

Date: 20130325
Docket: 12/57
Citation: *R. v. Pitcher*, 2013 NLCA 22

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

BETWEEN:

ROBERT JAMES PITCHER

APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

Coram: Welsh, Harrington and Hoegg JJ.A.

Court Appealed From: Provincial Court of Newfoundland and Labrador
Grand Bank

Appeal Heard: February 26, 2013

Judgment Rendered: March 25, 2013

Reasons for Judgment by Welsh J.A.

Concurring Reasons by Hoegg J.A.

Concurred in by Harrington J.A.

Counsel for the Appellant: Stephen Orr

Counsel for the Respondent: Robin Fowler

Welsh J.A.:

[1] Robert Pitcher was convicted of one count each of break, enter and theft, possession of break-in tools, breach of a recognizance and breach of probation. In appealing these convictions he submits that the trial judge erred in his application of the principles of law in respect of circumstantial evidence, mere presence at the scene, and recent possession.

BACKGROUND

[2] The offence relates to the theft of an automated teller machine (“ATM”) from the Lions Club located in Arnold’s Cove. There were no witnesses to the theft. As a result, the case against Mr. Pitcher is entirely circumstantial. In assessing the appeal, it is necessary, then, to review the facts in some detail.

[3] On May 8, 2012, the police were conducting a surveillance involving Mr. Pitcher. At about 11:39 p.m., he was seen in a red Dodge pickup truck along with two other men. The truck left a gas station in Kilbride, heading east. The truck proceeded under the overpass, stopped and made an illegal left turn to go up the ramp and head west toward Arnold’s Cove. At the Arnold’s Cove overpass, the truck went up the off ramp and stopped. The surveillance team considered this type of abrupt manoeuvre to be an attempt to detect or thwart surveillance. In his oral decision, the trial judge described the events that followed:

8. Rather than follow the [truck] up the ramp, (and reveal the surveillance effort), two of the surveillance vehicles went on under the overpass, and some distance up the [highway], while the following vehicles, having been advised of the [manoeuvre], held back and waited to see what would happen next.

9. At approximately 12:55 a.m., the [truck] went into the town of Arnold’s Cove. Having waited a short while, one of the surveillance units went into Arnold’s Cove to see what had become of the [truck]. As it did, it met the suspect vehicle coming out of Arnold’s Cove. This was around 1:11 a.m., according to Cst. Layden. The accused was seen in the cab of the truck, but, being in a car which was lower than the body of the [truck], Cst. Layden was unable to see what, if anything, was in the bed of the truck.

[4] The trial judge accepted evidence that the truck was traveling at a high rate of speed when seen by the police after it left Arnold’s Cove. Prior to returning to the highway the truck made another abrupt stop, seen by the

police to be another manoeuver to detect or thwart surveillance. The truck then headed east on the highway. The trial judge continued:

11. The suspect vehicle next turned down the road to Southern Harbour. However, it did not go all the way down the road into the community. Instead, it was subsequently seen through the woods in a gravel pit. Constable Carter took up a position to watch it, and, after the [truck] left the area, he went down to where the vehicle had been seen in the gravel pit. There, at around 1:30 a.m., he found an automated teller machine (ATM). The ATM had been damaged, and forced open. It was subsequently determined that this ATM belonged to the Arnold's Cove Lions Club.

12. When the [truck] got back to the [highway], it headed east again. The surveillance team continued to follow the vehicle, which then turned to go down into the community of Chance Cove.

13. At Chance Cove, the [truck] was seen parked next to an outdoor ATM, but it left the area as one of the undercover surveillance vehicles approached. A few minutes later, at 1:50 a.m. the [truck] was stopped by Cst. Bourden, a member of the Clarendville detachment of the RCMP.

14. Throughout all of the surveillance in Arnold's Cove, Southern Harbour, and Chance Cove, the police witnesses said that there were absolutely no other vehicles on the move in those communities while the police and the [truck] were moving through them. As will be seen, this is an important consideration in terms of circumstantial evidence and the temporal proximity of the accused to the scene of the break and entry, as well as to the ATM dump site in the Southern Harbour gravel pit.

15 ... Before the [truck] was impounded [and removed on a flatbed recovery vehicle], however, at around 2:00 a.m., Cst. Bourden took photographs of the vehicle, and seized various items which appear to have once formed part of the Arnold's Cove ATM.

16. The five photographs of the vehicle are blurry, and not particularly clear. However, they are clear enough to corroborate Cst. Bourden's evidence that the back of the [truck] was full of clutter and debris, including old Pepsi cans, and other assorted pieces of metal. Also found in the back of the truck, and recorded there at around 2:00 a.m., were an iron crow bar, and a red and white plastic sign, bearing the letters "ATM".

17. After the [truck] had been secured on the flatbed recovery vehicle, the tow truck was directed to Southern Harbour to recover the ATM which Cst. Carter had found in the gravel pit.

18. In the photographs taken at the gravel pit in Southern Harbour, and marked by Cst. Crummey as GC 1-10, it is clear that the ATM had been damaged, including having had the illuminated light beaten off the top. Also found near the ATM in the gravel pit area, in addition to some Pepsi cans, was a plastic red and white sign marked "ATM". That ATM sign is shown in photo GC 8, and appears to be identical to the ATM sign found in the back of the [truck] when it was stopped just before two o'clock in Chance Cove.

[5] Later that morning, on May 9, 2012, Mr. Lockyer, chair of the Arnold's Cove Lions Club bar committee (the "manager"), confirmed that the Club had been broken into after he left the premises at 9:30 p.m. the evening before. He provided a photograph of the ATM machine that was missing. The adjacent Pepsi machine had been forced open. Regarding the photographs of the ATM, the trial judge found:

22. It is clear from the photograph provided by Mr. Lockyer that when in operating condition, the ATM in the Lions Club had been equipped with a white plastic illuminated sign on top, with red letters marking it as an ATM. While Mr. Lockyer opined that the ATM sign was one-sided only, that evidence is not supported by the photograph. Instead, it is clear that the illuminated sign was made up of the two white signs with red lettering, one having been found in the [truck] at 2:00 a.m. by Cst. Bourden, and the other having been found in the Southern Harbour gravel pit at 4:00 a.m. by Cst. Crummey. ...

[6] At trial, Mr. Pitcher insisted that the ATM sign found in the bed of the truck ended up there when the ATM was moved into the truck by the police. The Crown submitted that the sign fell off the ATM and into the bed of the truck when it was being transported by the three accused. The trial judge concluded:

28. Taken in isolation, both positions might have been plausible. However, the law does not operate in a vacuum. Instead, the evidence must be considered in what has already been called temporal proximity. ...

...

35. The proximity of the [truck] to the ATM in the Southern Harbour gravel pit is more than a coincidence. While it is possible that the broken plastic piece subsequently found in the bed of the pickup might have come off the ATM after Cst. Crummey had put it there, (itself a matter of conjecture), there is no doubt that the other half of the white and red ATM sign was photographed in the bed of the truck at 2:00 a.m., while the truck was still in Chance Cove, and before Cst. Crummey put the ATM in the bed of the truck.

[7] After discussing the law regarding circumstantial evidence and the doctrine of recent possession, the trial judge concluded:

[44] ... In the circumstances of this case, there is no doubt that the accused had possession of the ATM, and in fact transported it from the Arnold's Cove Lions Club to the gravel pit in Southern Harbour, where it was forced open. It is the possession of the ATM which invites the inference that the accused committed the break, enter and theft in and from the Arnold's Cove Lions Club.

[45] The photographs taken in Chance Cove at 2:00 a.m. clearly show half of the red lettered white illuminated ATM sign in the back of the [truck]. The photographs also show a crowbar, consistent with the tool(s) used to pry open the fire exit door of the Arnold's Cove Lions Club. The accused must therefore be convicted of possession of break-in instruments.

[8] In the result, the trial judge convicted Mr. Pitcher of break, enter and theft, possession of break-in tools, breach of recognizance and breach of probation.

ISSUES

[9] At issue in this appeal is whether the trial judge erred in his application of the principles of law in respect of circumstantial evidence, mere presence at the scene of a crime, and the doctrine of recent possession.

ANALYSIS

[10] In appealing the conviction for break and entry of the Arnold's Cove Lions Club and theft of the ATM, Mr. Pitcher submits that the circumstantial evidence was insufficient to prove the offence beyond a reasonable doubt because the ATM could have been stolen by someone else between 9:30 p.m. when the Club was closed and 1:30 a.m. when the police found the ATM by the gravel pit. I note here that the photographs show that the ATM was found beside the road just before, rather than actually in, the gravel pit. Further, Mr. Pitcher submits that his mere presence in the truck and the mere presence of the crowbar in the truck bed cannot be used to ground the convictions.

The Law

[11] Theft is defined in section 322 of the *Criminal Code*:

(1) Every one commits theft who fraudulently and without color of right takes, or fraudulently and without color or right converts to his use or to the use of another person, anything, whether animate or inanimate, with intent,

(a) to deprive, temporarily or absolutely, the owner of it, or a person who has a special property or interest in it, of the thing or of his property or interest in it;

...

(2) A person commits theft when, with intent to steal anything, he moves it or causes it to move or to be moved, or begins to cause it to become movable.

...

[12] The test to be applied in determining whether an accused may be convicted on the basis of circumstantial evidence is set out in *R. v. Griffin*, 2009 SCC 28, [2009] 2 S.C.R. 42:

[33] ... The essential component of an instruction on circumstantial evidence is 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. ...

[13] Because there were three men in the truck, Mr. Pitcher also relies on the principle regarding presence at the scene of a crime as referenced in *R. v. Jackson*, 2007 SCC 52, [2007] 3 S.C.R. 514:

[3] The appellant relies for the success of his appeal on the proposition that mere presence at the scene of a crime does not prove culpable participation in its commission. That proposition is entirely sound. As we shall see, however, it is of little assistance to the appellant, whose conviction does not rest on his *mere presence* at the scene of the crime. It rests, rather, on the cumulative effect of his apprehension at the scene, the rejection of his explanation for being there, the particular nature of the offence, the context in which it was committed, and other circumstantial evidence of his guilt. ...

(Italics in original.)

I would note here that the need for an accused to provide an explanation is not a matter of the accused bearing an onus of proof, but of refuting evidence that would otherwise establish guilt.

[14] Mr. Pitcher also raises the evidentiary rule of recent possession which is discussed in *R. v. Newton*, [1977] 1 S.C.R. 399, at page 405:

... The rule has been variously stated in different cases, but in my view the essence of the matter is that in a case such as the present one where it has been established that the accused was in possession of recently stolen goods and where no explanation whatever has been advanced, the jury should be instructed that the evidence of such possession standing alone raises a *prima facie* case upon which they are entitled to bring in a verdict of guilty.

[15] Subsequently, following a comprehensive discussion of judicial authority, the rule was summarized by McIntyre J., for the majority, in *R. v. Kowlyk*, [1988] 2 S.C.R. 59, at pages 74 to 75:

In summary, then, it is my view, based on the cases, both English and Canadian, which I have referred to, that what has been called the doctrine of recent possession may be succinctly stated in the following terms. Upon proof of the unexplained possession of recently stolen property, the trier of fact may – but not must – draw an inference of guilt of theft or of offences incidental thereto. Where the circumstances are such that a question could arise as to whether the accused was a thief or merely a possessor, it will be for the trier of fact upon a consideration of all the circumstances to decide which, if either, inference should be drawn. In all recent possession cases the inference of guilt is permissive, not mandatory, and when an explanation is offered which might reasonably be true, even though the trier of fact is not satisfied of its truth, the doctrine will not apply.

[16] As to offences incidental to the unexplained possession of recently stolen goods, McIntyre J. wrote, at page 72:

The question which arises here is whether the unexplained recent possession of stolen goods, standing alone, will also warrant an inference of guilt of breaking and entering and theft of the goods under s. 306(1)(b) of the *Criminal Code*. It is my view that this question must be answered in favour of the Crown.

...

Application of the Law

[17] Mr. Pitcher submits that someone else stole the ATM after the Lions Club closed at 9:30 p.m. and before the police found the ATM near the gravel pit about four hours later. In view of the circumstantial evidence against Mr. Pitcher, that submission must be rejected as fanciful.

[18] The following facts, as found by the trial judge, lead inexorably to the conclusion that the Crown established beyond a reasonable doubt that Mr. Pitcher, along with others, broke into and entered the Arnold's Cove Lions Club and, without color of right, took the ATM with intent to deprive the

owner of it. Mr. Pitcher's guilt is the only rational inference that can be drawn from the circumstantial evidence.

- Mr. Pitcher was in the truck with two other individuals. The stolen ATM was an item of such a size and weight that it would require at least two individuals to remove it from the premises and place it in the bed of a truck. In the absence of any explanation by Mr. Pitcher, the inference could properly be drawn that the three men in the truck were acting in concert. Mr. Pitcher was not convicted on the basis of his mere presence in the truck. Like the situation in *Jackson*, his conviction rests on the cumulative effect of the circumstantial evidence.
- The truck engaged twice in manoeuvres indicative of an attempt to detect or thwart surveillance by the police.
- The truck proceeded to Arnold's Cove and was observed a few minutes later leaving the community at a high rate of speed.
- The truck was then seen proceeding down the road to Southern Harbour. However, it did not go down into the community. It was seen soon after heading back up the road to the highway. In the meantime, through the woods, a police officer observed the lights of a vehicle stopped near a gravel pit located along the road to Southern Harbour. When the vehicle left, the police officer investigated the area and located an ATM dumped by the side of the road near the gravel pit. The ATM had been damaged and forced open.
- There was no other traffic in the area during the time of the surveillance.
- The ATM was identified by the manager of the Arnold's Cove Lions Club to be the ATM that had been stolen sometime after 9:30 p.m. when he closed the Club the night before.
- An ATM sign of the type attached to the Arnold's Cove Lions Club ATM appears in photographs taken of the bed of the truck before the ATM was loaded. The trial judge found that this sign was from the stolen ATM.
- The break and entry and theft of the ATM occurred late at night within a window of opportunity of less than four hours.

[19] The weight of all the circumstantial evidence, where there was no reasonable explanation offered, leads to the conclusion that the trial judge did not err in determining that the only rational inference that could be drawn from the evidence is that Mr. Pitcher was guilty of the break and entry of the Lions Club and theft of the ATM.

[20] The trial judge also relied on the doctrine of recent possession in concluding, based on the circumstantial evidence, that Mr. Pitcher had possession of the ATM and that that possession “invites the inference that the accused committed the break, enter and theft in and from the Arnold’s Cove Lions Club” (paragraph 44). In my view, the doctrine of recent possession is not engaged in the circumstances of this case.

[21] Theft, of course, involves a component of possession because, when a person takes something, he has possession of it, at least for some period of time. Logically, possession is inherent in the “taking” aspect of the offence of theft. In some cases, a finding that an individual is in possession of property may provide a link which leads to an inference of guilt on a charge of break, enter and theft. For example, in *Kowlyk*, the police, upon searching a residence, found items that had recently been stolen. In that case, the doctrine of recent possession was useful in prosecuting the charge of theft.

[22] However, in this case, Mr. Pitcher was never actually seen or found in possession of the ATM. The possession involved in this case is that which is inherent in the taking of the item. The circumstantial evidence here, particularly the effect of the surveillance activities by the police, leads inexorably to only one rational inference; that is, that Mr. Pitcher broke into the Lions Club and “took” the ATM intending to deprive the rightful owner of that property. This is sufficient, without reference to recent possession, to establish the offence.

[23] Finally, the rationale underlying the conviction for break and entry of the Lions Club and theft of the ATM applies equally to the conviction for possession of break-in tools. A crowbar was photographed in the bed of the truck. The trial judge relied on that evidence in determining that use of a crowbar was consistent with the kind of tool that was used to pry open the fire exit door of the Arnold’s Cove Lions Club. In the absence of a reasonable explanation by Mr. Pitcher that, while he was present in the truck, he was not acting in concert with the other two, there is no basis on

which to conclude that the trial judge erred in convicting Mr. Pitcher of possession of break-in tools.

SUMMARY AND DISPOSITION

[24] The trial judge did not err in concluding that the only rational inference to draw from the circumstantial evidence is that Mr. Pitcher was guilty of break and entry, theft, and possession of break-in tools as well as the related offences of breach of a recognizance and breach of probation.

[25] Accordingly, I would dismiss the appeal.

B. G. Welsh J.A.

Concurring Reasons by Hoegg J.A.

[26] I agree with my colleague Welsh J.A. in the disposition of this appeal, and with her judgment save and except her comments in paragraphs 20 to 22 that it is not necessary to engage the doctrine of recent possession to uphold the trial judge's conviction of Mr. Pitcher for breaking into and entering the Lions Club at Arnold's Cove and stealing its ATM machine.

[27] The trial evidence established that there was a break and entry into the Lions Club sometime between 9:30 p.m. on May 8, 2012 and 1:30 a.m. on May 9, 2012. There were no witnesses to the break and entry and no direct or physical evidence placing Mr. Pitcher in or near the Lions Club. The trial judge found that circumstantial evidence established that Mr. Pitcher (as well as two accomplices) had had possession of the stolen ATM machine by virtue of it being in a red Dodge pick up truck in which he was a passenger at around 1:00 a.m. on May 9, 2012 in a community near Arnold's Cove. The trial judge said, at paragraph 38 of his decision:

I am therefore satisfied, to the standard of proof beyond reasonable doubt, that the accused and his accomplices had possession of the ATM and break-in tools prior to dumping the ATM in the gravel pit at Southern Harbour.

[28] The trial judge convicted Mr. Pitcher of the underlying offence of break, entry and theft. To do so, he invoked the doctrine of recent possession, for the evidence at trial established Mr. Pitcher's possession of the ATM machine, and not that he broke into and entered the Lions Club. In convicting Mr. Pitcher, the trial judge said, at paragraph 44:

... In the circumstances of this case, there is no doubt that the accused had possession of the ATM, and in fact transported it from the Arnold's Cove Lions' Club to the gravel pit in Southern Harbour, where it was forced open. It is the possession of the ATM which invites the inference that the accused committed the break, enter, and theft in and from the Arnold's Cove Lions' Club.

[29] The doctrine of recent possession permits a conviction for break, entry and theft if it is established that the accused is in recent possession of the goods stolen in the break and entry. Recency is determined by the circumstances, including the amount of time between the commission of the break, entry and theft and the possession of the stolen goods. Of course it must be established that the goods in possession of an accused are the goods which were stolen in the break and entry. The doctrine is invoked when there is no explanation put forward to explain the accused's possession of the stolen property.

[30] The doctrine is explained in both *Newton* and *Kowlyk*, as noted by my colleague in her decision. In addition to the excerpts quoted, I would add the words of McIntyre J. at pages 71 to 72 of *Kowlyk*:

On the basis of the Canadian authorities referred to above, I am of the view that it is clearly established in Canadian law that the unexplained recent possession of stolen goods, standing alone, will permit the inference that the possessor stole the goods. The inference is not mandatory; it may but need not be drawn. Further, where an explanation is offered for such possession which could reasonably be true, no inference of guilt on the basis of recent possession alone may be drawn, even where the trier of fact is not satisfied of the truth of the explanation. The burden of proof of guilt remains upon the Crown, and 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.

[31] The Manitoba Court of Appeal discussed the application of the doctrine in *R. v. Gagnon*, 2006 MBCA 125, 208 Man. R. (2d) 213. At trial, Mr. Gagnon was found in possession of many items which had been stolen during eleven break and entries into dwelling houses and one robbery that had occurred at various times in the six weeks preceding the stolen goods being found. The goods were located in two places under the control of Mr.

Gagnon, who did not provide any explanation for possessing them. The trial judge relied on the doctrine of recent possession in convicting Mr. Gagnon of the underlying offences of break and entry and robbery. The Court of Appeal upheld the convictions of the underlying offences (save for two charges which were confused in the trial judge's decision) and explained that the trial judge had correctly stated and applied the doctrine and was entitled to infer Mr. Gagnon's guilt of the underlying offences. The Court noted that such inferences are questions of fact a trial judge draws, to which considerable deference is owed.

[32] The Nova Scotia Court of Appeal also discussed the doctrine in *R. v. Harris* (1995), 147 N.S.R. (2d) 77 (C.A.). At trial, the circumstantial evidence established Mr. Harris' possession of a vehicle stolen in a break and entry into a car dealership which occurred approximately one hour before. Upon receiving a report of the break and entry, the police located the stolen vehicle being driven, and apprehended it. When it stopped, two persons exited the vehicle and ran away. One of them fled into the snowy woods nearby. An hour or so later, Mr. Harris emerged wet from the woods. The police followed the tracks through the snow and across an ice-covered brook, which showed that the person making tracks had broken through the ice. The trial judge relied on the doctrine of recent possession in convicting Mr. Harris of breaking into and entering the car dealership and stealing the vehicle, finding that the evidence led to no other reasonable inference than his guilt. The Court of Appeal upheld the conviction on application of the doctrine, observing that the accused had chosen not to testify at his trial and offered no explanation for his possession of the stolen vehicle.

[33] In this case, the strong circumstantial evidence established that Mr. Pitcher was in possession of the very ATM that had been stolen from the Lions Club earlier that night. This was found as a fact by the trial judge (paragraphs 38 and 44). Mr. Pitcher did not testify. No explanation was advanced for his being in lawful possession of the ATM, or otherwise refuting the evidence of his possession of it.

[34] In my view, the trial judge properly and necessarily invoked the doctrine of recent possession to convict Mr. Pitcher of the underlying offence of break, entry and theft, a finding to which deference is owed by this Court. Without application of the doctrine, the evidence falls short of supporting the conviction for break, entry and theft, and I would be unable to uphold Mr. Pitcher's conviction.

[35] I concur with my colleague that Mr. Pitcher's appeal against conviction must be dismissed.

L. R. Hoegg J.A.

I concur with the reasons of Hoegg J.A.:

M. F. Harrington J.A.