Court File No. 36435

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

B E T W E E N:

HER MAJESTY THE QUEEN

APPELLANT
(Respondent in the Court of Appeal)

- and -

OSWALD OLIVER VILLAROMAN

RESPONDENT
(Appellant in the Court of Appeal)

- and -

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IN THE SUPREME COURT OF CANADA
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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

> "Circumstantial evidence is a very tricky thing," answered Holmes thoughtfully. "It may seem to point very straight to one thing, but if you shift your own point of view a little, you may find it pointing in an equally uncompromising manner to something entirely different.[1]

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[1] Sir Arthur Conan Doyle, "The Boscombe Valley Mystery," *The Adventures of Sherlock Holmes*, p. 3 [not reproduced]

1. In this case, as is not unusual in cases of possession of child pornography, the Crown did not proffer any direct evidence. There was no witness who testified to having observed the commission of the offence; accordingly, the evidence tendered was necessarily circumstantial. Although there is no magic to circumstantial evidence, it is qualitatively different than direct evidence.

2. Direct evidence is evidence which, if believed, resolves a matter in issue.[2] By contrast, a legal conclusion is not a logical consequence of circumstantial evidence. There is no causal relationship between a piece of circumstantial evidence and guilt or innocence. Instead, an intermediate step; namely, inferential reasoning, is required.

3. Recognizing that when confronted with circumstantial evidence, triers of fact must engage in the exercise of inference-drawing, this Court in *Griffin, infra,* directed that it is essential to "instill in the jury that in order to convict, they must be satisfied beyond a reasonable doubt that the only rational inference that can be drawn from the circumstantial evidence is that the accused is guilty."[3] To depart from this well-settled principle would be to fundamentally alter the standard of proof in criminal law.

4. It is the position of the Criminal Lawyers' Association (the "CLA") that the law as it relates to circumstantial evidence has long been settled. There should be no derogation from the requirements set out by this Court in *Griffin.* This modern formulation of the historic "rule" in *Hodge's Case* provides an essential safeguard and ensures that in circumstantial cases, including cases of possession of child pornography, guilt is based on nothing less than proof beyond a reasonable doubt. Any lessening of the standard to be applied must be resisted, as it would be inconsistent with the presumption of innocence and the requirement that the Crown prove its case beyond a reasonable doubt.

B. Statement of Facts

5. The CLA takes no position with respect to the facts as advanced by the parties and defers to the parties on the factual record.

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[2] *Regina v. Cinous,* [2002] S.C.R. 3 at para. 88 [CLA's Book of Authorities at Tab 1]
[3] *Regina v. Griffin,* [2009] 2 S.C.R. 42 at para. 33 [Appellant's Book of Authorities at Tab 17]

PART II – QUESTIONS IN ISSUE

6. The Appellant raises two issues on appeal. Underlying both questions is the issue of proof beyond a reasonable doubt in circumstantial evidence cases. On these points, the law is well-settled.

7. Moreover, the CLA accepts the Respondent's submission that the issues as framed by the Appellant do not appear to arise from the decision of the Court of Appeal for Alberta. In response to the questions as posed by the Appellant, the CLA's position is as follows:

8. **Issue 1**: Where the Crown's evidence is circumstantial, does the rule in *Hodge's Case* mandate an acquittal where there is an innocent possibility not based in any actual evidence? Put another way, must the Crown disprove all innocent possibilities, whether or not there is any evidence to support them?

9. **CLA's Response**: It is submitted that the Appellant's focus on "actual evidence" is misplaced. As this Court has made clear in *Lifchus, infra,* a reasonable doubt "is logically derived from the evidence or absence of evidence".[4] The Crown is not required to disprove speculative possibilities. It is, however, required to disprove rational inferences pointing away from guilt in order to meet its burden of proof beyond a reasonable doubt.

10. **Issue 2:** Before a case of possession of child pornography can go to a trier of fact, must the Crown prove, beyond any hypothetical possibility, that the accused had exclusive access to the computer throughout the period over which the pornography was downloaded?

11. **CLA's Response:** The law does not impose a requirement of proof of exclusive possession. However, proof of possession in a circumstantial case does require that the jury be satisfied that the inferences drawn from the evidence are consistent with guilt and inconsistent with innocence. Much as with Issue 1, it is the position of the CLA that the Appellant has framed the question in a manner which ignores the critical evidentiary distinction between reasonable inference-drawing and speculation. The Crown is never required to disprove *speculative*

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[4] *Regina v. Lifchus,* [1997] 3 S.C.R. 320 at para 39 [Appellant's Book of Authorities at Tab 25]

hypothetical possibilities, but where there exist rational, alternative possibilities, the Crown has failed to discharge its burden.

PART III – STATEMENT OF ARGUMENT

A. Overview

12. It is the position of the CLA that this Court's decision in *Griffin* is a complete answer to both questions raised by the Appellant on appeal. This Court should neither reconsider nor derogate from the explanation of the rule in *Hodge's Case* as set out in *Griffin*. It does not impose an impossibly high standard of proof on the Crown. Rather, this essential component of an instruction in a circumstantial case ensures that triers approach the task of inference-drawing with care, to safeguard against the risk that a conviction could be based on anything less than proof beyond a reasonable doubt.

B. The Crown is Always Required to Prove its Case Beyond a Reasonable Doubt

13. The Appellant, at paragraph 50 of its factum, expressly cites this Court's direction in *Griffin* and *Lifchus* as the applicable governing principles, "consistent with fundamental rules of criminal justice" – that, to convict, the trier of fact must be satisfied beyond a reasonable doubt that the only rational inference that can be drawn from the circumstantial evidence is that the accused is guilty; and that the verdict must be based upon the evidence or *lack of evidence*.[5]

14. Yet, at the same time, the Appellant has framed the issue as whether the rule in *Hodge's Case* mandates an acquittal where there is "an innocent possibility not based in any actual evidence" or "whether or not there is any evidence to support them [innocent possibilities]?"[6] thereby conflating or confusing speculation and a reasonable doubt logically arising from the absence of evidence.

15. As stated by the Respondent at paragraph 49 of its factum, the manner in which a reasonable doubt may arise is a matter of settled law that this Court has clearly and

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[5] *Griffin, supra* note 3 at paras. 33, 45; *Lifchus, supra* note 4 at para. 36
[6] See Appellant's Factum at paras. 30, 31

unambiguously addressed on a number of occasions.[7] A reasonable doubt can arise from the absence of evidence where the Crown fails to tender sufficient evidence.

16. It is well-settled that a trier of fact cannot engage in speculation; however, by definition, a rational or reasonable inference is not a speculative one.[8] As this Court settled in *Regina v. Khela*, *infra*, and *Griffin*, the requirement that an inference be founded in proven facts is no longer an appropriate formulation of the standard. A trier may conclude that there is a rational possibility inconsistent with guilt based upon either inferences drawn from "actual evidence" or from the absence of evidence. [9]

C. *Griffin:* A Principled Approach to Circumstantial Evidence

17. Despite the Appellant's recognition that *Griffin* directs that, in a circumstantial case, a conviction can only be supported where the trier is satisfied beyond a reasonable doubt that the only rational inference that can be drawn from the circumstantial evidence is that the accused is guilty, the Appellant nevertheless appears to invite a reconsideration of this long-standing and fundamental explanation of the Crown's legal burden. Moreover, it suggests that these principles are to be applied differently in respect of circumstantial evidence of the *actus reus* and the *mens rea* of an offence. It is the position of the CLA that these well-established principles are more than adequate to answer the concerns raised by the Appellant in proving possession and need not be revisited.

a) The Griffin instruction provides an essential safeguard to ensure that the Crown is held to the high standard of proof beyond a reasonable doubt. It not only tells a trier how to assess proof beyond a reasonable doubt, but how to do so in a circumstantial case.

18. The rule in *Hodge's Case* alerts triers of fact to the type of reasoning process involved in circumstantial cases, including the difference between inference-drawing and speculation. Not only does this ensure that the burden of proof beyond a reasonable doubt is met, but it ensures a correct approach to the evidence. It is the position of the CLA that such an admonition applies equally to the constituent elements of an offence. As Professor Berger explains, the rule in

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[7] See Respondent's factum at paragraphs 49-51

[8] *Regina v. Munoz* (2006) 205 C.C.C. (3d) (Ont. Sup. Ct.) [Respondent's Authorities Tab 8]; *Regina v. Portillo* (2003), 176 C.C.C. (3d) 467 (Ont. C.A.) [CLA's Book of Authorities at Tab 2]

[9] *Regina v. Khela,* [2009] 1 S.C.R. 104 [Appellant's Book of Authorities at Tab 23]

Hodge's Case informs not only *what* conclusion is available to a trier on the evidence, but *how* the trier arrives at that conclusion: it describes the reasoning process. Moreover, the purpose of the rule in *Hodge's Case* is to alert the jury to the dangers associated with a particular kind of evidence, as the inferential reasoning process demands specific attention from the trier.[10]

19. The dangers associated with circumstantial evidence are not imaginary. As Baron Alderson observed in *Hodge's Case,* and as Professor Berger explains, inferential reasoning is fraught with prejudices and presuppositions. Jurors can and will distort circumstantial evidence to have it fit with their view of the case.[11] Trial judges too, can fall into error in the inference-drawing process by making inferential leaps which, upon closer examination, are speculative.[12] The admonition in *Hodge's Case* ensures that triers are alert to these dangers and provides them with a roadmap as to how to assess the evidence and draw inferences.

b) Griffin applies equally to circumstantial evidence of both the actus reus and the mens rea of an offence.

20. As noted above, in advancing its submission that proof of knowledge does not require the Crown to prove exclusive possession, the Appellant urges this Court to strictly limit the application of the *Griffin* principles to circumstantial evidence involving the *actus reus* of the offence. The CLA accepts the Respondent's statement of the law that *Mitchell* must be read in light of this Court's more recent jurisprudence.[13] As well, given that the central issue in this case was identity and not the intention of the accused, the Appellant's invitation to limit the application of *Griffin* appears not to be germane to the determination of this appeal. In any event, it is the position of the CLA that no limitation ought to be placed on the application of the *Griffin* principles. To do so would be to limit the ability of an accused to point to evidence which raises a reasonable doubt.

21. It is submitted that the decision of this Court in *Griffin* signalled a departure from any suggested limitation of the rule to a particular type of evidence. Instead, the Court adopted a

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[10] Benjamin Berger, "The Rule in *Hodge's Case:* Rumours of its Death are Greatly Exaggerated" (2005) 84:1 Can. Bar Rev. 47 at p. 60 [Appellant's Book of Authorities at Tab 50]
[11] *Ibid.*
[12] See Justice Doherty's discussion of the attractive, but unavailable inference based on the "shoe" evidence in *Regina v. Portillo, supra* note 6 [CLA's Book of Authorities at Tab 2]
[13] *Regina v. Mitchell,* [1964] S.C.R. 471 [Appellant's Book of Authorities at Tab 28]

more principled and flexible approach to the application of the rule in *Hodge's Case* to circumstantial evidence. Specifically, this Court explained that an instruction must instill in the jury that in order to convict, they must be satisfied beyond a reasonable doubt that guilt is the only rational inference to be drawn from the evidence.[14] It is submitted that the absence of any express reference to the *Mitchell* limitation in *Griffin* is a clear indication that no such distinction survives. The language used by this Court is also indicative of a more holistic approach to the inferences which can be drawn from the totality of the evidence.

22. As is clear from their application of the rule in *Hodge's Case* as it applies to cases involving a determination of the accused's state of mind, appellate courts across the country no longer adhere to any artificial distinction between the *mens rea* and the *actus reus* in determining whether guilt is the only rational inference available in a circumstantial evidence case.[15] For example, the Ontario Court of Appeal recently in *Roks, infra,* allowed an appeal on the basis of an unreasonable murder conviction, relying on *Griffin*, and finding that:

> In the absence of any direct evidence on the foresight or knowledge issue, this element could be proven beyond a reasonable doubt only if the only rational inference available from the circumstantial evidence as a whole was that the appellant (actually) knew that setting the fire at Woodbine would likely cause someone's death.[16]

23. Similarly, the model jury instructions used in Canada suggest a broad, purposive application of the rule in *Hodge's Case* without limitation to the *actus reus*. All three model charges, suggest an instruction consistent with *Griffin* and *Hodge's Case* where the case is based largely or wholly on circumstantial evidence.[17]

24. The CLA urges caution before considering the imposition of any limitation on the ability of an accused to point to favourable inferences arising from circumstantial evidence of

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[14] *Griffin, supra* note 3 at para. 33

[15] See, *e.g., Regina v. Bui,* 2014 ONCA 614; *Regina v. Banovic,* 2012 BCCA 471; *Regina v. Zhu,* 2013 BCCA 118; *Regina v. Mohamed,* 2011 ABCA 350; *Regina v. MacLeod,* 2013 MBCA 48, *Regina v. Oddleifson,* 2010 MBCA 44 [*Bui* located at Appellant's Book of Authorities at Tab 10; other cases not reproduced]

[16] *Regina v. Roks*, 2011 ONCA 526 at para. 142 [CLA's Book of Authorities at Tab 3]

[17] David Watt, *Watt's Manual of Criminal Jury Instructions,* 2nd ed., (Toronto: Carswell, 2015) at 278 [Appellant's Book of Authorities at Tab 61]; National Judicial Institute, *Model Jury Instructions,* (Ottawa: Canadian Judicial Council, 2014), s. 10..2, online: https://www.nji-inm.ca/index.cfm/publications/model-jury-instructions/ [Appellant's Book of Authorities at Tab 57]; Gerry Ferguson *et al., Canadian Criminal Jury Instructions* (Vancouver: Continuing Legal Education of British Columbia, 2014), s. 4.15 [Appellant's Book of Authorities at Tab 53]

knowledge or intention. It is the position of the CLA that a distinction between the approach to *mens rea* and the *actus reus* neither exists nor should be imposed. At all times, in assessing circumstantial evidence, a trier must be alert to explanations, contradictions, or inferences pointing toward innocence.

25. Moreover, it is position of the CLA that any distinction between the application of circumstantial evidence to the two elements of an offence is a false dichotomy: the principled approach to circumstantial evidence is consistent with the burden of proof. The rule in *Hodge's Case* imposes no additional burden on the Crown: it is a useful, qualitative articulation of the burden of proof as it applies to guilt. It is neither useful nor correct to revive a distinction which could result in a jury being instructed to apply one definition of reasonable doubt to *mens rea* and another definition to the *actus reus*. Such an approach would result in an unprincipled asymmetry in the assessment of evidence.

26. Where guilt is not the only rational inference arising from circumstantial evidence, there is, by definition, a reasonable doubt. Similarly, wherever there are competing reasonable inferences about an accused's intention or knowledge, there will be a reasonable doubt.[18] To accept the Appellant's assertion that the Crown must prove anything less when establishing *mens rea* erodes the sacred principle of proof beyond a reasonable doubt. It is submitted that the suggested limitation could lead to the dangerous result where a jury may have a doubt as to the accused's intention arising from circumstantial evidence, but nevertheless convict, because they have been instructed to apply different standards to intention and the act.

c) The Practical Difficulties in Reviving the Mitchell Dichotomy

27. It is respectfully submitted that a revival of the *Mitchell* dichotomy would bring with it both substantive and practical problems. There is a real risk of prejudice to an accused where a trier is instructed to approach inference-drawing with particular caution in respect of one aspect of the offence but not the other. As Laskin C.J.C., dissenting in the result, explained in *Cooper*:

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[18] *Griffin, supra* note 3; *Khela, supra* note 7, *Lifchus, supra* note 4; *Mitchell, supra* note 9; *Bui, supra* note 10 [Appellant's Book of Authorities at Tab 10]

> There are a few observations I would make on *Hodge's Case* specifically. Intent is no less a question of fact than is identity or the *actus reus* of an offence. I would not condone a situation where a trial Judge may properly charge a jury under *Hodge's Case* in respect of identity, and all other issues except intent, and then in the same case tell them to approach the Crown's burden of proof on a different basis on the question of intent. There must be consistency in a charge where burden of proof is concerned; and to have two different formulae in one case is as unjust to the Crown as it is to an accused.[19]

28. A bifurcated approach to the application of the rule presents further practical difficulties. In many, if not most cases, evidence of the act is inextricably intertwined with evidence of intention or knowledge. It may be difficult, if not impossible, to slot the evidence into "*mens rea*" and "*actus reus*" categories. This is particularly so in possession cases where the Crown seeks to establish liability through constructive possession. Evidence from which inferences about control can be drawn will undoubtedly overlap with those relating to knowledge.

29. The rationale underlying *Mitchell*; namely, that there will almost inevitably be competing inferences arising from the evidence that goes to intention, is no reason for limiting the application of the rule to the *actus reus* component of an offence. It is trite that individuals generally intend the consequences of their actions.[20] Any concern about the difficulties in reaching a conclusion as to a person's intention is tempered by the principle preventing speculation. Where, however, a rational inference inconsistent with knowledge or intention is available, the trier should and must acquit.

30. Any lessening of the burden of proof in this case has the potential to impact upon not only all cases involving proof of possession, but criminal offences more generally. The CLA urges caution in revisiting any of the well-established principles articulated by this Court.

PART IV – SUBMISSIONS ON COSTS

31. The CLA makes no submissions as to costs.

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[19] *Regina v. Cooper,* [1978] 1 S.C.R. 860 at p. 865 [Appellant's Book of Authorities at Tab 17]
[20] See, *e.g., Regina v. Seymour,* [1996] 2 S.C.R. 252 [not reproduced]

PART V – ORDER SOUGHT

32. The CLA respectfully requests an opportunity to present ten minutes of oral argument, or as long as this Honourable Court sees fit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 11th DAY OF FEBRUARY, 2016.

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PART VI – ALPHABETICAL TABLE OF AUTHORITIES

PART VII – RELEVANT LEGISLATION

[n/a]