SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Bennett*, 2014 NSSC 104

Date: 20140317
Docket: Syd No.: 411700
Registry: Sydney

Between:

Her Majesty the Queen

v.

Robert Francis Bennett

Judge:	The Honourable Justice Frank C. Edwards
Heard:	March 11& 12, 2014, in Sydney, Nova Scotia
Oral Decision	March 17, 2014
Written Release of Oral Decision	March 21, 2014
Counsel:	Steve Melnick, for the Crown Robert Francis Bennett, Self-Represented Accused

By the Court: (Orally)

[1] The Accused is charged with 3 counts of possession of stolen property; kitchen cabinets; prescription Digoxin pills, and Royal Wentworth fine china, the property of one Jim Fennessey (Fennessey).

I. Background:

[2] Fennessey is the owner of a cottage located in Framboise, N.S. He lives in Wisconsin, USA, but, between April and September of each year, stays at his Framboise cottage. He has a neighbour who checks on the cottage during the winter months. The neighbour advised Fennessey by phone of a break-in and theft in late February, 2012.

[3] Between January and March, 2012, someone broke into Fennessey's cottage and stole a number of items. As a result of information obtained from a confidential source on February 29, 2012, police, on March 4, 2012, recovered some of the stolen items at a property on Meadows Road.

[4] On March 8, 2012, Constable Alan Shaw (Shaw) spoke by telephone with Fennessey. Fennessey advised that he was still missing cupboards and china.

Fennessey forwarded pictures to Shaw. Shaw showed the pictures to an informant who advised that the items were in the Accused's home.

[5] Shaw obtained a search warrant to search the Accused's home on March 14, 2012. At approximately 8:25 p.m. on that date, Shaw arrested the Accused outside a residence on Brookside St., Glace Bay. Police took the Accused to the local police station, while Shaw and some other officers went to the Accused's residence on Crescent Street, also in Glace Bay. The Accused had given them his house keys. Inside the Accused's home, police located eleven pieces of disassembled cupboards in various rooms. They also located Royal Wentworth china (in a cardboard box) and a pill bottle (on the floor) containing Digoxin pills. The prescription printout on the pill bottle had Fennessey's name on it. By means of photos supplied by Fennessey, police concluded that the cupboards appeared to be Fennessey's.

[6] At the police station, the Accused spoke by telephone with a lawyer and then agreed to give a statement to police. In the statement the Accused described how he had purchased the cupboards and gotten them to his home. The Accused denied knowing the cupboards were stolen. He said the cupboards needed a lot of work

and that he would not have paid $900.00 for them if he had known they were stolen.

[7] The statement concluded at 12:19 a.m., March 15, 2012. Later that same day, police swore an Information charging the Accused with the offences now set out in the Indictment. The trial proceeded before me without a jury on March 11 and 12, 2014. The Accused represented himself.

II. Evidence of James Fennessey:

[8] Fennessey testified by video link from Wisconsin. He is a retired chemistry professor.

[9] **Cabinets:** Fennessey stated that in 2007 he had purchased the cabinets from Home Depot. He then proceeded to have them installed in his cottage. (Ex. 2 Tab 1 are photos of the cupboards after initial installation). The cabinets plus installation cost approximately $6000.00.

[10] Later in 2012, police returned the cupboards seized from the Accused's residence to Fennessey. Fennessey testified that he had the cabinets re-installed in his cottage and "they fit precisely." Ex. 2 Tab 3 Photo #4 shows a partially re-installed cabinet to the left of the kitchen stove. Fennessey pointed out how it fit in

the cut-away slate flooring. Fennessey also described how the upper cabinets fit exactly between two structural supports. And he described a stain in the corner cabinet which he had caused some years previously. The stain was still there. Fennessey had no doubt but that the cabinets he got from the police were his cabinets.

[11] **Pills:** Fennessey stated that he had gotten the Digoxin pills for his dog "to slow her heart down." As noted, his name was on the bottle, which had been left in the cottage. The prescription was dated April 21, 2010. The dog's name "Maude" was also on the label.

[12] **China:** Ex. 2 Tab 2 photo #26 is a photo of the bottom of one of the recovered china pieces. It shows the number 8692, which apparently is the manufacturer's number for that particular pattern. Fennessey recounted how when he left the property in the fall of 2011, he took a few pieces of the china home with him. When police contacted him in March 2012, Fennessey read them the number 8692 from one of the retained china pieces. He said the china had been a wedding gift received over 40 years earlier.

III. Defence Evidence:

[13] The Accused says he goes to Halifax frequently for doctor's appointments – his family physician is in Dartmouth, his dermatologist in Halifax. Frequently he takes a friend with him.

[14] Corey O'Neil testified that he remembers in 2012-13 going to Halifax with the Accused. O'Neil remembers stopping at Chapel Island on the way home to play machines. He says that the Accused saw an advertisement on a bulletin board, the Accused made a call – went outside and came back in. The Accused told him he was going to buy cabinets and the guy was going to deliver them.

[15] The Accused says he and O'Neil stopped at Chapel Island where he saw a notice – household items for sale – cupboards, dishes, vacuum cleaner, "toys & stuff" – phone number only – no name. The Accused says he could have gotten the phone number off his phone but police had seized it in connection with another matter. The Accused says he had gotten a $20,000.00 grant to renovate his home He was going to make a basement apartment to rent to a student – he needed cupboards.

[16] The Accused was driving a 2008 Chev Impala – as a result of being told the seller lived in a remote area the Accused did not go to see the cabinets. Instead he

says the seller and his son brought two pieces of cabinets for him to see – they made a deal – the Seller would deliver in a few days - $900.00 for cabinets; $100.00 for vacuum cleaner and dishes, and $100.00 for delivery.

[17] The next day, the Accused says he went to the cash store to borrow the money. Two to three days later, after 9:00 p.m., the seller arrived with the cabinets, dishes and vacuum cleaner. The Accused paid him $1100.00 and got a receipt (Ex. D4) for $900.00 for the cupboards. He says he needed the receipt in order to be reimbursed by the grant. The receipt is undated, states: "$900.00 for cupboards," and contains an indistinct signature.

[18] In cross-examination the Accused says he could not submit the receipt because he later learned the grant would not cover the cupboards. The Accused was confronted by what he had said at page 8 of his statement:

> A: The only way I can tell you how I bought them is I borrowed the money from the Cash Store I guess three weeks cause I got the grant, not it would be longer than that. I was coming down from Halifax my last doctor's appointment and I stopped and I played the machines in Chapel Island and there was a think on the bulletin board ah cupboards for sale and I took the thing and I called the man and he was native and I met him up there just past Chapel Island him and another fellow and **they put them in my truck and I came home with them** and I paid them.
>
> Q: **Ok. How did, how did you get them home?**
>
> A: **In the truck**.
>
> Q. In the back of the truck just the box?
>
> A: Yeah in the back of the truck yeah there's not that many cupboards there.

Q: $900.00 dollars?

A: Um hum and I borrowed the money from the Insta-Loan on Welton Street. He wanted money for them he wanted more money and I told him I had to pay for a truck to go get them and then he took off $200.00 bucks for them.

Q: Did you get a receipt?

A: Yeah I do have a receipt home.

Q: You do have a receipt for the cupboards?

A: Yes I do.

Q: Ok. Do you know the guy's name that you bought them off of?

A: No not really its on the receipt. (**Emphasis added**)

IV. Issues:

(a) Identification of the cabinets, china and pills;

(b) Whether guilty knowledge of the Accused could be inferred;

(c) Whether the doctrine of wilful blindness is engaged.

V. Analysis:

[19] **Issue (a): Identification of the cabinets, china and pills:** I will be brief. There is no question but that all three items were stolen from Fennessey's cottage sometime between January and March 1, 2012. Fennessey's evidence is absolutely conclusive on the identification issue.

[20] **Issue (b): Whether guilty knowledge of the Accused can be inferred:** The Accused has denied having any knowledge, or even a suspicion, that the goods were stolen. As he pointed out, the cupboards were in rough shape, needed work

and lacked a countertop. "I wouldn't have paid $900.00 for them if I thought they were stolen." Police evidence confirmed that the cupboards were in poor condition. The Crown presented no direct evidence to contradict the Accused's stated lack of guilty knowledge.

[21] **"Doctrine of Recent Possession:** The Crown must therefore rely on the so-called "doctrine of recent possession" to prove the Accused's guilt. The relevant elements of that "doctrine" are set out in ***R. v. Kowlyk*** [1988] 2 S.C.R. 59; 43 C.C.C. (3) 1.

[22] In ***R. v. Wiseman*** (1989), 52 C.C.C. (3) 160, our Court of Appeal rejected the use of the word "doctrine" and stated that what is really involved is an inference of unexplained possession of recently stolen goods. In any event, the elements at play in this case are as follows:

> 1. No adverse inference may be drawn against an accused from the fact of possession alone unless it were recent: ***R. v. Graham***, [1974] S.C.R. 59, 7 C.C.C. (2d) 93 (7:0);
>
> 2. **If a pre-trial explanation of such possession were given by the accused, and if it possessed** that degree of contemporaneity with the possession making evidence of it admissible, **no adverse inference could be drawn on the basis of recent possession alone if the explanation were one which could reasonably be true; *R. v. Graham,*** *supra;*
>
> 3. In the absence of such explanation, recent possession alone is quite sufficient to raise a factual inference of theft;

> 5. **Where an explanation which could reasonably be true is given for the possession, then no inference of guilt on the basis of recent possession alone may be drawn, even if the trier of fact is not satisfied as to the truth of the explanation** and thus, to obtain a conviction in the face of such an explanation, it must establish by other evidence the guilt of the accused beyond a reasonable doubt;
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> 7. Upon proof of the unexplained possession of recently stolen goods, the trier of fact may – but not must – draw an inference of guilt of theft or of offences incidental thereto; **(Emphasis added)**

[23] **Recent:** In ***R. v. Saieva***, [1982] 1 S.C.R. 897, 68 C.C.C. (2d) 97 (7:0), the court in considering whether possession was sufficiently **"**recent**"** to entitle reliance on the doctrine of recent possession approved the statement in ***R. v. Killam*** (1973), 12 C.C.C. (2d) 114, [1973] 5 W.W.R. 3 (B.C.C.A.), that the criteria to be used are the nature of the object "its rareness, the readiness in which it can, and is likely to, pass from hand to hand, the ease of its identification and the likelihood of transferability. Also in ***Killam*** the court stated at p. 121:

> **The expression "recent possession" is pliable. In one case it might be held to be recent possession if the article were found in the possession of the accused within a month of the theft, and in another case 12 months after**.
>
> …recent possession in cases of this class depends upon the nature of the goods, ie., whether they are likely to pass rapidly from hand to hand. **(Emphasis added)**

[24] As noted, I am satisfied that the items in question were stolen sometime between January 2012 and March 1, 2012. There had been a previous break-in in January 2012 and the cabinets and dishes were still in the cottage afterward. Given

the bulk of the cupboards, they were not likely to pass rapidly from hand to hand. They were found in the Accused's possession on March 14, 2012. I have no difficulty in determining that the Accused was found in possession of recently stolen goods.

[25] **Explanation:** the pivotal question regarding application of the doctrine of recent possession is whether the Accused's explanation could reasonably be true. Here, it might be argued that the Accused gave two explanations: one in his statement the night of his arrest, and the second on the witness stand. In ***R.*** *v.* ***Graham, supra*** and also in ***R.*** *v.* ***Ungaro*** [1950] S.C.R. 430, 96 C.C.C. 245, it was pointed out that where the Accused gives a statement to the police, but also testifies, it is the explanation under oath which, if reasonably true, negatives the inference of guilty knowledge.

[26] In his statement, the Accused appears to say that he hired a truck, and went to get the cupboards himself. If I look at the statement explanation in isolation I find that it could reasonably be true. It certainly warranted further inquiry. In his sworn evidence, the Accused says that the seller delivered the cupboards and the dishes (and a vacuum cleaner). The Accused says the seller charged him $100.00 for delivery.

[27] By the time the Accused testified, he knew that he needed an explanation that covered not only the cabinets but also the dishes and the pill bottle. On the night he gave the statement, the police did not ask the Accused about the dishes, and he made no reference to them. At the time of the statement, he told police he paid $900.00 for the cabinets, period.

[28] On the witness stand, the Accused said that he paid $900.00 for the cabinets, $100.00 for the dishes and vacuum cleaner and $100.00 for delivery. In particular, the evidence about the delivery is completely inconsistent with what he said in his statement. The Accused was unable to explain that inconsistency. He said he did not know why he had said in the statement that he had trucked the cupboards himself. He says he was heavily medicated when he gave the statement. An overall reading of the statement however, reveals that it was the product of an alert and conscious mind.

[29] In the result, neither the statement explanation, nor that given on the witness stand, can be viewed in isolation. One taints the other. I believe neither. The sworn explanation appears to have been crafted to meet the needs of the Defence evidence.

[30] The difficulty in resolving this case might have been avoided. On the night of his arrest, the Accused gave the police an explanation for his possession of stolen goods. Moreover, the Accused told the police that he had a receipt for the purchase at home. For reasons I do not understand, the police did not go to get the receipt nor did they request the Accused to bring it in.

[31] Instead, the police laid charges later the same day. That course of action would only have been justified if the Accused had given no explanation for his possession of the stolen property. Once he gave an explanation, whether they believed it or not, police should then have recognized that they required evidence that the Accused knew the property was stolen or, evidence from which his guilty knowledge could be inferred. At that point, his possession alone was not enough to sustain a prosecution.

[32] In argument, Crown Counsel suggested that the Accused could have brought the receipt in to police instead of bringing it forward at trial. Why would he? He had told police he had a receipt. Obviously, they were not interested in seeing it because they immediately laid charges.

[33] If police had done a proper follow-up, they might have been able to show that the Accused's explanation was false. The receipt, dubious though it is, stands

unchallenged. The Accused's evidence (also in the statement) about getting the loan to pay for the cupboards is uncontradicted. With luck, police may have been able to refute the Accused's evidence that the seller's number is on his telephone.

[34] It is unfortunate that some fine police work in locating and recovering the stolen property is undone. As noted, I do not believe the Accused's explanation. I have serious doubts about the authenticity of the receipt, it looks like it was made to order for the defence. As I also noted, the Accused's evidence about the seller's phone numbers being on his telephone (seized by police) is uncontradicted. His evidence about getting the loan to make the purchase is uncontradicted. Corey O'Neil's evidence is suspicious and vague but uncontradicted. Whether the Accused tried to submit the receipt for reimbursement by a grant – also uncontradicted. The presence of the pill bottle would be meaningless to the Accused unless there was evidence that he knew of a theft of Fennessey's property. There is none. For these reasons, despite my disbelief, the Accused's explanation at trial could reasonably be true.

[35] I am therefore unable to draw an inference of guilt on the basis of recent possession alone. There is no other evidence to prove that the Accused had guilty knowledge.

[36] **Issue (c) Wilful Blindness:** I am unable to say that the Accused was wilfully blind to the fact that the items might have been stolen. To engage the doctrine of wilful blindness, there must be a real suspicion in the mind of the Accused that is ignored [***R. v. Legace*** (2003), 181 C.C.C. (3d) 12 (Ont. C.A.)]. As the Accused testified, the cupboards were in a state of disrepair. The $900.00 price would seem reasonable and would not necessarily arouse suspicion. Similarly, the Accused does not possess the degree of sophistication from which I could infer a recognition that the "dishes" were in fact fine china. There was no evidence presented on the value of the china.

[37] Finally, as noted, the dated prescription pill bottle of canine medication would be meaningless to the Accused absent evidence of his knowledge of a theft from Fennessey.

[38] When, as here, the Accused calls evidence, I am obliged to apply the principles laid down in ***R***. *v.* ***W.D.*** [1991] 1 S.C.R. 742**.** Accordingly**,** although I do not believe the Accused, his evidence does raise a reasonable doubt.

[39] I therefore find the Accused not guilty on all counts in the Indictment.

Edwards, J.