C.A.C. No. 119488

NOVA SCOTIA COURT OF APPEAL

Cite as: R. v. Harris, 1995 NSCA 229
Clarke, C.J.N.S.; Hart and Bateman, JJ.A.

BETWEEN:

WILLIAM HARRIS	)	Maurice G. Smith, Q.C.
	)	for the Appellant
Appellant	)	
- and -	)	
	)	Denise C. Smith
	)	for the Respondent
HER MAJESTY THE QUEEN	)	
	)	
Respondent	)	Appeal Heard:
	)	November 24, 1995
	)	
	)	Judgment Delivered:
	)	November 24, 1995
	)	
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THE COURT: Appeal dismissed from conviction for break, enter and theft contrary to s. 348(1)(b), per oral reasons for judgment of Clarke, C.J.N.S.; Hart and Bateman, JJ.A. concurring.

C.A.C. No. 119488

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

WILLIAM HARRIS	)	
	)	
Appellant	)	
- and -	)	REASONS FOR JUDGMENT BY:
	)	
HER MAJESTY THE QUEEN	)	
	)	Clarke, C.J.N.S.
	)	(Orally)
Respondent	)	
	)	
	)	
	)	
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	)	
	)	

The reasons for judgment of the Court were delivered orally by:

CLARKE, C.J.N.S.:

This is an appeal from the conviction of the appellant that on March 11, 1995, he broke and entered a used car dealership office in Antigonish and committed the offense of theft of a 1994 Chev Blazer contrary to s. 348(1)(b) of the **Criminal Code**.

A passing motorist familiar with the Blazer saw it being driven from the lot at 12:15 o'clock in the morning. He informed the police who, upon finding the office had been broken into and the Blazer keys were missing, took chase. They came upon the Blazer on the highway. When it was stopped two persons exited the Blazer and ran away. Two constables followed the tracks of one of them in the snow through a wooded area. They noted on one or maybe two occasions the tracks broke through ice in a brook. Shortly before 2:00 a.m., the appellant came out of the woods on the Williams Point Road. His lower body was wet. Some chunks of snow and ice were clinging to his clothing. The police said the imprint from his footwear resembled the imprint found in the tracks they followed through the snow.

Justice MacLellan, in convicting the appellant, held that the doctrine of recent possession applied. He said that although the evidence was circumstantial, the facts he found to be proved led to no other reasonable inference than the guilt of the appellant.

The trial judge found the Blazer was stolen just before 12:15 a.m. on March 11, 1995 as a result of a break and enter; that the appellant was in the Blazer when it was stopped by the police and that it had been recently stolen; that the appellant ran from the vehicle and made the tracks in the snow which were followed by the police, and that the time periods for the happening of each and all of these events were consistent with his findings of fact.

The appellant contends the trial judge erred in law by applying the doctrine mainly because there is no evidence that he was in recent possession of the Blazer. Further he says the trial judge erred by determining the doctrine could apply because the

appellant failed to provide an explanation.

The doctrine of recent possession was discussed by the Supreme Court of Canada in **R. v. Kowlyk** (1988), 43 C.C.C. (3d) 1 (S.C.C.). Mr. Justice McIntyre stated at pages 12-13:

> 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.

A review of the record and a re-examination of the evidence persuades us that there was sufficient evidence to support the findings of fact made by the trial judge, that the appellant was in possession of the Blazer at the time he fled, and also that the inferences he drew and the conclusion he reached. He examined the evidence in detail and, helpful to an Appeal Court in review, supported his findings with reasons drawn from the evidence.

The focus of the remarks of the trial judge concerning a lack of explanation were mainly directed to his comparison of the facts in a case out of this Court where the accused had testified. (**R. v. Ryan** (1991), 105 N.S.R. (2d) 355.) In **Ryan** an explanation of the passenger's presence was given. A finding of possession, without explanation, can trigger the doctrine. We are satisfied the factual situation here is unlike **Ryan**. Also, on appeal, it is appropriate for this Court to observe that this appellant chose not to testify at his trial and thereby offered no explanation.

In our opinion the judgment of the trial judge was consistent with **Kowlyk** and the standards of review described in **Yebes v. The Queen** (1987), 36 C.C.C. (3d) 417, and

the decisions of the Supreme Court of Canada which have followed **Yebes** are satisfied.

Accordingly, the appeal from conviction is dismissed.

C.J.N.S.

Concurred in:

Hart, J.A.

Bateman, J.A.