably and logically drawn from a fact or group of facts established by the evidence": *R. v. Morrissey* (1995) 97 C.C.C. (3d) 193 (Ont.C.A.) at 209. A trier of fact "cannot be invited to draw speculative or unreasonable inferences": *R. v. Figueroa et al.*, at para. 35, 42. Most cases "will involve hiatuses in the evidence which can be filled only by inference": *Lameman v. Canada (Attorney General)*, [2006] A.J. No. 1603 (C.A.) at para. 87. "The process of drawing inferences from evidence is not, however, the same as speculating even where the circumstances permit an educated guess": *U.S.A. v. Huynh*, at 307."

**30** In this case the Crown relies on the following evidence as establishing that Mr. [REDACTED] had knowledge of the gun and ammunition found in the empty bedroom. With Mr. [REDACTED] name is on the lease for the apartment as an occupant. There was a plaque on the wall in the bedroom with Mr. [REDACTED] name on it. There were also metals and trophies on the dresser. Officer Frederick looked at them and said they involved both athletic and scholastic achievements. Although, as noted, none of the plaques or trophies were photographed or seized. In the top right drawer of the dresser in the bedroom, Officer Sandhu found 2007 and 2008 tax assessments addressed to Mr. [REDACTED] at the apartment, as well as a picture of an individual which one of the residents in the apartment identified as Mr. [REDACTED]. There were male clothes in the bedroom, none of which were seized. The evidence of Mr. [REDACTED], the superintendent for [REDACTED], who identified Mr. [REDACTED] as living in apartment [REDACTED] along with his father, mother and sister. He said that he saw Mr. [REDACTED] pass through the lobby on his way to work in the morning and would say good morning.

**31** While there is some evidence that Mr. [REDACTED] occupied the empty bedroom at some time, it does not come close, in my view, to establishing that he was using it at the time of the warrant or for a period prior thereto. The bedroom was neat and tidy, the bed was made. There was no indication that anyone had recently stayed in the room. The apartment was leased by [REDACTED], by lease dated May 1, 2006. It was a one year lease with no provision for renewal. Beatrice is Mr. [REDACTED] mother. The lease listed Mr. [REDACTED], as well as [REDACTED], his father, and [REDACTED], his sister, as persons entitled to occupy. While Mr. [REDACTED] is listed on the lease as an

occupant, the lease speaks as of its date, which is April 2006. Mr. ██████ said Mr. ██████ was living in Brampton with his sister at the time but could not confirm the address.

**32** I agree with both the Crown and defence that the evidence of Mr. ██████ must be viewed by the Court with some caution. He clearly had strong opinions concerning the case. He was dogmatic in his answers to questions, many of which did not respond to the question asked. Accordingly, I only am prepared to accept Mr. ██████ evidence where it is obvious or corroborated by other evidence which I do accept. That having been said, on August 30th, 2009, prior to obtaining the search warrant, Mr. ██████ driver's license listed his address as ██████, Brampton.

**33** I do not consider the metals and trophies in the room to be indicative of Mr. ██████ occupancy. They could easily relate to his high school years, as Mr. ██████ said, and, therefore, not signify recent occupation. No dates were mentioned. In my view, they are of little weight in the absence of photos or actual plaques or trophies.

**34** The documents belonging to Mr. ██████ were not the only things found in the dresser drawer. Officer Sandhu also found in the same drawer a pay stub dated September 12th, 2008, addressed to Mr. ██████. Noteworthy is that no additional documents belonging to Mr. ██████ were found.

**35** Nor do I consider the fact that male clothes were found in the room to be significant, in the absence of some evidence specifically linking them to Mr. ██████. They could have easily have been Mr. ██████ clothes, notwithstanding he said he moved his things out. He did return to the apartment to sleep from time to time.

**36** Nor, in my view, can I rely on ██████ evidence. It is not reliable. He was the super for two buildings, ██████. They are residential apartment buildings with the former having 16 stories and 171 units and the latter having 17 stories and 181 units. He lived and worked in ██████. He had an assistant who worked in ██████ and he said he did not attend that building very often. While I accept that he saw both Mr. ██████ and his father from time to time, his evidence, in my view, does not come close to establishing that Mr. ██████ lived in apartment ██████ on a full-time basis on or around August 30th, 2009, or at any time, for that matter.

**37** I am also troubled by his evidence in-chief that he had not seen Mr. ██████ before the court proceedings. He recognized Mr. ██████ when Officer McKenzie showed him his picture in May 2011. At that time he told Officer McKenzie that he did not see Mr. ██████ "very often". That inconsistency on an important point causes me to doubt Mr. Parsons' evidence of recollection generally.

**38** The Crown's evidence establishes that prior to August 31st, 2009, more than one person occupied the bedroom where the gun and ammunition were found. Further, it indicates that neither Mr. ██████ nor Mr. ██████ was occupying the bedroom at the time or were residents in the apartment.

39 Further, given the place where the gun was found, it is possible that someone could spend a night in the room and sleep in the bed and not know there was a gun and ammunition under the mattress.

40 When the police were obtaining information for the search warrant on August 30th, 2009, they did an MTO search in respect of Mr. [REDACTED]. It showed that Mr. [REDACTED] resided at [REDACTED], and that he had a [REDACTED] registered to him.

41 It is clear from the evidence, apart from Mr. [REDACTED], that he lived at apartment [REDACTED] Road, up until he moved to the apartment on [REDACTED].

42 In 2008, Mr. [REDACTED] was stopped by police on three occasions for various minor infractions. On April 6, 2008, he was cautioned for a liquor license infraction. He verbally gave his name and address as apartment [REDACTED], Exhibit 7. On May 9, 2008, he was cautioned that the vehicle he was driving was parked in a fire route. He was identified by his driver's license, which listed his address as apartment [REDACTED], Exhibit 8. On June 21st, 2008, he was questioned, along with others, in respect of drinking and smoking drugs in a parking lot. Again, he identified himself by his driver's license, which showed his address as apartment [REDACTED], Exhibit 9.

43 The parking change notice, Exhibit 6, in respect of apartment [REDACTED], indicates that effective July 1, 2008, Mr. [REDACTED] was entitled to occupy the outdoor parking spot [REDACTED] at [REDACTED].

44 In June 2008, Beatrice got a parking spot for Mr. [REDACTED]. The [REDACTED] was the family car, which his father transferred to Mr. [REDACTED] at some point. They ran into parking problems at [REDACTED], according to Mr. [REDACTED], and had to get another spot, which he said he arranged.

45 I am unable to conclude, therefore, when I consider all of the evidence, that the only reasonable inference that can be drawn from the Crown's evidence is that Mr. [REDACTED] had knowledge of the gun or ammunition. Nor has the Crown established that Mr. [REDACTED] had control over the bedroom or the apartment on August 31st, 2009. The police's information on the evening of August 31st, 2009, centered around an address and two individuals of interest, Mr. [REDACTED] and Mr. [REDACTED]. The evidence before me continues to still point to two people.

46 The Crown has, therefore, failed to establish beyond a reasonable doubt that Mr. [REDACTED] had possession of the gun or ammunition found in the bedroom at apartment [REDACTED], on the evening or the early morning of August 31st, 2009. All of the charges are therefore dismissed.

47 Mr. [REDACTED] you are free to go, sir.