SUPREME COURT OF YUKON

Citation: *H.M.Q.* v. *Guan*, 2010 YKSC 16

Date: 20100419
S.C. No. 09-01511
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

AND:

YAO LIN GUAN

Before: Mr. Justice R.S. Veale

Appearances:

Jennifer Grandy — Counsel for Her Majesty the Queen
Gordon Coffin — Counsel for Yao Lin Guan

REASONS FOR JUDGMENT

INTRODUCTION

[1] Yao Lin Guan is charged that, on September 30, 2009, he possessed cocaine for the purpose of trafficking contrary to s. 5(2) of the *Controlled Drugs and Substances Act* and failed to stop his motor vehicle while being pursued by a police officer in order to evade the police officer, contrary to s. 249.1(1) of the *Criminal Code.*

[2] This judgment discusses the burden on the Crown to prove its case beyond a reasonable doubt when all the evidence relating to possession is circumstantial. It also considers the principle that circumstantial evidence must be inconsistent with any other rational conclusion in the context of the principles of *R.* v. *W.(D.)*, [1991] 1 S.C.R. 742, when the accused has testified.

THE EVIDENCE

[3] Corporal Jerry Walker (“Cpl. Walker”) has been an RCMP officer for eight and one half years. From December 2003 to April 2009, he worked in the drug section, initially in Prince George, British Columbia, and then Whitehorse, Yukon. He is presently attached to the crime reduction unit in Whitehorse that targets prolific offenders. He has investigated in excess of 100 cocaine trafficking cases.

[4] On September 29, 2009, at about 7:15 p.m., Cpl. Walker was on his way home from work and stopped at the Tags gas station (“Tags”) on 4th Avenue in Whitehorse (“4th Avenue”). He was at the set of pumps closest to 4th Avenue, but on the store side of the pumps as opposed to the street side. His vehicle was facing north in the direction of the McDonald's (“McDonald’s”) fast food restaurant next door to Tags. He observed a male person at the phone booth outside of McDonald's hanging up the phone, then waiting around and watching for someone. His curiosity was piqued as it looked like a drug sale. He then observed a Toyota Matrix (“Toyota”) coming in a southerly direction along 4th Avenue. The Toyota turned left into the Tags parking lot and proceeded past Cpl. Walker on the street side of the gas pumps, into the McDonald's parking lot, and pulled up beside the male person that Cpl. Walker observed. When the Toyota passed him at the gas pumps, Cpl. Walker identified the person in the passenger seat to be the accused, Mr. Guan. The male person walked to the passenger side of the Toyota and put his hand into the vehicle. The person in the passenger side handed something back, the two shook hands and the Toyota drove away. Cpl. Walker did not see what was exchanged, however he considered it to be a drug deal. He testified that the area was commonly used for drug deals.

[5] Cpl. Walker wrote the licence plate number of the Toyota, ETZ 63, on a piece of paper. He described the Toyota as a grey charcoal colour hatchback. The next morning on September 30, 2009, Cpl. Walker ran the licence plate number and learned that the vehicle was registered to Yao Lin Guan, at 312 Alexander St., Whitehorse, Yukon. Cpl. Walker was on the day shift that morning and drove past 312 Alexander St. He observed the same Toyota that he had seen the previous evening parked on the street in front of the residence at 312 Alexander St.

[6] Cpl. Walker went about his business, but later that morning when he was driving along 4th Avenue near Alexander St., he observed the Toyota backing out of 312 Alexander and driving up to 4th Avenue. The driver appeared to be the same man that was in the passenger seat on the previous evening. Cpl. Walker followed the vehicle in a northerly direction on 4th Avenue, approximately four vehicles behind. When the Toyota reached the intersection of 4th Avenue and Chilkoot Way, Cpl. Walker observed it turn right into a shopping centre area. The intersection of 4th Avenue and Chilkoot Way has a traffic light. Cpl. Walker drove past the intersection and turned right on a road way leading to the Canadian Tire store. He did not observe anything on the latter road. He saw the Toyota turn left from Chilkoot Way towards the Canadian Tire store, pass in front of the Canadian Tire store and then return in the direction of Chilkoot Way and stop near a group of stores best described as a strip mall. The Toyota parked but the driver did not get out. Cpl. Walker observed Mr. Guan looking around as though he was looking for somebody. Cpl. Walker considered this to be strange behaviour. Cpl. Walker was in full uniform with a marked police car. He drove past the Toyota and identified the driver as the same person that he saw the previous evening in the passenger seat of the Toyota. Cpl. Walker said that he looked directly at Mr. Guan and

they made eye contact. At this point, the accused drove the Toyota onto the road leading towards Chilkoot Way. Cpl. Walker turned the police vehicle around and followed the Toyota. When the accused drove through the stop sign at the Chilkoot Way without stopping, Cpl. Walker activated his siren and flashers and pursued Mr. Guan. There was plenty of space for Mr. Guan to stop on Chilkoot Way or pull into Mark's Work Warehouse.

[7] Cpl. Walker said that Mr. Guan did not stop but slowed down and then sped up to the intersection of 4th Avenue and Chilkoot Way, where he turned right, going through a red traffic light without stopping. Cpl. Walker pursued Mr. Guan proceeding up Two Mile Hill, passing the road where Cpl. Walker had previously entered the shopping centre near the Canadian Tire store. Cpl. Walker said that Mr. Guan's speed was not excessive, but he sped up, slowed down and sped up again. He observed that Mr. Guan appeared to be fumbling to the left side of his body and he observed his right shoulder reach to the left. Cpl. Walker could not see his hands. As Mr. Guan was not stopping his vehicle, Cpl. Walker pulled up beside him and yelled at him to pull over. Cpl. Walker had his passenger window down and he could see that the driver and passenger windows of Mr. Guan's vehicle were open. Cpl. Walker observed that Mr. Guan reached to the passenger side of the vehicle as Mr. Guan pulled his vehicle ahead again. However, as Mr. Guan was not pulling over, Cpl. Walker pulled up and passed Mr. Guan's vehicle and drove in front of him, forcing Mr. Guan to stop. The two vehicles stopped a short distance up Two Mile Hill.

[8] Cpl. Walker got out of his vehicle and went to the driver's side of Mr. Guan's vehicle. He noticed that the passenger window of Mr. Guan's vehicle was up and opened only a couple of inches. Cpl. Walker advised Mr. Guan that he was under arrest

for flight from a peace officer. Mr. Guan was placed in handcuffs. He did not appear to understand Cpl. Walker. Mr. Guan said “no English”. Cpl. Walker searched Mr. Guan's vehicle subsequent to his arrest and found a cellular telephone, and three separate sums of cash in different pockets, one with $300, the other with $60 and the third one with $5. Cpl. Walker stated that one of the sums of money may have been in a big wallet or man purse.

[9] Corporal Pelletier (“Cpl. Pelletier”) was called to the scene to assist. Based upon Cpl. Walker's observation of Mr. Guan not stopping his vehicle, having his passenger window open and fumbling in the vehicle, Corporal Rod Hamilton (“Cpl. Hamilton”), the dog handler, was called in to see if a search of the area would indicate drugs.

[10] As Mr. Guan was a person of Chinese ancestry and indicated that he did not speak English, Cpl. Walker took Mr. Guan to the R.C.M.P. detachment to get an interpreter for Mr. Guan.

[11] Cpl. Hamilton, as directed by Cpl. Walker, started to search with his dog from the area where Mr. Guan’s vehicle was pulled over in a southerly direction towards the intersection of Chilkoot Way and 4th Avenue. When Cpl. Hamilton reached the roadway that led into the Canadian Tire store, he spotted a clear tied up baggy on the pavement. He brought his dog over to sniff it. When the dog sniffed it, he sat down, indicating that it was a drug. Cpl. Hamilton described the baggie as clean with no tire or crush marks. He described it as a clear small Ziploc bag tied off with a white substance inside. Cpl. Hamilton called Cpl. Pelletier and the plastic baggie was seized. Cpl. Hamilton indicated the time as approximately 12:14 p.m. There was a moderate traffic flow so that quite a few cars passed the area.

[12] The baggy contained seven spit balls of cocaine, individually wrapped, weighing respectively 1.84 g, 1.00 g, 1.84 g, 1.66 g, 1.055 g, 1.925 g. and 2.01 g.

[13] In cross-examination, Cpl. Walker indicated that it was still daylight on September 29, 2009, similar to an overcast day, when he observed Mr. Guan at Tags. He indicated that he was at the gas pumps for approximately five minutes. He estimated his distance from McDonald's to be six car lengths. When the Toyota passed him at the gas pumps, he did not see the driver. Cpl. Walker said that he did not try to arrest anyone as he was on his way home. He called dispatch, but they were busy. He had never seen the passenger before and his observation of him was a few seconds.

[14] When he forced Mr. Guan to stop on the following day, Mr. Guan had a blank look, indicating that he did not understand English. Mr. Guan said "no English" and spoke no other English words. Cpl. Walker said that he did not see anything thrown out the window while he was following Mr. Guan.

[15] In a *voir dire*, Cpl. Walker testified about a telephone call received on the cellular telephone seized from Mr. Guan. At 5:02 p.m. on September 30, 2009, Cpl. Walker answered, and wrote down the following conversation:

"Walker	Hello.
Caller	Hey.
Walker	Hey.
Caller	It's Shane.
Walker	Hey.
Caller	Can you do McDonald's?
Walker	Yeah, what do you need?
Caller	Three.

Walker Three.

Caller Yeah.

Walker Okay, be there in a bit."

[16] Cpl. Walker believed this to be a call to purchase drugs.

[17] The second call was received at 5:27 p.m. the same day from the same caller:

"Walker Hello.

Caller Hey.

Walker Hey.

Caller The McDonald's thing.

Walker Yeah.

Caller You coming?

Walker Yeah, you wanted three grams, right?

Caller No, three balls.

Walker Oh, okay. Three balls. Be there in a bit."

[18] Cpl. Walker then drove to McDonald's in a marked vehicle, in full uniform where he observed the same male person that he observed on the night of September 29th, standing near the payphone. The male person identified himself as Shane Malcolm and said that he was purchasing for his personal use. He had $600 in one bundle and $300 in another bundle. Cpl. Walker arrested Shane Malcolm for possession of a controlled substance and took him to the police station where his identity was confirmed. No charges were laid. Shane Malcolm never said where he got the cell phone number. Cpl. Walker confirmed that the word "cocaine" was never used in the telephone conversations.

[19] The contents of the cell phone conversations were admitted for reasons set out below.

[20] Constable Todd Monkman (“Cst. Monkman”) was qualified as an expert witness on street-level cocaine trafficking. He has been an RCMP officer since January 2000. He has been involved in drug-related work throughout his career. He has been assigned to the Whitehorse drug section since November 2007, and has been involved in 30 cocaine related cases. He described four distinct areas of drug related investigation which include surveillance, confidential informants, execution of search warrants and undercover operations. He described each area in detail. He read the reports on this file, viewed the exhibits and listened to the Crown’s evidence. He said the typical sale for a street consumer involved one half gram, one gram or an eight ball, which is 1/8 of an ounce or three and a half grams. An eight ball would sell for $350-$400, and the gram might sell for under $260 depending on quality and weight. Prices vary depending on friendship, supply and demand. His rule of thumb with respect to using cocaine was that one gram in a non-tolerant or recreational user could have lethal consequences, while three recreational users could enjoy ½ gram of cocaine. Two to five grams a day could be tolerated by a hard or habitual user.

[21] He identified the seven spit balls in this case as being packaged for street sale as they had been pre-divided, so that no scales were necessary. He stated that a user would not carry such a large amount for fear of the loss of drugs by theft or a physical attack.

[22] Cst. Monkman also stated that spit balls, the street name for the quantity seized, were usually packaged in weights of one to two grams for street sale.

[23] Cst. Monkman also found it significant that there were three different amounts of cash, indicating that personal money and drug money were often kept separate.

[24] Cst. Monkman described the two cell phone conversations as typical drug conversations. The caller does not identify himself, gives the location for the transaction, the specified quantity requested without mentioning the drug. He considered the second call to be more explicit than usual in referring to “balls”, which indicates cocaine.

[25] He opined that when Cpl. Walker picked up Shane Malcolm, the bundles of money possessed by him were significant in that they would facilitate a quick transaction.

[26] Cst. Monkman stated that the spit balls could be sold at $200 each, so the cash of $600 in the possession of Shane Malcolm could assist in making a quick transaction.

[27] He confirmed that the meeting on the 29th of September between Mr. Guan and Shane Malcolm was typical for a drug transaction. The meeting was at a public pay phone, at an accessible meeting place, often a parking lot, a hand goes into the car and a hand comes out, and the vehicle leaves. He also stated that the approach of the Toyota permitting a check-out of the scene was consistent with a drug transaction.

[28] Similarly, Mr. Guan’s drive by the Canadian Tire store and waiting in his Toyota for no apparent reason was another common feature of a drug transaction.

[29] Cst. Monkman stated that the quantity of 11 grams in seven separate packages was possession for the purpose of trafficking as opposed to possession for personal use.

[30] In cross-examination, Cst. Monkman conceded that it was possible that the drugs could be purchased for personal use for $1,200, representing approximately $100 per gram. He did not find the fact that only two calls were received on the cell phone

particularly surprising as it depends on the particular dealer and purchaser. He admitted that not everyone who drives like Mr. Guan is a drug trafficker.

[31] When the Crown closed its case, Crown and defence agreed that the plastic package containing the drugs was examined for fingerprints and none were found.

[32] Mr. Guan testified in Chinese, through a translator. He was born in China in 1963 and came to Canada in March 2005. He lived in Vancouver and was unable to find a job.

[33] He came to Whitehorse on August 31, 2009, just a month before these events, because he found a job at a restaurant with Mr. Nip. He could not say the name of the restaurant or describe its location in English. He says that he has never conversed with anyone in English and does not understand it.

[34] Mr. Guan is employed as a kitchen helper and works a shift of 2:30 p.m. to 10:30 p.m., Monday to Friday. On Saturday and Sunday, he learns to prepare meals. He claims that there were no documents recording his time, but it was agreed upon and he was paid.

[35] He testified that he worked the usual shift on September 29th, and never left the restaurant. He denied travelling to McDonald's and meeting someone.

[36] He admitted owning the Toyota, but did not think anyone else drove it. He kept his car keys in his jacket, which he hung behind a door with the jackets of other workers at the restaurant. Other workers would have access to his jacket. All but one person on his shift were of Chinese ancestry.

[37] On the day of his arrest, he testified that he had driven his car to Canadian Tire to buy a snow shovel. In explanation of his parking lot behaviour, he said that he did not know how to purchase and pay in English, so he had to go home to get his wife to buy

it. He knew that from his experience in Vancouver and seldom went shopping except to Chinese-speaking stores. He stated that he could not clear Customs on entering Canada without an interpreter.

[38] He confirmed that he stopped for a few moments in the Canadian Tire parking lot while he thought about going to get his wife and then slowly pulled away. He says that he did not see the police car until the siren was activated. When asked why he did not stop his car, he explained that in China when they hear police coming they drive away so as not to block the police car. When asked if he was trying to run away from the police, he said that he was very afraid and did not want to get in the way. He said he was not trying to get away and he was travelling at 20, 30 or 40 kilometres an hour.

[39] When asked why he turned right at the Two Mile Hill intersection rather than to the left to get his wife, he said he was afraid and wanted to pull over at the first safe place. He said when he turned, there were no cars behind him. He said he realized the police wanted him to stop, as the police continued to follow him, and it was not a question of being in the way. He denied throwing anything out of his car.

[40] He said he did not understand what the police officer said. He said that he has never seen or possessed cocaine, or given or sold cocaine to anyone.

[41] He acknowledged having a cell phone on him that was purchased in his name in Whitehorse. He produced the cell phone invoice dated August 31, 2009, but said he could not read it. He said that he asked his employer to go to the phone company to start the phone account. He said that he used the cell phone to call his son in Vancouver and his family in China and also so that friends could call him.

[42] In answer to the question whether he used the cell phone to call and buy drugs, he said absolutely not. He said that he never had a conversation in English on his cell phone.

[43] Mr. Guan's counsel asked if he was aware that Mr. Nip was stopped recently driving Mr. Guan's car and charged with possession of cocaine for the purpose of trafficking. He said that he was told this by his lawyer and denied that he knew anything about Mr. Nip and cocaine.

[44] In cross-examination, Mr. Guan said he never allowed other people to drive his car. On further cross-examination, he said that he had to go to Vancouver for medical treatment for a month and that he handed his car key to Mr. Nip. He said when he came back, Mr. Nip told him that he drove Mr. Guan's car when the car of a friend of Mr. Nip's broke down and they used Mr. Guan's car to go to work. Mr. Guan acknowledged that the truth is that other people drive his car.

[45] Mr. Guan stated that he went to Vancouver from January 16 to February 16, i.e. after Christmas.

[46] He advised that he had a Canadian driver's licence and that he took a test in Chinese to obtain it in Vancouver. He said that it was an exam on a computer doing multiple choice questions. He said he understood that he had to stop at a stop sign. He said he usually stops at stop signs and red lights. He acknowledged that he understood how to obey the laws of the road.

[47] He admitted stopping in the parking lot near Canadian Tire for somewhere between three or five minutes, but said he did not see the police. He said that he stopped at the stop sign at Chilkoot Way. He explained that he did not move out of the

way of the police as the roadway was too narrow and he thought he would block the police.

[48] He admitted that he drove through the red light at the 4th Avenue intersection. He said he did not stop because he thought he was blocking the police and he could not move over any further to the fringe of the road. He said that when he realized the police were following him, he stopped.

[49] The Crown and defence agreed to further particulars about Mr. Nip. On March 11, 2010, at 11:45 p.m., Mr. Nip was observed driving Mr. Guan's Toyota. He was pulled over by the police and was arrested with 76 grams (about three ounces) of cocaine in the foot well of the driver's seat.

ISSUES

[50] There are four issues to decide:

1. What are the grounds for admitting the two cell phone conversations?
2. What are the findings of fact on the evidence?
3. Has the Crown proved its case beyond a reasonable doubt based upon the circumstantial evidence that Mr. Guan possessed cocaine for the purposes of trafficking?
4. Has the Crown proved beyond a reasonable doubt that Mr. Guan failed to stop his motor vehicle while being pursued by police in order to evade the police?

The Admission of the Cell Phone Conversations

[51] It is not unusual in the context of drug allegations that cell phones are seized by the police. Some times they ring and the police have conversations with the caller. The

question is whether the contents of the conversations are admissible and for what purpose.

[52] In *R.* v. *Ly*, [1997] 3 S.C.R. 698, the police had a conversation with an unidentified person who made arrangements to deliver drugs to a police officer at a certain time and place. The trial judge rejected the telephone conversation as hearsay. In *R.* v. *Ly*, [1996] A.J. No. 1089, the Alberta Court of Appeal admitted the contents of the telephone conversation as part of the narrative and even if it was hearsay, it was admitted for the truth of what was said as the evidence "enjoyed circumstantial guarantees of reliability, necessity and truthfulness" (para. 4). In the Supreme Court of Canada decision, McLachlin J. as she then was, stated at para. 3:

> "We are all of the view that the appeal should be dismissed and the Court of Appeal's order for a new trial confirmed. The telephone conversation was admissible. It was a statement of intention, or a statement tendered to establish the alleged drug transaction, and hence not tendered for the truth of its contents. Accordingly, it was not hearsay. The telephone conversation is merely one of the circumstances which, combined with others, may suffice to establish that the appellant, when he appeared at the designated time and place, in possession of the drugs, did so for the purpose of trafficking. Any frailties in relation to the connection between the appellant and the telephone conversation go to weight and not admissibility."

[53] Although the circumstances are somewhat different in the case at bar (the caller in this case was calling for drugs to be delivered by the person who owned or answered the cell phone), the police confirmed that the caller was a real person who wished to buy cocaine.

[54] In *R.* v. *Nguyen*, 2003 BCCA 556, the British Columbia Court of Appeal admitted the cell phone conversation where the police had the accused's phone and received calls ordering drugs. The Court had previously admitted similar evidence in the *R*. v.

Cook (1978) 10 B.C.L.R. 84 (C.A.). In *Nguyen*, Mackenzie J.A., referred to *R.* v *Ly* for support and stated at para. 17:

> "In my view, the conclusion that these telephone conversations are not hearsay rests on the circumstantial guarantee of their trustworthiness and therefore meets the requirements of necessity and reliability of the evidence which, of course, are also the basis for the principled exception to the hearsay rule enunciated by the Supreme Court of Canada in the *R*. v. *Khan*, [1990] 2 S.C.R. 531."

[55] In the case at bar, the circumstance of reliability is stronger as Cpl. Walker went to the location of the caller and confirmed his interest in purchasing cocaine.

[56] Recently, in *R.* v. *Williams*, 2009 BCCA 284, cell phone calls were received by the police who heard the inquiries about drug purchases from a person named Williams by name. P.D. Lowry, J.A., did not consider the calls to be an exception to the hearsay rule and stated at para. 10, "... In particular, I agree such calls are admissible as circumstantial evidence of knowledge of the purpose of drugs, which is an element of possession. …"

[57] I conclude that the cell phone calls received by Cpl. Walker on Mr. Guan's cell phone are admissible as circumstantial evidence of the knowledge of the cocaine which is an element of possession. The weight to be given is another matter.

THE FACTS

[58] I do not find the evidence of Mr. Guan to be credible. His explanation that he was in the parking lot to purchase a snow shovel at Canadian Tire is unbelievable. If he were truly there to buy a snow shovel, he would have brought his wife to assist with English. He would not have sat in the car with the engine running. If he were really shopping, he would park and enter the store. If he were really going to get his wife, he would not have turned right on Two Mile Hill which took him in the opposite direction from his home.

[59] In examination-in-chief, he said he never allowed anyone to drive his Toyota, a pretty straightforward statement. In cross-examination, he stated that he in fact loaned the car to Mr. Nip to use for a month while he was away on medical leave. The fact that Mr. Nip was using the Toyota recently undermines his credibility in stating that no one else drove his vehicle.

[60] Further, I do not believe Mr. Guan's explanation for not stopping on hearing the police siren because the practice in China was to drive away so as not to block the police car. This excuse does not stand up to any scrutiny because it is contrary to the requirement to stop in the *Criminal Code*. It is no excuse that he had a contrary practice more than five years ago in China. He also indicated that he understands the laws of the road. He was not in fact speeding ahead of the police car, but appeared to be fumbling with something in the car rather than pulling over to the side of the road. He did not pull over until the pursuing police car had pulled alongside him motioning to stop, and finally drove directly in front of him to force him to stop.

[61] I conclude that I do not believe the evidence of Mr. Guan and it does not leave me with a reasonable doubt. However, in *R.* v. *W(D)* one must still consider whether the Crown has proven its case beyond a reasonable doubt on the evidence I do accept.

[62] I find the following facts:

1. Cpl. Walker identified Mr. Guan on September 29, 2009, at Macdonald's participating in a drug transaction.
2. Cpl. Walker ran Mr. Guan's licence plate number and located the Toyota owned by Mr. Guan at 312 Alexander Street.
3. Cpl. Walker followed Mr. Guan in the Toyota later that morning on September 30, 2009.

4. Cpl. Walker did not observe anything on the road he previously entered into the Canadian Tire store where the baggy of cocaine was found by Cpl. Hamilton after the arrest of Mr. Guan. There were no fingerprints on the baggy. It was clean with no tire or crush marks.
5. Mr. Guan did not stop his Toyota at the stop sign on Chilkoot Way or the red light at the 4th Avenue intersection. He had ample opportunity to stop his vehicle on the road or by pulling into Mark's Work Warehouse.
6. Mr. Guan did not travel in the direction of his home to pick up his wife.
7. Mr. Guan continued to evade Cpl. Walker as he alternatively sped up and slowed down, as he proceeded up Two Mile Hill without stopping despite Cpl. Walker following him with his siren and flashers on in a marked police car.
8. The cell phone seized from Mr. Guan was used for the purpose of making arrangements to sell cocaine.
9. Mr. Guan was speeding up and slowing down and fumbling while he drove ahead of the police car in order to evade the police until he was able to dispose of his cocaine.

Possession for the Purpose of Trafficking

[63] Mr. Guan is charged with possession of cocaine for the purpose of trafficking, contrary to s. 5(2) of the *Controlled Drugs and Substances Act*. The *Act* defines possession as "possession within the meaning of s. 4 of the *Criminal Code*". That section states:

> "(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 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."

[64] The onus is on the Crown to prove beyond a reasonable doubt that the accused had the requisite elements of possession which in this case is:

1. knowledge that the substance is cocaine, and
2. control of it, in circumstances where it was found on a roadway that he had driven past.

[65] In many cases the evidence of possession is direct in that the drug is found on the person or when the person is present with the drug in a particular place. There are also cases where the evidence of knowledge and possession may not be direct but rather circumstantial.

[66] In *R.* v. *Nguyen,* two officers followed a known drug car. Just before the car stopped the police saw a black object being thrown from the passenger window. It was found to be a small plastic film canister containing four plastic wrapped balls of cocaine and heroin. There were also three cell phones found in the car that received several calls ordering drugs. As indicated above, the cell phone calls were admitted and the British Columbia Court of Appeal upheld the conviction of the accused of possession of

cocaine and heroin for the purpose of trafficking. A distinguishing factor in the case at bar is that Cpl. Walker did not see the baggy thrown out of Mr. Guan's Toyota.

[67] In the case of *R.* v. *Pham*, [2005] O.J. No. 5127 (Ont. C.A.), Pham was convicted of possession of cocaine for the purpose of trafficking. Although she was not present when the drugs were seized in her apartment, the 98 grams of crack cocaine, individually wrapped, were found in a small black cloth purse in the bathroom. The evidence established that although Ms. Pham was not present, she had previously participated in drug transactions observed at her front door by a neighbour and surveillance officers observed drug users approaching the apartment. They also arrested a person leaving the apartment with two pieces of crack cocaine and executed a search warrant to discover the drugs.

[68] The Court of Appeal sustained the convictions and cited the trial judge's instruction to himself at para. 30:

> "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."

[69] The Ontario Court of Appeal also cited McEachern C.J.B.C. in *R.* v. *TO*, [1992] B.C.J. No. 1700, where the trial judge did not believe the accused's evidence that he did not know 4.4 lbs of heroin was in a plastic bag that he placed in a vehicle. The Chief Justice 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 could properly be said that an inference of knowledge in this case would be unreasonable or unsupported by the evidence."

[70] Another case called *R.* v. *Nguyen*, 2007 BCSC 2005, dealt with the *R.* v. *W.(D.)* test in a case of circumstantial evidence. In that case, the two Asian men were observed carrying a big bag, like a bulky equipment bag, full of something heavy into a garage at approximately 6:45 p.m. The police arrived shortly after 7 p.m. and found the two accused, also Asian men, standing outside the garage. On entering the garage, the police found a BMW and three large bags, like hockey bags, containing about 97 pounds of marihuana. While the identification of the two Asian men in the eyewitness observation was not sufficient standing alone to satisfy the trial judge that the Asian males were the accused Asian males. However, in all the circumstances, the trial judge found an irresistible inference that the accused carried one of the bags containing marihuana into the garage. The BMW was used by one of the accused and had $42,000 inside, mostly in $100 bills.

[71] Rice J. stated the following at paras. 20 and 21:

> "Before basing a verdict of guilty on circumstantial evidence, the trier of fact must be satisfied beyond a reasonable doubt that the guilt of the accused is the only reasonable inference to be drawn from the proved facts, *R. v. Dhaliwal* [2005] B.C.J. No. 1404. In considering whether the circumstantial evidence supports an inference of guilt beyond a reasonable doubt, the court must not examine each individual circumstance in isolation. The proper approach is to consider whether all the evidence taken together in its totality proves the accused's guilt or is inconsistent with any other rational conclusion. The court must also refrain from speculation. A reasonable doubt cannot be granted on speculative or fanciful possibilities that do not arise from or fit with the proven facts.

> In order to prove possession, it is not necessary to prove that there was manual handling. The court [sic] must prove that the accused knew of the presence of the drugs and that there was some control over them. Counsel for the accused submitted that for several reasons a reasonable doubt arises as to whether the accused were the persons who placed the marihuana in the garage, or if they did, whether they knew it contained marihuana. Hung Nguyen testified that neither he nor his brother nor anyone else whom he knew at the time placed any of the bags containing the marihuana in the garage. His purpose and his brother's purpose for entering on the property was to help a friend move furniture."

[72] The conviction was sustained in the Court of Appeal cited as *R.* v. *Nguyen*, 2009 BCCA 209.

ANALYSIS

[73] Let me first deal with the defence submission that the frailties of eyewitness identification should raise a reasonable doubt. I do not find any evidence that the identification of Mr. Guan by Cpl. Walker had any frailty in fact.

[74] Considering the facts in this case, I conclude that Mr. Guan had knowledge of drug trafficking from his participation in a drug transaction on September 29, 2009, which itself was confirmed by Cpl. Walker receiving two calls on Mr. Guan's cell phone that led to the same buyer at the same location wishing to purchase cocaine. As I have rejected Mr. Guan's evidence entirely, I do not believe that he is incapable of understanding the rudimentary English that is required for what was essentially a request for three spit balls of cocaine at Macdonald's.

[75] Based upon his observations on September 29, 2009, and subsequent motor vehicle search, Cpl. Walker had good reason to follow Mr. Guan on the morning of September 30 to investigate whether there would be another drug transaction. He confirmed his identification of Mr. Guan by driving up beside him, looking directly at him.

When Mr. Guan turned right on Chilkoot Way without stopping, Cpl. Walker activated his siren and flashers. Mr. Guan did not stop but continued to the intersection of 4th Avenue, where he went through a red light without stopping and continued up Two Mile Hill until he was forced to stop. I infer from these facts that Mr. Guan knew that he was in possession of cocaine and made efforts to dispose of it. While Cpl. Walker did not actually see the baggie thrown out of Mr. Guan's vehicle, I infer that his refusal to stop and fumbling was Mr. Guan's attempt to get rid of the drug before he was pulled over. As I do not believe the evidence of Mr. Guan, the question is whether there is any other rational conclusion but that Mr. Guan was in possession of the eleven grams of cocaine for the purpose of trafficking. While it may be argued that there is another rational conclusion based on the possibility that someone else may have put the drugs on the road where the officer found the baggie, there is no evidence to support that conclusion. The evidence of the apparent drug transaction the evening before outside Macdonald's, the confirmation that it was a drug transaction from the cell phone calls and Cpl. Walker's attendance to identify the same purchaser, the attempt to evade the police, the fumbling of Mr. Guan in his car and the location of the baggie of cocaine individually wrapped on the roadway leading from Two Mille Hill, all support the inference that Mr. Guan had the knowledge and control of the cocaine. In my view, despite Mr. Guan's attempt to temporarily dispossess himself of the cocaine, he still had the cocaine albeit in a public place for his benefit. I therefore find him guilty of possession of cocaine for the purpose of trafficking.

Failing to Stop a Motor Vehicle

[76] Section 249.1(1) of the *Criminal Code* reads as follows:

> "Every one commits an offence who, operating a motor vehicle while being pursued by a peace officer operating a motor vehicle, fails, without reasonable excuse and in order to evade the peace officer, to stop the vehicle as soon as is reasonable in the circumstances."

[77] There are three elements to the offence: operating a motor vehicle and being pursued by a peace officer in a motor vehicle; failing to stop his motor vehicle as soon as reasonable in the circumstances and without reasonable excuse; and the intent to evade the peace officer.

[78] There is no dispute that Mr. Guan was being pursued by a peace officer in a marked police car that he had an opportunity to see before the pursuit began. I have rejected Mr. Guan's excuse that he was following the practice that he employed in China and find that he had no reasonable excuse to fail to stop. I do not accept his evidence that the road was too narrow.

[79] I also do not accept his evidence that he did not know that he was being pursued. The officer was directly behind him during the pursuit and pulled up beside him once and finally forced him to stop at the side of the road.

[80] Mr. Guan's counsel submits that his driving does not constitute an intent to evade. I agree with that submission in the sense that Mr. Guan was not racing or speeding in a classic attempt to completely escape from the police officer by outrunning him. But I do find that he was evading the police officer in pursuit, until he had an opportunity to dispose of his baggie of cocaine. Mr. Guan went through a stop sign without stopping which caused the pursuit and then went to the next intersection where he failed to stop at a red light. The pursuit continued past the next roadway to the Canadian Tire store before Mr. Guan was forced to stop by the police officer pulling his police car in front of Mr. Guan's vehicle. At no time did Mr. Guan come to a stop, which

he reasonably could have accomplished as soon as he entered Chilkoot Way. I find Mr. Guan guilty of intent to evade a police officer pursuant to s. 249.1(1) of the *Criminal Code*.

CONCLUSION

[81] In summary, I convict Mr. Guan of possession of cocaine for the purpose of trafficking and evading a police officer in pursuit in a motor vehicle.

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VEALE J.