IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *R.* v. *Gillespie*, 2006 YKSC 66

Date: 20061215
Docket No.: S.C. No. 06-01512
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

Respondent

And

ROBERT JOSEPH GILLESPIE

Applicant

Before: Mr. Justice L.F. Gower

Appearances:

David McWhinnie — Counsel for Her Majesty the Queen
Malcolm Campbell — Counsel for the Applicant

REASONS FOR JUDGMENT

INTRODUCTION

[1] The accused was committed to stand trial by Lilles J. of the Territorial Court on August 31, 2006 on a charge that he did, on or about June 9, 2005, possess certain stolen property, contrary to s. 354 of the *Criminal Code*. This is an application to quash that committal for trial.

[2] The issue is whether there was any evidence, upon which a reasonable trier of fact, properly instructed, could possibly convict. If not, then the learned Territorial Court Judge exceeded his jurisdiction in committing the accused to stand trial for that offence.

LAW

A. Scope of Review on *Certiorari*

[3] As this is an application for an order in the nature of *certiorari* to quash the order to stand trial, it is helpful at the outset to note the scope of my review powers on such an application. These were helpfully set out in *R.* v. *Mauro*, [1993] O.J. No. 386, by Salhany J., of the Ontario Court of Justice, at p. 6 of the Quicklaw Report:

> "In Martin, Simard and Desjardins, (1978), 41 C.C.C. (2d) 342 (S.C.C.), Chief Justice Laskin described the right of review of an order to stand trial this way, at p. 345,
>
> > . . . the review on sufficiency must be a review to determine whether the committal was made arbitrarily or, at the most, whether there was some evidence upon which an opinion could be formed that an accused should go to trial.
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> In my view, the expression "some evidence" must mean more than a scintilla of evidence. The responsibility of the reviewing judge in determining whether there is "some evidence" must of necessity require him to engage in some weighing or testing process. At the same time, he must recognize that he must not substitute his discretion for that of the presiding justice. Even if he disagrees with the presiding justice as to the sufficiency of the evidence, he is not entitled to quash so long as there was "some evidence upon which an opinion could be formed" by the justice that the accused should be put on his trial." (my emphasis)

[4] In *Skogman* v. *The Queen*, [1984] 2 S.C.R. 93, Estey J., for the majority of the Supreme Court of Canada, was speaking of the review powers of a superior court on an application to quash a committal for trial when he held, at p. 107, that the Court:

> ". . . must be satisfied that the evidentiary test has been passed or failed, as the case may be, as a matter of law. . . [T]he Court must independently assess the record to determine whether there was any evidence to support the committal for trial." (my emphasis)

B. Test for Committal in Circumstantial Cases

[5] The well-known test for committing an accused for trial at a preliminary inquiry comes from *United States of America* v. *Shephard*, [1977] 2 S.C.R. 1067 (S.C.C.). That test is "whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty". In cases involving direct evidence, the test is relatively straightforward in its application. However, in cases involving circumstantial evidence, the application of the test becomes more complicated, because the essential elements of the offence have to be inferred from facts not in issue. Therefore, in order to determine whether a properly instructed jury could reasonably convict, a preliminary inquiry judge must determine whether, assuming the circumstantial facts are proved, it would be reasonable to make the inference, or inferences, sought by the Crown: see *R.* v. *Charemski*, [1998] 1 S.C.R. 679 at para. 22. Thus, it is in evaluating the rationality of the necessary derivative inference, or in testing the legitimacy of the inference, that the judge at the preliminary inquiry performs a weighing function (*R.* v. *Charemski*, *supra*, at para. 23).

[6] A problem arose in some of the earlier jurisprudence, when importing into this analysis the so-called rule in *Hodge's Case* regarding circumstantial evidence. In brief, the rule in *Hodge's Case* states that a conviction based upon circumstantial evidence can only be supported if the guilt of the accused is the <u>only</u> reasonable inference to be drawn from the evidence. If there are other competing reasonable inferences which are equally consistent with the innocence of the accused, then the trier of fact should be left with a reasonable doubt about the accused's guilt.

[7] Fortunately, the issue has been more recently clarified by the Supreme Court of Canada. Initially, in *Mezzo* v. *The Queen* (1986), 27 C.C.C. (3d) 97, McIntyre J., for the majority of that Court, stated at p. 107, that ". . . even in circumstantial cases the law now is that any determination as to compliance with the rule in *Hodge's Case* would be left to the jury". In other words, any determination as to whether there are indeed competing inferences and how much weight those inferences should be given is a matter for the trier of fact and not for the preliminary inquiry judge in deciding upon a committal for trial. That conclusion was supported by McLachlin J., as she then was, speaking for the dissent in *R.* v. *Charemski*, cited above. Later, in *R.* v. *Arcuri*, 2001 SCC 54, McLachlin C.J. delivered the judgment of the court. At para. 27, she stated that both the majority and the dissent in *Charemski* clearly reaffirmed the test in *Shephard*, cited above. In circumstantial cases, McLachlin C.J. allowed, at para. 23, that there must be a "limited weighing" of the evidence by the preliminary inquiry judge in order to determine whether that evidence is reasonably capable of supporting the inferences that the Crown asks the jury to draw. However, in doing so, the judge does not draw factual inferences or assess credibility. Rather, he or she only asks whether the evidence, if believed by the trier of fact, could reasonably support the inference of guilt sought by the Crown. Interestingly, at para. 25 of *Arcuri*, McLachlin C.J. referred back to the decision of McIntyre J. in *Mezzo* and noted that his concern there was to reject the argument that the judge, in deciding upon a committal for trial or a directed verdict, must determine whether guilt is "the only reasonable inference" (my emphasis).

[8] In the more recent case of *R.* v. *Sazant*, 2004 SCC 77, Major J., speaking for the five to two majority of the Supreme Court of Canada, once again confirmed the

Shephard test for a preliminary inquiry judge in committing an accused to trial, and stated that the judge is not permitted to assess credibility or reliability. Importantly, he also said, at para. 18, that "where more than one inference can be drawn from the evidence, only the inferences that favour the Crown are to be considered". Further, Major J. warned that a preliminary inquiry judge who fails to respect these constraints acts in excess of his or her jurisdiction.

[9] In the hearing before me, there was a debate between Crown and defence counsel about the state of the law in situations involving committals for trial or applications for directed verdicts (or non-suits), in cases where the evidence is entirely circumstantial. The dispute arose from the earlier jurisprudence I just alluded to dealing with the rule in *Hodge's Case*. For example, *R.* v. *Alle*, [1995] O.J. No. 810, a decision of Marchand J. of the Ontario Court of Justice, relied upon the previous decision of the Ontario Provincial Court in *R.* v. *Nelles* (1982), 16 C.C.C. (3d) 97. *Nelles* concluded that, in a case of circumstantial evidence where the evidence is equally consistent with a rational conclusion that the accused is innocent, as it is with the accused's guilt, then there is no evidence upon which a reasonable jury properly instructed could convict. Similarly, Marchand J. in *Alle* stated, at para. 9, that it is:

> ". . . well established that where the evidence is equally consistent with innocence as with guilt, there is no evidence upon which the accused may be committed for trial."

Defence counsel initially relied upon *Alle* as a correct statement of the law. However, when pressed by me to provide additional authority, as the Crown fundamentally opposed the proposition in *Alle*, counsel were unable to locate any superior court

authority expressly endorsing the decision. On the contrary, Ray J., of the Ontario Court of Justice (Prov. Div.), in *R.* v. *Sittampalam*, [1996] O.J. No. 3494, at para. 31, feared that the *Nelles* and *Alle* decisions may have resurrected a test specifically rejected by the Supreme Court of Canada, and she declined to follow them. Rather, at para. 26, Ray J. held that where the evidence is circumstantial, it must not be weighed for competing inferences, but solely to see if it meets the *Shephard* test.

[10] In *R.* v. *Green,* [1998] O.J. No. 5673, Ewaschuk J., of the Ontario Court of Justice (Gen. Div.), also confirmed that the rule in *Hodge's Case* does not apply at a preliminary inquiry:

> "In face [as written] of competing reasonable inferences, the judge fundamentally erred by requiring that the evidence heard at the preliminary inquiry gave rise to the exclusive reasonable inference that the accused had guilty knowledge and, therefore, possession of the gun and ammunition. Had the judge found that the evidence gave rise to mere suspicion as opposed to reasonable inference the judge would have been justified in discharging the accused." (my emphasis)

[12] It is the last sentence of the above-captioned quote which defence counsel ultimately sought to rely upon in attacking the committal for trial in the case at bar. In my view, this comment by Ewaschuk J. says nothing more than what the Supreme Court of Canada said in *Arcuri* about the need for a preliminary inquiry judge to engage in a "limited weighing" of the evidence in order to assess the reasonableness of the inference the Crown seeks to draw from the circumstantial evidence. If that inference could be drawn, then it is of no concern to the preliminary inquiry judge that there are additional competing inferences pointing to the innocence of the accused. It is exclusively for the trier of fact to determine whether it will draw such competing inferences and what weight

it will give them. In other words, if the preliminary inquiry judge correctly concludes that there is evidence which is reasonably capable of supporting the inference the Crown relies upon to prove the essential elements of the offence, then the *Shephard* test for committal for trial will be met. Evidence which falls short of that standard and merely gives rise to a “suspicion”, as opposed to a reasonable inference, will result in the discharge of the accused at the preliminary inquiry.

ANALYSIS

[13] The learned Territorial Court Judge correctly recognized that, as he was dealing with a preliminary inquiry and not a trial, he was not concerned with the reliability or credibility of the Crown witnesses.[1] He also correctly identified this case as one which involves only circumstantial evidence.

[14] However, the learned Territorial Court Judge justified his committal on the possibility that a reasonable inference could be drawn that the accused must have had knowledge of and control over the stolen goods, and therefore possession of them, based upon evidence that:

a) the nature, quantity and manner of storage of the goods were such that they could not have escaped the accused’s attention;

b) the accused had knowledge of the tenants of the house in which the stolen goods were found; and

[1] Transcript, August 2, 2006, p. 109, lines 11-12;
and Transcript, August 31, 2006, p. 11, lines 14-25; p. 12, lines 1-7

c) the accused was a landlord of the tenants and received monthly rent from them.

That portion of the Judge's reasons which reflect the above reads as follows:

> ". . . .I think it is open for a jury, acting reasonably, to conclude that Mr. Gillespie was aware of the goods piled up in the house. He lived 30 feet away. There is some evidence – there is some evidence – although inconsistent evidence, that he visited the place. Keep in mind that the tenancy was very short. Considering the amount of goods and how they were stored in the house, Mr. Gillespie, having some knowledge of the tenants, and there's some evidence indicating that there's some previous connections either to the tenants or to relatives of the tenants, a jury could conclude that he was aware of the goods in the house, and, from the nature of the goods, the quantity of the goods, how they're stored, that he knew that they were stolen. In the words of one of the cases filed, the operation was too pervasive to be easily concealed.
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> Gillespie was a landlord. He took monthly rent. He could have evicted the tenants and did not do so. He allowed the property to be used for illegal purposes and received compensation for so doing. He had a choice to do otherwise."[2]

[15] With great respect, in my view the learned Territorial Court Judge may have erred here, as there was arguably no evidence capable of supporting a reasonable or rational inference that the accused had knowledge of the stolen property in the house <u>for the reasons expressed above</u>.

[16] Firstly, the Territorial Court Judge was clearly in error, or misspoke himself, when he referred to evidence that the accused resided "30 feet" from the house in which the stolen goods were located. The investigating officer, Cst. Bechtel, clearly testified at the preliminary inquiry that the accused's residence was some thirty yards (not feet) from the

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[2] Transcript, August 31, 2006, p. 12, lines 18-27; and p. 13, lines 1-12.

subject house.[3] The distance could well be significant to a trier of fact, because, as defence counsel submitted, thirty yards is about the width of two city lots.

[17] Secondly, the Constable testified that the accused lived in a converted bus, and that in between the bus and the subject house, there was a shop or garage.[4] Yet, there was no evidence led as to the availability of a sightline from the accused's residence to the house, or the positioning of windows in either the bus or the house, which might have been capable of supporting a reasonable inference that the accused could have seen into the house and therefore observed some of the stolen property without entering.

[18] Thirdly, there was nothing in the evidence about the accused's previous knowledge of the tenants which was capable of supporting a reasonable inference that he must therefore have had knowledge of the presence of stolen goods in the house. There was evidence that the accused was acting as a landlord with respect to the house and that one of the tenants, Warren Edzerza (a.k.a. Ellis), had previous knowledge of the accused and described him as a friend.[5] There was also evidence that the other tenant, Kim Mulholland, knew the accused before commencing her tenancy in the house and that the accused had previously worked with her grandfather.[6] However, there is nothing in any of that evidence, standing alone, which could rationally support an inference that the accused must therefore have known about the stolen property in the house.

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[3] Transcript, August 2, 2006, p. 37, line 11.
[4] Transcript, August 2, 2006, p. 37, lines 6-11.
[5] Transcript, August 2, 2006, p. 77, lines 11-26.
[6] Transcript, August 2, 2006, p. 53, lines 3-14.

[19] On the other hand, the learned Territorial Court Judge correctly observed the evidence that the accused had visited the house at some time during Mr. Edzerza's tenancy, which may have commenced on or about April 17, 2005, if not earlier. Because of its potential importance, I will set out this portion of Mr. Edzerza's evidence on the point:

> "Q. When you were living at that residence, did he ever visit you at the house you rented or did you ever visit him on his bus?
>
> A. When I wasn't living there, he came to town and visited me at my place, yes. A couple of times.
>
> Q. Okay. <u>When you were living there, did he ever come into the house to visit you?</u>
>
> A. <u>Oh, yeah.</u>
>
> Q. If he'd have gone into the house - - would you have had any objection if he had gone into the house without you being there, for example?
>
> A. No. Wouldn't have cared; you could have went in there and I wouldn't have cared.
>
> Q. You trusted him?
>
> A. Yeah. Yeah." [7] (my emphasis)

[20] Admittedly, in cross-examination, Mr. Edzerza conceded that he could have been mistaken about the fact the accused visited him and that it was possible that he did not come into the house while Mr. Edzerza was staying there.[8] However, a trier of fact hearing that evidence could decide to reject Mr. Edzerza's equivocation or retraction in cross-examination and accept his earlier evidence confirming that the accused had indeed visited him in the house when he lived there.

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[7] Transcript, August 2, 2006, p. 104, lines 15-27; p. 105, lines 1-2.
[8] Transcript, August 2, 2006, p. 105, lines 23-27; p. 106, lines 1-7.

[21] Having said that, I questioned whether that evidence, standing alone, is capable of supporting a reasonable inference that the accused visited the house at a time when the stolen property was present, and therefore must have had knowledge about it. Cst. Bechtel testified that, on June 9, 2005, which was the day Ms. Mulholland and Mr. Edzerza were arrested, the house was found to be "stacked full of various property, from tools, saws, drills, routers, other furniture items [and] numerous paintings . . .".[9] In addition, there were cameras and laptop computers, and from a room in the basement, a number of firearms were seized. The exhibit list of the stolen property filed at the preliminary inquiry totalled some 183 items.[10] The Constable said that the house was so packed with the items that there was a kind of "pathway to get into the rooms" and that he couldn't even go into all of the rooms because they were so full of the stolen goods that he couldn't walk through them without climbing over the items.[11] Based on this evidence, if the accused had visited the house at a time after the stolen property had been brought into the house and stored in that fashion, a reasonable inference could easily be drawn that the accused would have had knowledge of its presence. The problem, however, is that there is no evidence as to when the visit or visits by the accused with Mr. Edzerza occurred in relation to when the stolen goods were brought into the house.

[22] Without such evidence, could a trier of fact reasonably infer that such a visit or visits occurred at a time when the stolen property was present? Having considered this at some length, I am inclined to conclude that such an inference could not reasonably be

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[9] Transcript, August 2, 2006, p. 23, lines 16-18.
[10] Exhibit #1.
[11] Transcript, August 2, 2006, p. 23, lines 18-27; p. 24, lines 1-3.

made. I say that because the evidence is ambiguous. Clearly, the visit or visits were during Mr. Edzerza's occupancy and therefore likely during his tenancy. But, beyond that, the evidence could mean the accused visited either after, or <u>before</u>, the stolen goods were present in the house. Therefore, in order for a trier of fact to conclude that the visit(s) occurred <u>after</u> the stolen property was present, the trier would have to engage in assumption or speculation, neither of which constitutes the process of drawing a reasoned and logical inference from other proven non-contentious facts.

[23] Further, the learned Territorial Court Judge made reference to the accused acting in the capacity as landlord for both Mr. Edzerza and Ms. Mulholland to support the possibility that one could reasonably infer that the accused had control of the house ("He allowed the property to be used for illegal purposes. . ."").[12] I will return to this point later, but for now it will suffice to observe that the learned Territorial Court Judge seemed to couple the potential inference of control with the possible inference that the accused also had knowledge of the stolen property within the house, to support a further reasonable inference that, at the very least, the accused was in constructive possession of that stolen property. Once again, the reasonableness of that analysis depends entirely on whether a trier of fact could infer that the accused had knowledge of the presence of the stolen property in the house, based simply on the evidence that the accused visited the house. In my respectful view, that proposition is so tenuous that it could only give rise to a "mere suspicion" and not a reasonable inference. However, for reasons which I will come to shortly, my criticism of the learned Territorial Court Judge's apparent reasoning here does not affect the result on this application.

[12] Transcript, August 31, 2006, p. 13, lines 10-11.

[24] Defence counsel emphasized that there was no certificate of title filed at the preliminary inquiry and that consequently there was no evidence to indicate whether the accused was actually the owner of the land on which the house, shop and bus were located, or whether he held some other lesser form of interest in the land. Further, the defence argued that there was no evidence that the accused had any interest in the land prior to the commencement of the tenancies with Mr. Edzerza and Ms. Mulholland. Hence, a reasonable inference could be drawn that the accused's interest in the land coincided with the commencement of Mr. Edzerza's tenancy on April 17, 2005. Accordingly, the defence argument was that there was no opportunity for the accused to exercise any control over the house prior to the commencement of Mr. Edzerza's tenancy. Therefore, there would have been no possibility of the accused being in direct possession or constructive possession of any stolen goods in the house, prior to the commencement of Mr. Edzerza's tenancy, since control is an essential element which must be proven to establish possession.

[25] I accept the defence argument to a point. If the only reasonable inference capable of being drawn from the evidence was that the commencement of the accused's interest in the land was concurrent with the commencement of Mr. Edzerza's tenancy, then there would have been no opportunity for the accused to exercise any independent exclusive control over the land or the house, which might otherwise be capable of giving rise to the inference that the accused could have played a part in the stolen goods being moved into the house. However, as I will attempt to demonstrate shortly, there is evidence which could reasonably lead to an inference that the accused's interest in the land pre-dated Mr. Edzerza's tenancy.

[26] I also agree with the Crown that if this were simply a case of the accused being found in possession and control of the house, then absent any intervening circumstances, a reasonable inference could clearly be drawn that he also had knowledge about and control over any stolen property found in the house. However, the intervening tenancies give rise to the hypothetical possibility that the stolen goods were brought into the premises by either Mr. Edzerza or Ms. Mulholland, or indeed by Ms. Mulholland's boyfriend, Jerry Byrne. There was evidence that Mr. Byrne visited the house and stayed overnight from time to time during Ms. Mulholland's tenancy, and that he was the sole occupant of the house on the day Ms. Mulholland and Mr. Edzerza were arrested. Unfortunately, the Crown was unable to secure Mr. Byrne's attendance at the preliminary inquiry and we have no testimony from him. Rather, the only evidence of the various comings and goings within the house came from Mr. Edzerza and Ms. Mulholland. Thus, the Crown attempted to establish through its evidence that, as there was no evidence clearly linking Mr. Edzerza or Ms. Mulholland to the bulk of the stolen property, the possibility arises that the property must somehow be linked to the accused.

[27] Further to this argument, the Crown points in particular to the evidence of Ms. Mulholland that she did not bring any of the stolen goods into the house.[13] She also said that the stolen goods were not in the house when she first came to live there, although she was less clear about precisely when she first noticed some of the goods being present.[14]

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[13] Transcript, August 2, 2006, p. 57, lines 19-21.
[14] Transcript, August 2, 2006, p. 57, lines 25-27; p. 58, lines 1-12.

[28] Mr. Edzerza also testified that he did not bring stolen property into the house.[15] He said that he couldn't recall whether Ms. Mulholland brought stolen property into the house.[16] He also couldn't recall whether some or all of the property was in the house when he moved in.[17]

[29] Therefore, the Crown says that it has effectively negatived the possibility of either Mr. Edzerza or Ms. Mulholland being responsible for bringing the stolen goods into the house. Accordingly, the Crown says that a trier of fact could draw a reasonable inference that the accused brought the stolen goods into the house, which would be evidence of his possession of those goods, by virtue of his knowledge and control.

[30] Of course, that argument ignores the competing reasonable inference that the property may be linked also to Mr. Byrne. However, the test for a committal for trial in cases where the evidence is entirely circumstantial only requires that the preliminary inquiry judge be satisfied that there is some evidence reasonably capable of supporting the inference which the Crown would ask the trier of fact to draw. The preliminary inquiry judge does not have to be satisfied that that is the only inference which can be drawn. Indeed, the evidence may give rise to other competing inferences which point to the accused's innocence. But the preliminary inquiry judge, and equally a judge reviewing a committal for trial in these circumstances, is not to concern him or herself with whether there are such competing inferences, but only whether the inference the Crown will ask the trier of fact to draw is reasonably possible, based upon the evidence.

[15] Transcript, August 2, 2006, p. 94, lines 8-9.
[16] Transcript, August 2, 2006, p. 94, lines 10-12.
[17] Transcript, August 2, 2006, p. 92, lines 2-25.

Accordingly, the Crown says that it does not have to negative the possibility that Mr. Byrne brought the stolen goods into the house.

[31] While the law compels me to agree with the Crown's argument on this point, the existence of Mr. Byrne in the equation does tend to move the Crown's case towards the "mere suspicion" end of the spectrum, and away from the possibility of a reasonable inference implicating the accused. Indeed, if the evidence led at the trial of this matter is the same as that tendered at the preliminary inquiry, and if the principle from *Hodge's Case* were applied, there would seem to be no reasonable likelihood of a conviction. But, that is not my concern here.

[32] In any event, in my respectful view, notwithstanding the one factual error (or misstatement of fact) by the learned Territorial Court Judge with respect to the distance between the accused's home and the home in which the stolen property was located, and the other potential weaknesses in his analysis of the evidence, an independent assessment of the record shows that there was circumstantial evidence supporting the committal for trial.

[33] First, there was evidence linking the accused with the house in which the stolen property was found. That included the rental receipt respecting the house from the accused to Warren Edzerza, dated April 17, 2005, as well as the document issued by the accused to Kim Mulholland confirming that she had been renting "my house", that is, the accused's house, since April 18, 2005 and also that she was renovating the house into a duplex "to be completed by June 1, 2005."[18] Further, there was evidence from

[18] Preliminary Inquiry, Exhibit #2 and Exhibit #A, respectively.

Ms. Mulholland herself that she was renting a portion of the house and that she was renovating the kitchen area, the bathroom area, and the upstairs loft area in lieu of paying rent.[19] Ms. Mulholland was also clear that she was renovating "Rob's house", which was an obvious reference to the accused, Robert Gillespie.[20] With respect to the accused's interest in the land, Ms. Mulholland testified as follows:

> "Q. Now whose land was this, as far as you knew?
>
> A. As far as I knew, Warren was renting the place off of Rob Gillespie."[21] (my emphasis)

[34] There was also evidence that, when Mr. Edzerza was shown a photocopy of the receipt from the accused dated April 17, 2005, he said "I was renting his place at the time" (my emphasis), again obviously referring to the accused's house.[22]

[35] The investigating officer, Cst. Bechtel, testified that the house containing the stolen goods was on a piece of property apparently belonging to the accused:

> "A. "It was his property and he was living outside in his - - is what I understand, in his motor home bus, right beside the house.
>
> Q. And that's the information that you received from Cst. White or from someone else?
>
> A. I believe it was Cst. White . . . ".[23] (my emphasis)

Notwithstanding that Cst. Bechtel's evidence regarding the accused's apparent interest in the land on which the house was located was hearsay, it was nevertheless admissible and probative.

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[19] Transcript, August 2, 2006, p. 45, lines 14-18.
[20] Transcript, August 2, 2006, p. 47, lines 6-10.
[21] Transcript, August 2, 2006, p. 52, lines 15-17.
[22] Transcript, August 2, 2006, p. 78, line 10.
[23] Transcript, August 2, 2006, p. 34, line 27; p. 35, lines 1-5.

[36] Cst. Bechtel also testified that he obtained the certificate of title for the property on which the house was located “later on”, presumably meaning after the search on June 9, 2005, and that it was “in Mr. Gillespie’s name”.[24]

[37] Second, it seems to me that the linking of the accused to the real property in question could lead to a reasonable inference that the accused had control of the house prior to the commencement of the tenancies with Mr. Edzerza and Ms. Mulholland. That, in turn, could lead to the further inference that the accused had control of and knowledge about the stolen goods in the house.

[38] Third, Mr. Edzerza testified that he didn’t believe there was anyone living in the house when he moved in.[25] If that evidence were to be accepted by a trier of fact, it could lead to a reasonable inference that the house was unoccupied prior to the Edzerza tenancy. That inference, coupled with the potential inference that the accused had an interest in the land prior to the Edzerza tenancy, and therefore control of the house and its contents, could, in turn lead to a reasonable inference that the accused had knowledge and control of the stolen goods within the house. Accordingly, he could be found to be in possession of those goods.

[39] Fourth, there is evidence which could reasonably suggest the accused had access to the house even during the Edzerza and Mulholland tenancies. Ms. Mulholland initially said that she changed the locks to the house as soon as she moved in[26] and that the accused did not have a key to access the house. However, she later said that she

[24] Transcript, August 2, 2006, p. 36, lines 24-25.
[25] Transcript, August 2, 2006, p. 91, lines 21-23.
[26] Transcript, August 2, 2006, p. 59, lines 10-25.

couldn't remember if it was she or somebody else who changed those locks and she couldn't remember how it was that Mr. Edzerza happened to have a key to the house. Indeed, she allowed that it may have been Mr. Edzerza who changed the locks and gave her a key.[27] Thus, if a trier of fact were to accept Ms. Mulholland's evidence that she couldn't remember how it was the locks came to be changed, then it seems to me that a further reasonable inference could be drawn that she would be unable to say <u>when</u> the locks were changed or either <u>who</u> necessarily had keys to the locks. That, of course, leads to the possibility of a further reasonable inference that the accused had access to the house prior to the locks being changed and perhaps even after the locks were changed.

[40] On a related point, although Ms. Mulholland said that her boyfriend, Jerry Byrne, did not have a key to the house[28], there was evidence that Mr. Byrne was the sole occupant of the house prior to the arrival of the police on June 9, 2005. Obviously then, Mr. Byrne had access to the house, apparently without a key. That, in turn, seems to allow for the possibility of a reasonable inference that the accused could also have gained access to the house.

[41] Further still, Mr. Edzerza testified that he never got any keys from anybody for the house[29], which of course contradicts Ms. Mulholland. But, even ignoring that contradiction for the present purposes, if Mr. Edzerza's evidence on this point were to be accepted by a trier of fact, then it seems to me that it is capable of leading to the reasonable inference that, if Mr. Edzerza had access to the house without a key, then

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[27] Transcript, August 2, 2006, p. 60, lines 5-27; p. 61, lines 1-3.
[28] Transcript, August 2, 2006, p. 59, lines 16-17.
[29] Transcript, August 2, 2006, p. 96, lines 24-26.

others did as well, including the accused. Indeed, Mr. Edzerza testified that, as far as he was concerned, the accused had permission to enter the house when he was not present:

> "Q. Okay. When you were living there, did he ever come into the house to visit you?
>
> A. Oh, yeah.
>
> Q. If he'd have gone into the house - - would you have had any objection if he had gone into the house without you being there, for example?
>
> A. No. Wouldn't have cared; you could have went in there and I wouldn't have cared.
>
> Q. You trusted him?
>
> A. Yeah. Yeah."[30] (my emphasis)

[42] Fifth, there is evidence that Mr. Edzerza's tenancy predated, perhaps significantly, Ms. Mulholland's tenancy. At the very least, there was evidence that it did so by one day, as the rental receipt from the accused to Mr. Edzerza is dated April 17, 2005, whereas the document respecting Ms. Mulholland says that she commenced renting on April 18, 2005. Further, Mr. Edzerza's statement, "Yeah, I was renting his place at the time", when shown the rent receipt of April 17, 2005, if interpreted to be in the past tense, could lead to the reasonable inference that he "was [already] renting" the house from the accused "at the time" the rent receipt was issued. Finally, when Mr. Edzerza was shown the rent receipt and asked whether that was the first one, the last one, or one of a series issued by the accused, he answered:

> "I really can't recall. There may have been more. There may have been - - that might have been the first, that might have been the last. I don't

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[30] Transcript, August 2, 2006, p. 104, lines 20-27; p. 105, lines 1-2.

know."[31]

Once again, taking this evidence as a whole, a trier of fact could reject Mr. Edzerza's professed lack of memory on the point and reasonably infer that this rental receipt was one of a series of receipts, some of which pre-dated the one from April 17, 2005. That in turn would support the possibility of a reasonable inference that his tenancy commenced prior to April 17, 2005.

[43] Thus, there is evidence upon which a trier of fact could reasonably infer that the accused had access to and indeed control over the house prior to Ms. Mulholland's occupancy and the changing of the locks which she testified about.

[44] Lastly, I disagree with the defence submission that there is no evidence that the accused had any need to access the house for repairs or maintenance.[32] On the contrary, there is evidence that Ms. Mulholland, with or without the assistance of Mr. Byrne and/or Mr. Edzerza, had undertaken to do certain renovations to the house in lieu of payment of rent. Given that circumstance, it would not be an unreasonable inference that the accused, as landlord, would have had the need to access the house from time to time for the purpose of overseeing those renovations.

[45] For these reasons, I conclude that there is evidence which is reasonably capable of giving rise to a number of possible inferences which could support a finding that the accused had access to the house, either before the Edzerza and Mulholland tenancies when the house was vacant, or during those tenancies. Those potential inferences

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[31] Transcript, August 2, 2006, p. 79, lines 9-11.
[32] Applicant's Factum, p. 18, lines 2-6.

could all suggest, in turn, that the accused had a degree of control over both the house and the stolen goods, as well as knowledge of those goods.

CONCLUSION

[46] Having independently assessed the record, notwithstanding that I disagree with portions of the analysis of the learned Territorial Court Judge in committing the accused to stand trial, I am nevertheless satisfied that there was evidence upon which a reasonable trier of fact, properly instructed, could return a verdict of guilty on the offence of possession of stolen property. In particular, the evidence is capable of supporting the inference which the Crown seeks to draw, which is that the accused had control over both the house and the stolen goods within, as well as knowledge of those goods.

[47] Accordingly, the learned Territorial Court Judge did not exceed his jurisdiction in committing the accused to stand trial and the application to quash that committal is dismissed.

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GOWER J.