Case Name:

R. v. Do

Between
Regina, and
Chinh Thi Kim Do and Dien Van To

[2006] B.C.J. No. 1835

2006 BCPC 385

Vancouver Registry No. 157226-1

British Columbia Provincial Court
Vancouver, British Columbia

Warren Prov. Ct. J.

Heard: May 1, 2006.
Oral judgment: May 1, 2006.

(13 paras.)

Criminal law -- Controlled drugs and substances -- Possession or trafficking -- Acquittal of the co-accused for possession of marijuana for the purpose of trafficking -- Police seized 300 marijuana plants after execution of a search warrant from a home occupied by the co-accused -- The Crown failed to prove that the amount seized was sufficient to support a trafficking conviction -- Despite evidence that connected the co-accused to the residence, the Crown failed to prove that the co-accused had knowledge and control of the marijuana plants.

Criminal law -- Evidence -- Burden and standard of proof -- Standard of proof -- Beyond a reasonable doubt -- Acquittal of the co-accused for possession of marijuana for the purpose of trafficking -- Police seized 300 marijuana plants after execution of a search warrant from a home occupied by the co-accused -- The Crown failed to prove that the amount seized was sufficient to support a trafficking conviction -- Despite evidence that connected the co-accused to the residence, the Crown failed to prove that the co-accused had knowledge and control of the marijuana plants.

Counsel:

Counsel for the Crown: M. Bozic.

Counsel for the Defendant: J. Solomon.

1 **WARREN PROV. CT. J.** (orally):-- Chin Thi Kim Do and Dien Van To are charged that on July 21st, 2004, at or near the City of Vancouver, in the Province of British Columbia, unlawfully possessed a controlled substance, Cannabis marihuana, in an amount exceeding three kilograms for the purpose of trafficking.

2 The main issue for the court is whether the Crown has proven knowledge and control to the requisite standard beyond a reasonable doubt. Defence, however, also raises the issue that the Crown has not proven that the amount of marihuana which was discovered on execution of the search warrant was in an amount exceeding three kilograms, and I am satisfied that that is indeed the case.

3 Evidence about the average weight of the marihuana bud produced by a mature plant was given by an expert who testified. That expert was not there on the day of the execution of the warrant. None of the officers testified as to the weight.

4 I cannot guess by looking at pictures what marihuana weighs. My task is to make determinations based on the evidence before me. Clearly, there is some marihuana but what the weight is, is unclear. Thus, any conviction would have to be on a lesser included offence.

5 With respect to the issue of knowledge and control, the evidence was that Mr. To answered the door to the residence at (No.) East 42nd. Motor vehicle insurance documentation in his name and at that residence was found in the residence. He produced valid picture ID at the request of the police which gave that same address.

6 Ms. Do was found in the kitchen. A Terasen Gas bill was discovered in her name and address at (No.) East 42nd. She too produced valid picture ID. She gave that same address. Also her clothing was in the bedroom where she changed.

7 When the police executed the search warrant, they found a total of 308 plants. Some, approximately 198, were in the basement and 200 clones were found in the closet of a room on the main floor. The total value, if all the plants matured to harvest, was estimated to be approximately $150,000. However, I am satisfied that this is significantly on the high side, given the testimony on cross-examination of the expert witness.

8 The Crown referred the court to a number of cases from the Court of Appeal, with respect to the principles to be followed. These were: ***R. v. Bauer***, [2003] B.C.J. No. 505, 2003 BCCA 138; ***R. v. Hubble***, [2002] B.C.J. No. 2327, 2002 BCCA 561; ***R. v. Tran***, Ontario Court of Appeal, [2005] O.J. No. 607; ***R. v. To***, [1992] B.C.J. No. 1700; also B.C. Supreme Court case ***R. v. Dueck***, [2004] B.C.J. No. 1330, 2004 BCSC 859. The defence relies on the decision, a B.C. Supreme Court case of ***R. v. Polukoshko***, [1999] B.C.J. No. 646.

9 General principles relied on by the Crown are repeated in a number cases, but one of them, ***R. v. To***, is at the bottom of page 7, where the court says:

> 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.

10 The other principle from the 1908 decision of ***R. v. Jenkins***, [1908] B.C.J. No. 52, is found cited in numerous of the decisions, but in particular was found in the ***R. v. Bauer*** case, paragraph 22, where the court quotes:

> It is true that a man is not called upon to explain suspicious things, but there comes a time when, circumstantial evidence having enveloped a man in a strong and cogent net-work of inculpatory facts, that man is bound to make some explanation or stand condemned.

11 Do the circumstantial facts here envelop the two accused in a strong and cogent enough network of inculpatory

facts to be satisfied beyond a reasonable doubt that the accused are guilty? Not quite. It is highly suspicious, but not proof beyond a reasonable doubt. Unlike the cases referred to me by the Crown, in this case, there is no evidence of the smell of marihuana, no evidence of noisy fans on July 21st, 2004, inside the house. No evidence of what was in the second bedroom, whether it was furnished or not furnished, used or not used. Whether the door to the closet was open or not. No evidence of how the basement, where the mature plants were was accessed from, whether from the inside or not or whether there was a door and if so was it locked. No evidence of increased hydro usage, or visible wires in the living room. No evidence related to trafficking or possession for that purpose such as score sheets, scales, bags, clippings, as there were in other cases. Although there was evidence connecting the two accused to the residence, there is no evidence that Mr. To or Ms. Do leased or owned the premises.

12 As indicated in my ruling on the voir dire, the difficulty in this case was that none of the police officers who testified could really remember anything about the execution of this warrant. The note-taking was minimal in some cases and non-existent by the rest. The lack of note-taking and the lack of recollection is no doubt related to the sheer volume of cases that police were involved in. However, I am left, in the result, with a highly suspicious case but not a situation where I can be satisfied beyond a reasonable doubt, and I therefore acquit both Mr. To and Ms. Do.

13 Thank you both.

(EXCERPT CONCLUDED)

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