SUPREME COURT OF NOVA SCOTIA
Citation: R. v. T.R.A., 2011 NSSC 185

Date: 20110511
Docket: Hfx. No.336232
Registry: Halifax

Between:

T.R.A.,
(A young person within the meaning of the *Youth Criminal Justice Act*)

Appellant

-and-

Her Majesty the Queen

Respondent

Decision

Judge: The Honourable Justice Robert W. Wright

Heard: May 11, 2011 at Halifax, Nova Scotia

Oral Decision: May 11, 2011

Written Decision: May 20, 2011

Counsel:
Counsel for the Appellant - Chandra Gosine
Counsel for the Respondent - James Van Wart

Wright, J. (Orally)

[1] This is a summary conviction appeal from the oral decision of Judge Jamie Campbell, sitting as a judge of the Youth Justice Court of Nova Scotia, rendered on May 19, 2010.

[2] The accused was charged and convicted of the following three offences:

(1) possession of stolen property, contrary to s. 355(b);

(2) the unlawful taking of a motor vehicle without the consent of the owner with intent to drive it or being an occupant thereof, contrary to s. 335(1) (commonly known as joyriding);

(3) breach of probation, contrary to s. 137 of the *Youth Criminal Justice Act*.

[3] The accused was also charged with theft of a motor vehicle but that charge was stayed by the trial judge under the *Kienapple* principle and is not in issue on this appeal.

[4] The trial judge heard evidence from the owner of the stolen vehicle and three police officers. No evidence was called by the accused, or his co-accused A.C.

[5] The trial judge began his decision by recognizing that there is no direct evidence with respect to the charges laid. Rather, the case is built on circumstantial evidence. The trial judge recognized that the test to be applied was whether or not that circumstantial evidence proves the case against the accused beyond a reasonable doubt. That, said the trial judge, required a consideration of

the inferences to be drawn from the evidence.

[6] The trial judge then recognized that the Crown can prove its case based on inferences if the guilt of the accused is a reasonable inference beyond a reasonable doubt and if no other reasonable inference can be sustained.

[7] After reviewing the material facts from the evidence of the police officers, the trial judge stated that he could not see any rational explanation for four people to be seen running away from a car with all the doors left open (after a police chase of a car of a matching description just minutes before that), in a location not close to anything else, at 1:00 o'clock in the morning, other than drawing the inference that they had been the occupants of the stolen car.

[8] He then made reference to the doctrine of recent possession under which the court may draw the inference that when property has been stolen and people are in possession of it shortly afterwards, the inference can be made that the occupants knew that the vehicle was stolen.

[9] In this case, the judge said that there was simply no evidence before him that would allow him to draw any other inference than the fact that the four people who were in that car knew that the car was a stolen vehicle (given all the surrounding circumstances). The trial judge noted the flight of the four persons coming from the immediate proximity of the vehicle, abandoned behind a building

with all four doors left open, all of whom refused the police officer's command to

stop.

[10] After referring to the accused having been found by police hiding in nearby bushes quickly thereafter, the trial judge reiterated the inference that the accused was one of the occupants in the car and that there was simply no reasonable inference that could otherwise be taken. He stated that he could simply conceive of no reason why a young person would be hiding in the bushes after 1:00 o'clock in the morning a short distance away from a stolen vehicle abandoned with the four doors left open, and people seen running away from it.

[11] The trial judge then concluded that the accused's culpability was based on what could only be described as an overwhelmingly powerful inference establishing his guilt beyond a reasonable doubt that he was involved with, or at least an occupant of, that vehicle.

[12] The trial judge added that he was not satisfied that there was any evidence to establish that either the accused (or his co-accused) was the driver of the stolen vehicle. However, he was satisfied that they were occupants of the vehicle, knowing that the vehicle was stolen. He therefore found the accused guilty of the three offences above recited.

[13] At a later sentencing hearing, the judge imposed a period of probation for nine months, including the following conditions:

(a) Reporting requirement;

(b) Attend school;

(c) Be subject to curfew between 10:00 p.m. and 6:00 a.m.;

(d) No contact clause with his co-accused or a third individual or to associate with anyone with a criminal or youth record;

(e) To attend for assessment and counselling as required.

[14] Although the Notice of Appeal refers to an appeal against both conviction and sentence, no submissions have been made on the sentencing aspect, the sentence having been served. Rather, all the submissions made pertain to the appeal from conviction and impugn the inferences drawn by the trial judge and his application of the law of possession of the vehicle, where it is argued that the requisite element of some measure of control in order to constitute possession under s.4(3) of the Code has not been established.

[15] The powers of an appellate court on findings of guilt are set out in s.686(1)(a) of the Criminal Code. It provides that an appellate court may allow an appeal against conviction where:

(i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence;

(ii) the judgment of the trial court should be set aside on the ground of a wrong

decision on a question of law, or

(iii) on any ground that there was a miscarriage of justice.

[16] The seminal case on the standard of review to be applied on a summary conviction appeal in this province is *R. v. Nickerson* [1999] N.S.J. No. 210 where Justice Cromwell stated (at para. 6):

> The scope of review of the trial court's findings of fact by the Summary Conviction Appeal Court is the same as on appeal against conviction to the Court of Appeal in indictable offences: see sections 822(1) and 686(1)(a)(i) and R. v. Gillis (1981), 60 C.C.C. (2d) 169 (N.S.S.C.A.D.) per Jones, J.A. at p. 176. Absent an error of law or a miscarriage of justice, the test to be applied by the Summary Conviction Appeal Court is whether the findings of the trial judge are unreasonable or cannot be supported by the evidence. As stated by the Supreme Court of Canada in R. v. Burns, [1994] 1 S.C.R. 656 at 657, the appeal court is entitled to review the evidence at trial, re-examine and reweigh it, but only for the purpose of determining whether it is reasonably capable of supporting the trial judge's conclusions. If it is, the Summary Conviction Appeal Court is not entitled to substitute its view of the evidence for that of the trial judge. In short, a summary conviction appeal on the record is an appeal; it is neither a simple review to determine whether there was some evidence to support the trial judge's conclusions nor a new trial on the transcript.

[17] This passage has been affirmed by the Court of Appeal on a number of occasions, most recently in *R.v. E.(C.)*, 2009 NSCA 79.

[18] Depending on its quality, circumstantial evidence can be just as persuasive as direct evidence. However, as the trial judge recognized, before basing a verdict of guilty on circumstantial evidence, the court must be satisfied beyond a reasonable doubt that the guilt of the accused is the only reasonable inference to be drawn from the proven facts. Judge Campbell expressly drew that inference here in convicting the accused.

[19] In applying the above recited test from *R. v. Nickerson*, this court is entitled to review the evidence at trial, re-examine and reweigh it, but only for the purpose of determining whether it is reasonably capable of supporting the trial judge's conclusions. If it is, this court is not entitled to substitute its view of the evidence for that of the trial judge.

[20] I have done that review here and conclude that the trial judge's findings of fact, based as they are on inferences drawn from the uncontradicted circumstantial evidence before him, are not unreasonable and that they are indeed supportable by that evidence. I find no error on the part of the trial judge in finding that the accused was one of the occupants of the stolen motor vehicle.

[21] That was really the only issue argued before the trial judge. What is now raised on this appeal is the further argument that the trial judge erred in law in his application and interpretation of the law of possession. Not having been raised before the trial judge, his oral decision is silent on the elements of possession of a stolen vehicle.

[22] Possession is a defined term under s.4(3) of the Criminal Code. Subsection (b) provides that "where one of two 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".

[23] The appellant relies on the Supreme Court of Canada decision in *R. v.*

Terrance (1980) 55 CCC (2d) 183 for the proposition that a passenger in a stolen car ordinarily will not be guilty of the offence of possession of it by virtue of s.4(3), even if there is knowledge and consent, without some measure of control. In that case, there was no evidence that the accused was a party to the offence committed by the driver within the meaning of s.21 of the Code and his culpability therefore depended on the provisions of s.4(3). The Supreme Court ruled that a constituent and essential element of possession under [s.4(3)] of the Criminal Code is a measure of control on the part of the person deemed to be in possession by that provision. That element, argues the appellant, has not been proven in this case.

[24] It should be noted, however, that in *Terrance*, no evidentiary justification was found to support the conclusion that the accused knew the vehicle to be stolen where he had testified with an explanation to the contrary.

[25] Crown counsel acknowledges this jurisprudence but argues that it does not necessarily follow that the trial judge erred in making his finding of possession of the stolen vehicle against the accused.

[26] The Crown relies on the more recent decision of the British Columbia Court of Appeal in *R. v. Barnhardt* [2001] B.C.J. No. 446, a case in which s.21(1)(c) of the Code was relied on in upholding a possession of stolen property conviction for an occupant of a stolen vehicle. That section provides that everyone is a party to an

offence who abets any person in committing it.

[27] The majority of the Court of Appeal concluded that s.21(1)(c) does provide a basis upon which a conviction for possession of stolen property can be supported.

[28] In that case, the Court found there was ample evidence to support the finding that the accused and his co-accused were the occupants of the stolen vehicle, and that they knew it was stolen. The majority of the Court of Appeal reasoned as follows (at para. 81):

> As the sole occupants of the vehicle, it is evident that either the appellant or Eck was driving prior to abandonment, and therefore had the control necessary to find possession. If the appellant was the driver, he was the principal offender and the application of s. 21 need not be considered. If Eck was the driver, however, and the appellant the passenger, s-s. 21(1)(c) does apply. The only reasonable inference open to the trier of fact in the circumstances described is that the appellant was a voluntary passenger in a vehicle he knew to be stolen, and that he thereby encouraged Eck in possessing the stolen property. I am unable to see any other reasonable inference on the evidence and the findings of fact.

[29] The Court therefore concluded that it was open to the trial judge to find that the accused committed the offence of possession of stolen property, being a party to that offence under the provisions of s. 21.

[30] In my view, that avenue of reasoning was also open to Judge Campbell to adopt in this case. Similarly, findings of fact were reasonably made that the accused was at least an occupant, if not the driver, of a stolen vehicle and that he knew it was stolen.

[31] The trial judge was therefore at liberty to have drawn the extended inference (had the issue been argued before him), not only that the accused was, at the very least, a voluntary passenger in a vehicle he knew to be stolen, but also that he thereby encouraged the driver in possessing the stolen property. That is a form of abetting and it was thereby open to the trial judge to have found that the accused committed the offence of possession of stolen property as a party to that offence under s. 21.

[32] In the final analysis, I find no error on the part of the trial judge in making the findings of fact that he did, and in being satisfied beyond a reasonable doubt that the guilt of the accused of the subject offences was the only reasonable inference to be drawn from the proven facts.

[33] This appeal is therefore dismissed.

J.