S.C.C. No. 02600

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Clarke, C.J.N.S, Matthews and Chipman, JJ.A.

BETWEEN:

JODY WILLIAM KEANS	)	Edmund R. Saunders for the appellant
Appellant	)	Robert E. Lutes for the respondent
- and -	)	Appeal Heard: March 12, 1992
HER MAJESTY THE QUEEN	)	Judgment Delivered: April 3, 1992
Respondent	)	

THE COURT: Appeal allowed, the conviction set aside and the appellant acquitted of the offence as charged per reasons for judgment of Matthews, J.A.; Clarke, C.J.N.S. and Chipman, J.A. concurring.

MATTHEWS, J.A.:

On September 18, 1991, the appellant was found guilty of break and enter into a business establishment at Milton, Queen's County and committing the indictable offence of theft therein contrary to s. 348(1)(b) of the **Criminal Code**. He now appeals from that conviction.

The trial judge's decision is not lengthy. It is here set out in complete form:

> "At approximately 8 a.m. on February 9th, 1991, a break-in was discovered at Ron's Chain Saws and Rentals in Milton, Queens County, Nova Scotia. It was discovered that six chain saws, some potato chips, chain saw chains, chain saw files and $67.58 in Petty Cash and $96.93 as a float were missing.
>
> At six o'clock that same morning, Mrs. Lillian Crouse was up early doing a crossword puzzle and she, so she was up to open the door to admit her step-son Jason Crouse and two of his friends, Brian Pittman and the accused, Jody Keans. She noted that they looked, as she described it, raggedy, as if they'd been out all night. They went to Jason's bedroom and closed the door and were there for about twenty minutes. Then Jason went to the bathroom where he was for some time and when he came out, Jody went into the bathroom. Mrs. Crouse fell asleep some time during the time that the accused was in the bathroom. She woke up later and checked the bedroom. All three were gone, and on the bed she found an Export A cigarette package with a notation 3 divided into 95 and an empty dime roll on the bed. She checked the clothes hamper in the bathroom and found that there were dirty muddy clothes - wet clothes - in the hamper, Jason's pants and Jody's pants. When she checked the closet, two other pairs of Jason's pants,

were missing.

Later that day, the R.C.M.P. Officers arrived on the scene to investigate. At the scene of the break-in, they discovered an Irving Oil envelope with two footprints on it. These were later matched to Brian Pittman's sneakers. They also found a file set - one of the missing file sets - in the woods and followed a trail through the woods and across a brook over muddy marshy ground. They were unable to get any prints or tracks but they were able to determine that there was more than one set of tracks involved. Also in that vicinity, they found a tag off a Husqvarna chain saw similar to the, a tag which would have been on one of the chain saws that was stolen.

Mr. Pittman and Mr. Crouse were called by the Crown. Both had trouble remembering the events of that night but both admitted that all three were together at the People's Store in Liverpool some time after midnight on February 9th, 1991.

Jason Crouse said that all three of them were together again at approximately 8 a.m. when Crouse woke up in Pittman's car in Pittman's yard and the defendant was also present. Pittman came out of the house to the car at that time, and although neither of them can remember the events described by Mrs. Crouse, Crouse said that he and Keans must have been at home because both had different pants on when they woke up and Keans was wearing a pair of Crouse's pants.

There is no dispute on these facts as the defence called no evidence. The defendant reminds me that in cases of circumstantial evidence, the rule in **Hodges** case applies, the facts proved must not only be consistent with the guilt of the accused, but also cannot lead to any other reasonable inference.

In regard to the accused, the following facts and inferences are consistent with his guilt.

1. The accused was with Brian Pittman and

Jason Crouse at 1 p.m. (sic a.m.) or later in Liverpool.

2. Brian Pittman's footprints were found at the scene of the crime.

3. There were tracks of more than one person in the woods leading from the vicinity of the scene to the vicinty of Jason Crouse's house, across a brook and through a swamp. A file set missing from the scene of the crime was found along that trail as was a tag from a Husqvarna chain saw of the same type missing from the scene.

4. It would take more than one person to carry six chain saws and it would take a minimum of three people to carry them any distance on foot.

5. Brian Pittman was with Jason Crouse and the accused when they arrived at Jason Crouse's house at 6 a.m.

6. All three went to Jason Crouse's bedroom where a dime roll and a cigarette package were later found. The cigarette package had numerical notations on it indicating someone had used it to figure out a division of $95.00 into thre equal parts. The amount of the missing float was $96.93.

7. Jason Crouse and the defendant each changed clothes at Jason Crouse's. The pants and socks they left behind were muddy and wet.

8. At 8 a.m. Jason Crouse woke up in Brian Pittman's yard in his car. The accused was also in the car and Brian Pittman came out of his house.

All of the facts in this case are consistent with the guilt of the defendant and I fail to see any other reasonable inference to which these facts would lead nor has any been suggested to me. In particular, defence counsel's suggestion that Brian Pittman committed the theft alone and that the accused and Jason Crouse simply happened to meet in Liverpool and again prior to ariving at Jason Crouse's home, is highly improbable.

> I therefore find that the Crown's case has been established beyond a reasonable doubt and that the defendant is guilty as charged."

Pittman and Crouse were each charged with the same offence as the appellant. Neither gave any evidence which implicated the accused with the offence. Guilt of the appellant was based on circumstantial evidence. The respondent acknowledges "that there is no direct evidence linking the Appellant to the offence of break, enter and theft in a sense of identifying him as being physically present or taking some physical action to further the objective of the break and enter into" the store.

The respondent further acknowledges that: "The rule in Hodge's case (which comes from the case of **R.** v. **Hodge** (1938), 168 E.R. 1136 (Assises) at p. 1137) has been altered in Canada and reduces to a test of '...the only reasonable inference to be drawn from the proven facts' (see R. v. **Cooper** (1977), 34 C.C.C. (2d) 18 (S.C.C.) at p. 33;)..."

There is no doubt that the items listed were stolen from the store. It is clear that the appellant was with the other two young men in the early hours of February 9, 1991 and also later that morning. The respondent argues that:

> "13. The most incriminating evidence against the Appellant is that he arrived with Mr.

Pittman and Mr. Crouse at 6:00 a.m. at the home of Mr. Crouse, went to the bedroom for a period of time, changed his pants and clothes which were muddy and wet, and the sum of $95.00 appears to have been three ways. The evidence connects to the evidence of Constable Stevenson who testified that across from Ron's Chainsaw is a ballfield and then a wooded area and a stream. The police followed the stream through a marshy area where they found a file and footprints of more than one person, which footprints they followed until they arrived at Milford Street (C.A., pp. 91,92,95 and 97). Also the evidence of Constable Urquhart that he found a tag from a Husquvarna chainsaw in the wooded area adjacent to the graveyard (C.A., p. 102). He further testified that there is a triangle formed by the Crouse residence, the graveyard and Ron's Chainsaws (C.A., p. 103).

14. In addition to the muddy wet clothes and the proximity to Ron's Chainsaws and the residence of Mr. Crouse there was a cigarette package found by Mrs. Crouse indicating a division of $95.00 into three equal parts, which evidence couples with the missing float of $96.93 to be strong circumstantial evidence against the Appellant.

15. The question which must be asked is whether the Trial Judge was correct in entering a verdict of guilty and in applying the test of: 'the only reasonable inference to be drawn from the proven facts', which facts are as follows:

> the Appellant having been with the other two parties at 1:00 a.m. and again at 6:00 a.m.,
>
> the Appellant having changed his muddy wet pants and socks, and having been a party to the division of $95.00,
>
> Mr. Pittman being in the building, and
>
> six chainsaws being taken - unlikely that one person would have been

> able to perform that theft unless more than one trip was made."

The facts are that Mrs. Crouse found in Jason Crouse's bedroom a cigarette package with a notation of three divided into 95. The amount of the missing float was $96.93. $67.58 in petty cash was also missing. None of this evidence, in my opinion would prove that the appellant was present when the writing was done or that the appellant knew of the existence of the cigarette package. It is not correct to say that it is a fact that the appellant was a party to the division of $95.00. The Crown may argue that it is an inference, but it is not a fact. If the appellant did break into the store with Pittman and Crouse would the reasonable inference not be that his share of the cash would be one-third of $96.93 plus $67.38?

Further, why 1/3 of 95 rather than 96, a figure more easily divisible by three.

There is no evidence to relate the empty dime roll to the theft of items from the store.

The trial judge was in error when she said at her third point, that "the file set... was found along that trail". The police found a file. The evidence is not clear as to the location in which it was found except that it was at the start of the

wooded area behind a ball diamond.

It is also of some interest that all the police constable could say was that there was more than one set of footprints along the path. The evidence did not relate any of the footprints to the print of Pittman's found in the store. The footprints on the path do not assist in drawing an inference of guilt on the part of any of the three young men and in particular, the accused.

The inferences to be drawn from the facts are such that anyone would indeed be suspicious of the involvement of the appellant in this crime. That is not enough. The presumption is not of guilt but the contrary. The conclusion is that the offence was committed, but it does not necessarily follow that it was committed by the appellant.

It is necessary, in order to find the appellant guilty, for the Crown to prove that the guilt of the appellant is "...the only reasonable inference to be drawn from the proven facts". With respect that has not been accomplished. The four "facts" as set out by the Crown neither separately nor cumulatively lead to the appellant's guilt as the only inference to be drawn from those "facts". In my opinion it is not necessary to list all the many alternate inferences which may be drawn from

the facts of this case.

I am of the opinion that guilt of the appellant is not "the only reasonable inference to be drawn from the proven facts". There are many reasonable inferences to the contrary.

I would allow the appeal, set aside the conviction and acquit the appellant of the offence as charged.

Kenneth W. Matheson
J.A.

Concurred in:

Clarke, C.J.N.S.

Chipman, J.A.

1991 S.C.C. No. C.14600

IN THE SUPREME COURT OF NOVA SCOTIA
APPEAL DIVISION

BETWEEN:

JODY WILLIAN KEANS

APPELLANT

- and -

HER MAJESTY THE QUEEN

RESPONDENT

NOTICE OF APPEAL

Place of Conviction: Bridgewater, Nova Scotia

Name of Judge: Justice Anne Crawford

Name of Court: Provincial Court

Name of Crown Prosecutor at trial: Craig Harding

Name of Counsel at trial: Edmund R. Saunders

Offence of which appellant convicted: at or near Milton, in the County of Queens, in the Province of Nova Scotia did unlawfully break and enter a certain place, to wit: Ron's Chain Saws and Rentals Limited situate at Milton, Queens County, Province of Nova Scotia and did commit therein the indictable offence of theft contrary to Section. 348 (1) (b) of the Criminal Code of Canada.

Sections: 348 (1) (b) Criminal Code of Canada

Plea at Trial: Not Guilty

Sentence imposed: 12 months incarceration and 1 year probation with restitutionof $ 1,011.50

Date of Conviction: September 18, 1991

Date of Sentence: October 16, 1991

Place of Incarceration: A Provincial Institution

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