Her Majesty the Queen v. Pham
[Indexed as: R. v. Pham]

77 O.R. (3d) 401
[2005] O.J. No. 5127
2005 CanLII
Docket: C41829

Court of Appeal for Ontario,
McMurtry C.J.O., Blair J.A. and Kozak J. (ad hoc)
December 2, 2005

***Application for an extension of time dismissed January 26, 2006 (Fish, Abella and Charron) Application for leave to appeal would not have succeeded.**

Criminal law -- Drug offences -- Possession for purpose of trafficking -- Constructive possession -- Accused sharing apartment with another person -- Accused trafficking in cocaine out of apartment in past -- Police executing warrant and finding cocaine in bathroom of apartment 32 hours after accused left apartment -- Trial judge reasonably finding that accused had sufficient knowledge and control to constructively possess that cocaine either personally or jointly with her co-occupant.

The accused was convicted of possession of cocaine for the purpose of trafficking. The drugs were found in an apartment originally occupied by the accused alone; at the time of the search and seizure, the premises were occupied by the accused and a male person, N. Before N moved in, a neighbour of the accused observed numerous visitors coming to the accused's door, money being slipped under the door, and clear plastic bags containing a white substance coming out of the unit. The police were contacted, and they set up a surveillance of the building some time after N moved into the accused's apartment. Surveillance officers noted that people who were known to the police to have drug problems entered and left the building. A search warrant was obtained for the accused's apartment and was executed the day after the accused was observed to leave the building. N was the sole occupant of the unit at the time of the search and seizure. Individually-wrapped crack cocaine, totalling 9.8 grams, was found in the bathroom in a cloth purse, and currency was found in a make-up bag. At the time of the search, the accused had been absent from the apartment for some 32 hours. The issue at trial was whether the accused had knowledge and control of the cocaine found in the bathroom and therefore had it in her possession. The trial judge found as a fact that N did not personally bring the cocaine into the unit after the accused left. He stated that he would have to speculate to find that another person delivered the cocaine after the accused left. He also stated that there was no evidence that N had the means to purchase the drugs. The trial judge concluded that the accused had sufficient knowledge and control to constructively possess the cocaine either personally or jointly with N. The accused appealed.

Held, the appeal should be dismissed.

Per Kozak J. (ad hoc) (Blair J.A. concurring): The trial judge was entitled to find on the evidence that the accused had constructive possession of the cocaine either alone or jointly with N. The appeal should be dismissed even assuming that N or someone else brought the drugs into the apartment during the accused's absence. The evidence and the trial judge's findings supported the conclusion that she was in constructive and/or joint possession of the cocaine even if that were so. The following findings and evidence regarding both knowledge and control of the cocaine by the accused supported that conclusion. (1) The accused elected to use her home as a drug trafficking centre, and was a key figure in the trafficking scheme carried on out of that centre. She continued to be the occupant of the unit and retained control of the apartment while she was away. (2) Both the purse containing the drugs and the make-up bag containing the money were found in full view in the bathroom, a common area of the apartment. (3) The purse and make-up bag were consistent with the personal toiletries of the accused and were found amidst her personal toiletries and make-up. (4) There was no evidence of any men's toiletries in the bathroom. (5) The main bedroom was littered with woman's clothing, contained documents in the accused's name, and was the source of drug-related dime bags and cut up newspapers and grocery bags of the type used to wrap a 40 piece of crack cocaine. (6) The circumstantial evidence supported as the only logical inference a consistent awareness of, and participation in, all that occurred in her home on the part of the accused, and demonstrated much more than a quiescent or passive knowledge of the drugs, as well as an element of control over them. (7) The role of the accused in the trafficking scheme strongly suggested power and authority over the disposal of the cocaine found, and an ability to withhold consent to the keeping of any drugs in her home. (8) N either filled the accu sed's shoes as the primary distributor during her absence or she and N jointly operated the trafficking scheme. The foregoing provided ample basis to found an inference of the requisite knowledge and supported the trial judge's finding that the accused had sufficient knowledge and control to constitute constructive possession of the cocaine either personally or jointly with N.

Per McMurtry C.J.O. (dissenting): The only evidence available to the trial judge on which an inference might be drawn that the accused had knowledge of the cocaine that was discovered in her bathroom was that the accused was the principal occupant of the premises and that she was actively engaged in the trafficking of drugs. However, the accused had been absent from the apartment for at least 32 hours before the drugs were discovered by the police. The evidence advanced at trial was not capable of excluding the reasonable inference that someone else left the 9.8 grams of crack cocaine in the bathroom during the accused's absence. There was no evidentiary basis for the trial judge's findings that neither N nor anyone else had brought the 9.8 grams of cocaine to the apartment in the accused's absence or that N did not have the means to purchase the cocaine. The trial judge further found that if N had brought the cocaine to the apartment, it would likely be found in an area of the unit that he controlled and not the bathroom, which would be accessible to all occupants and visitors. Given the fact that the trafficking in cocaine was probably a joint enterprise on the part of N and the accused, the discovery of the 9.8 grams of cocaine in the bathroom did not support the trial judge's finding that N did not bring the cocaine to the apartment. There was insufficient evidence on which the trial judge could find as a fact that the cocaine was in the apartment before the accused left. It may well have been, but this possibility or even probability did not discharge the onus on the Crown to prove its case beyond a reasonable doubt. Mere suspicion of knowledge does not permit a trial judge to convict on a charge of possession for the purpose of trafficking. The required knowledge should be proven either directly or by the proof of objective, relevant and admissible facts from which a rational inference of knowledge would emerge irresistibly. The verdict in this case was unreasonable.

APPEAL from the conviction entered and the sentence imposed by O'Dea J. of the Ontario Court of Justice on March 9, 2004, for possession of cocaine for purpose of trafficking.

R. v. Grey (1996), 1996 CanLII 35 (ON CA), 28 O.R. (3d) 417, [1996] O.J. No. 1106, 47 C.R. (4th) 40 (C.A.) (sub nom. *R. v. Escoffery*); *R. v. Sparling*, [1988] O.J. No. 1877, 31 O.A.C. 244 (C.A.), revg [1988] O.J. No. 107 (H.C.J.), consd

Other cases referred to *Caswell v. Powell Duffryn Associated Collieries Ltd.*, [1940] A.C. 152, [1939] All E.R. 722, 108 L.J.K.B. 779, 161 L.T. 374, 55 T.L.R. 1004, 83 Sol. Jo. 976 (H.L.); *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, [2002] S.C.J. No. 31, 219 Sask. R. 1, 211 D.L.R. (4th) 577, 286 N.R. 1, 272 W.A.C. 1, [2002] 7 W.W.R. 1, 30 M.P.L.R. (3d) 1, 2002 SCC 33, 10 C.C.L.T. (3d) 157; *R. v. Barreau*, 1991 CanLII 241 (BC CA), [1991] B.C.J. No. 3878, 9 B.C.A.C. 290, 19 W.A.C. 290 (C.A.); *R. v. Biniaris*, [2000] 1 S.C.R. 381, [2000] S.C.J. No. 16, 2000 SCC 15, 184 D.L.R.(4th) 193, 252 N.R. 204, 143 C.C.C. (3d) 1, 32 C.R. (5th) 1; *R. v. Caldwell* (1972), 1972 ALTASCAD 33 (CanLII), 7 C.C.C. (2d) 285, [1972] 5 W.W.R. 150, 19 C.R.N.S. 293 (Alta. S.C. (A.D.)); *R. v. Chambers*, 1985 CanLII 169 (ON CA), [1985] O.J. No. 143, 9 O.A.C. 228, 20 C.C.C. (3d) 440 (C.A.); *R. v. Coates*, 2003 CanLII 36956 (ON CA), [2003] O.J. No. 2295, 107 C.R.R. (2d) 293, 176 C.C.C. (3d) 215, 43 M.V.R. (4th) 241 (C.A.); *R. v. Jenner*, [2005] M.J. No. 95, 2005 MBCA 44, 195 C.C.C. (3d) 364 (C.A.); *R. v. Kelly*, 1966 CanLII 543 (BC CA), [1967] 1 C.C.C. 215, 49 C.R. 216, 56 W.W.R. 577 (B.C.C.A.); *R. v. Lukianchuk*, [2001] B.C.J. No. 3000, 2001 BCSC 119; *R. v. Terrence*, 1983 CanLII 51 (SCC), [1983] 1 S.C.R. 357, 147 D.L.R. (3d) 724, 47 N.R. 8, 4 C.C.C. (3d) 193, 33 C.R. (3d) 193; *R. v. Williams* (1998), 1998 CanLII 2557 (ON CA), 40 O.R. (3d) 301, [1998] O.J. No. 2246, 125 C.C.C. (3d) 552, 17 C.R. (5th) 75 (C.A.); *R. v. Zanini*, 1967 CanLII 16 (SCC), [1967] S.C.R. 715, [1968] 2 C.C.C. 1, 2 C.R.N.S. 219

Statutes referred to *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, ss. 2 [as am.], 5(2) *Criminal Code*, R.S.C. 1985, c. C-46, ss. 4(3) [as am.], 21(2) *Opium and Narcotic Drug Act*, R.S.C. 1952, c. 201, s. 17(1) [as am.]

Craig Parry, for appellant.

Andrew Sabbadini, for respondent.

KOZAK J. (ad hoc) (BLAIR J.A. concurring):--

Introduction

[1] As a result of a police search that took place on March 5, 2003 at unit #4, 28 Overlea Crescent in Kitchener, Ontario, the appellant Kim Thi Pham and Lieng Van Nguyen were jointly charged with possession of cocaine for the purpose of trafficking contrary to s. 5(2) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19. On May 28, 2003, prior to the trial, the charge against Nguyen was withdrawn without explanation. Following a judge alone trial in which the appellant did not testify, she was convicted. There was no evidence of actual possession in that the appellant was not present in the apartment when the search was conducted, so that the Crown's case rested on constructive or joint possession.

[2] Ms. Pham appeals her conviction on two grounds:

(i) the verdict was unreasonable and not supported by the evidence; and

(ii) the trial judge misapprehended the evidence.

[3] The sentence appeal was abandoned since the appellant has served her sentence. For reasons that follow, I would dismiss the conviction appeal.

Position of the parties

[4] The drugs were found in premises primarily occupied by the appellant and then later shared with Nguyen. The appellant contends that Nguyen was trafficking in crack cocaine during her absence and therefore the drugs and money, all of which were found in a common area of the apartment (i.e., the bathroom) could reasonably belong to Nguyen alone. The appellant also argues that the trial judge misapprehended the evidence in concluding that the drugs found in the residence at the time of the search had been in the apartment prior to the appellant's departure on March 3, 2003, and that Nguyen had not left the apartment between the time of the appellant's departure on March 3, 2003 and the time of the search on March 5, 2003.

[5] The Crown takes the position that on the facts of the case, it has proven constructive or joint possession. In this regard the Crown submits that this was a simple trial in which the requisite elements of possession, i.e., knowledge, consent and control were considered by the trial judge in light of all the direct and circumstantial evidence. The Crown contends that in convicting the appellant the trial judge made no palpable and overriding error in his factual findings, nor did he draw any inferences that were clearly wrong, unreasonable, or unsupported by the evidence.

The facts

[6] The appellant moved into the apartment at unit #4 during the month of October 2002, at which time she was the sole occupant. Some two months later Lieng Nguyen moved into the apartment. Ms. Lee Ann Poulton occupied unit #3 which was located directly across from unit #4, and from the peek hole in her door she had a clear view of the entranceway of unit #4.

[7] After the appellant moved into the building, numerous visitors came to her door on a consistent basis. As a result of watching through the peek hole, Ms. Poulton saw:

(i) people approach the door to unit #4;

(ii) money being slipped under the door; and

(iii) a clear plastic bag would come out containing white stuff.

The visitors would not usually go inside the appellant's apartment but, instead would participate in short exchanges with someone behind the door. On occasion Ms. Poulton heard voices and was able to identify the appellant as one of the people speaking. On two occasions she saw the appellant open the door. The first was when a man asked if $50 was enough and she let him in. The second was on March 1, 2003 when she saw the exchange of money for a small plastic bag with white stuff in it.

[8] Some time during the latter part of December 2002, Lieng Nguyen became an occupant of unit #4.

[9] The police were contacted and a surveillance of the building, which was a six-plex, was set up on January 3, 2003. The surveillance continued on the following days: January 6, 7 and 8; February 25, 27

and 28; and March 3, 4 and 5, 2003. The comings and goings of persons into and out of the building were noted by the surveillance officers. Many of those people were know to the police to have problems with drug addiction.

[10] On March 3, 2003 at 4:40 p.m. the appellant was seen (by surveillance) to leave her apartment and did not return prior to the seizure of the drugs on March 5, 2003.

[11] On March 4, 2003, during Ms. Pham's absence a person attended at unit #4 briefly and then departed. The police arrested this person and seized from him two pieces of crack cocaine. The police then obtained a search warrant to enter unit #4, and during the early morning hours of March 5, 2003, a search of the apartment was conducted. Lieng Nguyen was the only person in the apartment. During the course of the search two pouches were discovered in the bathroom adjacent to the sink. One pouch was described as a small black cloth purse sitting in full view. Upon opening the purse the police found individually wrapped crack cocaine. On the other side of the sink and sitting in full view was an open pink make-up bag which contained $165 of Canadian currency, mostly in $20 bills. It was conceded that the 9.8 grams of crack cocaine was seized from the appellant's apartment which she shared with Nguyen.

Legal considerations

[12] The issue at trial was whether the appellant had knowledge and control of the cocaine found in the bathroom and therefore had it in her possession.

[13] Section 2 of the *Controlled Drugs and Substances Act* adopts the definition of "possession" in s. 4(3) of the *Criminal Code*, R.S.C. 1985, c. C-46. That section reads:

> 4(3) 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 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.

[14] Section 4(3) of the *Code* creates three types of possession:

(i) personal possession as outlined in s. 4(3)(a);

(ii) constructive possession as set out in s. 4(3)(a)(i) and s. 4(3)(a)(ii); and

(iii) joint possession as defined in s. 4(3)(b).

[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), 1972 ALTASCAD 33

(CanLII), 7 C.C.C. (2d) 285, [1972] 5 W.W.R. 150 (Alta. S.C. (A.D.)); *R. v. Grey* (1996), 1996 CanLII 35 (ON CA), 28 O.R. (3d) 417, [1996] O.J. No. 1106 (C.A.).

[16] In order to constitute joint possession pursuant to s. 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. See *R. v. Terrence*, 1983 CanLII 51 (SCC), [1983] 1 S.C.R. 357, 147 D.L.R. (3d) 724; *R. v. Williams* (1998), 1998 CanLII 2557 (ON CA), 40 O.R. (3d) 301, [1998] O.J. No. 2246 (C.A.); *R. v. Barreau*, 1991 CanLII 241 (BC CA), [1991] B.C.J. No. 3878, 19 W.A.C. 290 (C.A.); and *R. v. Chambers*, 1985 CanLII 169 (ON CA), [1985] O.J. No. 143, 20 C.C.C. (3d) 440 (C.A.).

[17] The element of knowledge is dealt with by Watt J. in the case of *R. v. Sparling*, [1988] O.J. No. 107 (H.C.J.), at p. 6 (QL):

> There is no direct evidence of the applicant's knowledge of the presence of narcotics in the residence. It is not essential that there be such evidence for as with any other issue of fact in a criminal proceeding, it may be established by circumstantial evidence. In combination, the finding of narcotics in plain view in the common areas of the residence, the presence of a scale in a bedroom apparently occupied by the applicant, and the applicant's apparent occupation of the premises may serve to found an inference of the requisite knowledge.

The Court of Appeal decision in *R. v. Sparling*, [1988] O.J. No. 1877, 31 O.A.C. 244 (C.A.) upheld the above passage as being sufficient evidence to infer knowledge.

[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 *R. v. Chambers*, *supra*, at p. 448 C.C.C., 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".

Analysis

[19] The central issue at trial was whether the appellant had knowledge and control of the cocaine found in the black cloth purse in the bathroom, sufficient to constitute constructive or joint possession as defined in paras. 4(3)(a) and (b) of the *Code*. In my view the trial judge was entitled to find on the evidence as he did, that she had constructive possession of the cocaine either alone or jointly with Mr. Nguyen.

[20] In dealing with the issue of possession the trial judge made it clear that the evidence of Ms. Poulton and the surveillance officers was used only to support a trafficking scheme and not for the purpose of showing propensity. He considered this evidence in the context of the evidence as a whole, as playing a significant role in his assessment of the elements of constructive possession.

[21] The trial judge found that the 9.8 grams of cocaine were in the apartment before the appellant left the unit on March 3, 2003. He relied on the evidence of the surveillance officers that Nguyen was in the unit on March 3rd and 4th as the various persons were seen coming and going, and that he was still there at the time of the police entry. In his words:

> I would have to speculate given the evidence before me to find that he left the unit at a point after the accused did, and later returned. I find he did not personally bring the cocaine in after the accused left.

[22] That Mr. Nguyen left the unit and returned with the drugs in question (or that someone else brought them in), and therefore that the cocaine was not in Ms. Pham's possession on March 5th, is an argument raised by defence counsel, not on the basis of any evidence but merely as a speculative consideration. In *R. v. Jenner*, 2005 MBCA 44 (CanLII), [2005] M.J. No. 95, 195 C.C.C. (3d) 364 (C.A.), at para. 16, this type of approach was dealt with as follows:

> The accused's argument is found not on attempting to rebut the evidence tendered by the Crown, but on raising questions and issues that although valid in a rhetorical sort of way, add nothing to the issues that the trial judge had to address, and the manner in which he did so. Such a manner of attack was dealt with by this court in *R. v. Drury (L.W.) et al* (2000), 2000 MBCA 100 (CanLII), 150 Man. R. (2d) 64, (2000) M.B.C.A. 100. Huband J.A. addressed the issue as follows (at para. 92):
>
> > This is a question that only the accused Drury could answer, but he elected not to testify. Raising the question and inviting the court to speculate as to the answer does nothing to overcome the body of evidence which overwhelmingly points to guilt.

[23] I am inclined to the view that the Manitoba Court of Appeal's reasoning applies in the circumstances of this case. However in the end it does not matter for the purpose of the disposition of this appeal.

[24] In his companion reasons which I have had the opportunity of considering, Chief Justice McMurtry concludes that there was no evidentiary basis upon which the trial judge could conclude beyond a reasonable doubt that the particular drugs in question were in the apartment prior to Ms. Pham's departure. He would therefore allow the appeal. Respectfully I would dismiss the appeal even assuming that Mr. Nguyen or someone else brought the drugs into the apartment during Ms. Pham's absence. The evidence and the trial judge's findings support the conclusion that she was in constructive and/or joint possession of the cocaine even if that were so.

[25] The following findings and evidence regarding both knowledge and control of the 9.8 grams of crack cocaine by the accused support that conclusion:

(a) the accused elected to use her home as a drug trafficking centre, and was a key figure in the trafficking scheme carried on out of that centre; she continued to be the occupant of unit #4 and retained control of the apartment while she was away;

(b) both the black cloth purse containing the drugs and the pink make-up bag containing the money were found in full view in the bathroom, a common area of the apartment;

(c) the cloth purse and the make-up bag are consistent with the personal toiletries of the appellant and were found amidst her personal toiletries and make-up;

(d) there was no evidence of any men's toiletries in the bathroom;

(e) the main bedroom was littered with woman's clothing, contained documents (including a passport) in Ms. Pham's name, and was the source of drug-related "dime bags" and cut up newspapers and grocery bags of the type used to wrap a 40 piece of crack cocaine;

(f) the circumstantial evidence supported as the only logical inference a consistent awareness of, and participation in, all that occurred in her home on the part of Ms. Pham, and demonstrated much more than a quiescent or passive knowledge of the drugs, as well as an element of control over them;

(g) the role of the accused in the trafficking scheme strongly suggested power and authority over the disposal of the cocaine found, and an ability to withhold consent to the keeping of any drugs in her home; and

(h) Mr. Nguyen either filled Ms. Pham's shoes as the primary distributor during her absence or she and Mr. Nguyen jointly operated the trafficking scheme.

[26] In my view, the foregoing provided ample basis to found an inference of the requisite knowledge and supported the trial judge's finding that the appellant had sufficient knowledge and control to constitute constructive possession of the cocaine either personally or jointly with Nguyen. It was agreed that if possession was established, that the possession was for the purpose of trafficking.

[27] Whether someone is in possession of something pursuant to s. 4(3) of the *Code* is a question of fact to be determined on the evidence based on the inferences to be drawn in each case. The difficulty in determining the sufficiency of the evidence required to support an inference of possession is aptly demonstrated in the contrasting decisions of R. v. Sparling and R. v. Grey mentioned earlier.

[28] In *Grey,* the accused was convicted of possession of crack cocaine for the purpose of trafficking. The police found the cocaine hidden in the bedroom of his girlfriend's apartment. The case against the accused rested principally on his regular occupancy of his girlfriend's apartment (i.e., 3 or 4 nights a week) and on the presence of his clothing and other belongings in the bedroom where the crack cocaine was found. The above evidence was found to be insufficient to infer knowledge in that:

(1) there was no direct evidence of the appellant's knowledge. The Crown did not have a witness who could state affirmatively that the appellant knew about the cocaine;

(2) the drugs seized by the police were not in plain view, they were hidden;

(3) the apartment was rented by the co-accused;

(4) other persons frequented the apartment; and

(5) the appellant was not a permanent occupant.

[29] In *Sparling*, the accused entered into a joint lease and was a full-time tenant. The drugs were in full view on the coffee table. This court agreed with Watt J. that direct evidence of knowledge was not essential and that knowledge could be established by circumstantial evidence. *Sparling* is closer to the facts of this case than *Grey*.

Conclusion

[30] The trial judge instructed himself on reaching a conviction based on inferences from proven facts. At p. 4 of the judgment he states as follows:

> If I am to convict on inferences of fact, I must be satisfied beyond a reasonable doubt that guilt is the only reasonable inference to be drawn from all of the proven facts. In assessing inferences for each piece of evidence the reasonable doubt standard is not to be applied each time. I am to consider the inference suggested against any other reasonable inference that can be drawn and attribute weight accordingly. All of the evidence that I determine merits weight is then assessed on the reasonable doubt standard.

This is in keeping with what Lord Wright emphasized in *Caswell v. Powell Duffryn Associated Collieries Ltd.*, [1940] A.C. 152, [1939] All E.R. 722 (H.L.), where at p. 169 A.C. he stated:

> ... that inference must be carefully distinguished from conjecture or speculation and there can be no inferences unless there are objective facts from which to infer other facts which it is sought to establish.

In *R. v. Lukianchuk*, [2001] B.C.J. No. 3000, 2001 BCSC 119, Romilly J. had this to say at p. 7, para. 19:

> In *R. v. To*, supra, the accused was arrested after placing a plastic bag in a vehicle. The bag contained several videotapes and 4.4 lbs of heroin. The trial judge disbelieved the accused's evidence that he did not know what was in the bag. McEachern C.J.B.C. stated at page 230:
>
> > It must be remembered that we are not expected to treat real life cases as a completely intellectual exercise where no conclusion can be reached if there is the slightest competing possibility. The criminal law requires a very high degree of proof especially for inferences consistent with guilt, but it does not demand certainty. I do not think it can properly be said that the inferences of knowledge in this case would be unreasonable or unsupported by the evidence.

[31] It has not been shown that the trial judge committed any palpable and overriding error or made findings of fact including inferences of fact that are clearly wrong, unreasonable or unsupported by the evidence. The trial judge did not misapprehend the evidence. I would accordingly dismiss the appeal.

[32] Like Chief Justice McMurtry, I agree that the appellant might well have been convicted as a party to the offence, under s. 21(2) of the *Criminal Code*. However, the case was not put on that basis, either at trial or on appeal.

[33] MCMURTRY C.J.O. (dissenting):-- I have read the reasons for judgment of my colleague, Kozak J. (ad hoc) and find that I am unable to agree with his disposition on the appeal.

[34] As Kozak J. has outlined the relevant facts in his reasons, I will make no further reference to the facts other than to emphasize that there was no evidence as to whether or not the male occupant of the apartment, Lieng Van Nguyen, had left the apartment during the appellant's absence. Furthermore, there was no evidence as to whether or not any other persons had attended the apartment during the appellant's absence.

<u>Reasons of Trial Judge</u>

[35] At the outset of the appellant's trial, Crown counsel stated that "essentially the issue for your Honour is whether or not Ms. Pham had knowledge and control of the crack cocaine and cash found in her apartment".

[36] The trial judge "instructed" himself that "the Crown must prove beyond a reasonable doubt that the accused not only knew of the existence of the cocaine but as well exercised control over it. The control need not be actual physical control. It must show some power or authority over the cocaine in question. Control may also be shown where an accused can grant or withhold consent to the storage of the cocaine in a particular location such that sufficient control is evident even where the accused is absent from that location".

[37] In reaching his decision, the trial judge also stated that "I must determine whether the substance found was in the unit before the accused left." He then went on to find as a fact that the male occupant Nguyen "did not personally bring the cocaine in after the accused left". The trial judge further stated that "on the evidence I heard, I would have to speculate to find that another person delivered the cocaine after the accused left". He also stated that "there is no evidence Nguyen had the means to purchase [the] drugs". It is my view that there was simply no evidentiary basis for the trial judge's findings that neither Nguyen nor anyone else had brought the particular 9.8 grams of cocaine to the apartment in the appellant's absence or that Nguyen did not have the means to purchase the 9.8 grams.

[38] The trial judge further found that if Nguyen had brought the cocaine to the apartment, it would likely be found in an area of the unit that he controlled and not the bathroom which would be "accessible to all occupants and visitors". Given the fact that the trafficking in cocaine was probably a joint enterprise on the part of Nguyen and the appellant, the discovery of the 9.8 grams of cocaine in the bathroom does not support the trial judge's finding that Nguyen did not bring the cocaine to the apartment.

[39] The trial judge concluded his finding of the appellant's guilt by stating that "I find the 9.8 grams of cocaine was in Unit 4 before the accused left on March [3], 2003 and, notwithstanding her absence until the date of the entry, the accused had sufficient knowledge and control to constructively possess the cocaine either personally or jointly with Nguyen."

[40] On appeal before our court, the Crown relied on the trial judge's finding of fact that the cocaine was in the appellant's apartment before she left.

Analysis

[41] The *Criminal Code* definition of possession is found in s. 4(3) which states:

> (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.

[42] In our court's decision of *R. v. Chambers*, 1985 CanLII 169 (ON CA), [1985] O.J. No. 143, 20 C.C.C. (3d) 440 (C.A.) in relation to possession for the purpose of trafficking, Martin J.A. makes reference to the former s. 17(1) of the Opium and Narcotic Drug Act, R.S.C. 1952, c. 201, which read as follows:

> 17(1) Without limiting the generality of subsection (1) or paragraph (b) of subsection (3) of s. 4, any person who occupies, controls, or is in possession of any building, room, vessel, vehicle, enclosure or place in or upon which any drug is found shall be deemed to be in possession thereof unless he proves that the drug was there without his authority, knowledge or consent.

(Emphasis added)

Martin J.A. goes on to state at p. 448 C.C.C. that, "the failure of Parliament to enact in the present Act a provision similar to s. 17 does not, however, preclude a court from drawing appropriate inferences from evidence that a prohibited drug is found in a room under the control of an accused where there is also evidence from which an inference may properly be drawn that the accused was aware of the presence of the drug" (emphasis added).

[43] The only evidence available to the trial judge on which such an inference of knowledge might be drawn is that the appellant was the principal occupant of the premises and that she was actively engaged in the trafficking of drugs. However, the evidence established that the appellant had been absent from the apartment for at least 32 hours before the drugs were discovered by the police. The evidence advanced at trial was not capable of excluding the reasonable inference that someone else left the 9.8 grams of crack cocaine in the bathroom during Ms. Pham's extended absence.

[44] There was insufficient evidence on which the trial judge could find as a fact that the cocaine was in the apartment before the appellant left. It may well have been, but this possibility or even probability does not discharge the onus on the Crown to prove its case beyond a reasonable doubt. Mere suspicion of knowledge does not permit a trial judge to convict on a charge of possession for the purpose of trafficking. The required knowledge should be proven either directly or by the proof of objective, relevant and admissible facts from which a rational inference of knowledge would emerge irresistibly. See *R. v. Kelly*, 1966 CanLII 543 (BC CA), [1967] 1 C.C.C. 215, 56 W.W.R. 577 (B.C.C.A.).

[45] The test for unreasonable verdict is set out in *R. v. Biniaris*, 2000 SCC 15 (CanLII), [2000] 1 S.C.R. 381, [2000] S.C.J. No. 16 as follows [at paras. 36 and 37]:

> The test for an appellate court determining whether the verdict of a jury or the judgment of a trial judge is unreasonable or cannot be supported by the evidence has been unequivocally expressed in *Yebes* as follows:
>
> > [C]urial review is invited whenever a jury goes beyond a reasonable standard . . . . [T]he test is "whether the verdict is one that a properly instructed jury acting judicially, could reasonably have rendered." [cites omitted]
>
> . . . . .
>
> The *Yebes* test is expressed in terms of a verdict reached by a jury. It is, however, equally applicable to the judgment of a judge sitting at trial without a jury. The review for unreasonableness on appeal is different, however, and somewhat easier when the judgment under attack is that of a single judge, at least when reasons for judgment of some substance are provided. In those cases, the reviewing appellate court may be able to identify a flaw in the evaluation of the evidence, or in the analysis, that will serve to explain the unreasonable conclusion reached, and justify the reversal ... [I]n trials by judge alone, the court of appeal

> often can and should identify the defects in the analysis that led the trier of fact to an unreasonable conclusion. The court of appeal will therefore be justified to intervene and set aside a verdict as unreasonable when the reasons of the trial judge reveal that he or she was not alive to an applicable legal principle, or entered a verdict inconsistent with the factual conclusions reached.

[46] In this appeal it is the factual conclusions reached that in my view were inconsistent with the evidence adduced at trial.

[47] The Supreme Court held in *Housen v. Nikolaisen*, 2002 SCC 33 (CanLII), [2002] 2 S.C.R. 235, [2002] S.C.J. No. 31 that the standard of review for findings of fact -- including inferences of fact -- is palpable and overriding error [at paras. 21, -- 23]:

> [I]n our view, the standard of review is not to verify that the inference can be reasonably supported by the findings of fact of the trial judge, but whether the trial judge made a palpable and overriding error in coming to a factual conclusion based on accepted facts, which implies a stricter standard.
>
> ... [A]lthough we agree that it is open to an appellate court to find that an inference of fact made by the trial judge is clearly wrong, we would add the caution that where evidence exists to support this inference, an appellate court will be hard pressed to find a palpable and overriding error.
>
> We reiterate that it is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence. If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion. The appellate court is not free to interfere with a factual conclusion that it disagrees with where such disagreement stems from a difference of opinion over the weight to be assigned to the underlying facts.

(Emphasis in original)

[48] This court applied *Housen* in the context of the reasonableness of a criminal verdict in *R. v. Coates*, 2003 CanLII 36956 (ON CA), [2003] O.J. No. 2295, 176 C.C.C. (3d) 215 (C.A.) as follows [at para. 20]:

> A trial judge's findings of fact and inferences from facts can only be overturned where the judge committed a palpable and overriding error: *Housen v. Nikolaisen* [cites omitted]. The decision in *Housen*, *supra*, stressed very strongly the need for great caution and deference on the part of appellate courts when they review the assessment of facts by a trial court. The rule in *Housen*, *supra*, does not, however, preclude an appellate court from identifying errors in the findings of fact where those errors are sufficiently palpable and important and have a sufficiently decisive effect that they would justify intervention and review on appeal: *Prud'homme v. Prud'homme*, 2002 SCC 85 [reported 221 D.L.R. (4th) 115].

Conclusion

[49] There was no direct evidence that the appellant had knowledge of the cocaine that was discovered in her bathroom some 32 hours after she had left her apartment. The issue of knowledge depended on

the proper inference that could be drawn by the trial judge from circumstantial evidence adduced by the Crown.

[50] In my opinion it was not open to the trial judge to conclude that there existed a reasonable inference that the appellant knew that the cocaine was present when the apartment was searched by the police and in drawing that inference the trial judge committed a palpable and overriding error. Accordingly, the verdict is unreasonable.

[51] The case was prosecuted at trial solely on the basis that the appellant had knowledge of the actual cocaine and cash found in the apartment. As stated earlier in these reasons, Crown counsel made the following statement at the opening of trial:

> I can indicate to your Honour that -- so essentially the issue for Your Honour is whether or not Ms. Pham had knowledge and control of the crack cocaine and cash found in her apartment ...

[52] It may well be that the appellant could have been convicted as a party to Nguyen's possession under s. 21(2) of the *Criminal Code* (*Zanini v. The Queen*, 1967 CanLII 16 (SCC), [1967] S.C.R. 715, [1968] 2 C.C.C. 1). However, that theory was never advanced at trial or on appeal.

[53] In the result, I would set aside the conviction and enter a verdict of acquittal.

Appeal dismissed.