IN THE COURT OF APPEAL OF NEW ZEALAND C.A.269/91

THE QUEEN

v

JAN PATRICIA ELVINES

Coram: Richardson J (presiding)
Hardie Boys J
Gault J

Hearing: 13 December 1991

Counsel: K B Campbell for Appellant
M J Robb for Crown

Judgment: 13 December 1991

ORAL JUDGMENT OF THE COURT DELIVERED BY GAULT J

This is an appeal against conviction for receiving following a jury trial in the District Court at Wellington on 17 July 1991. There was also an appeal against the sentence imposed but that was abandoned and accordingly is dismissed.

The facts may be set out briefly. A trailer was stolen from a building site on or about 21 February 1991. It was discovered by the police at the back of the appellant's property in Upper Hutt on 1 March 1991. It was located at the rear of the house between 6 - 12 ft from the back door and with the draw-bar towards the door. At the time the registration plate had been

removed. In the trailer were a quantity of garden rubbish, lawn clippings, hedge trimmings and items apparently taken from the garage.

The appellant when interviewed by the police explained that a member of a gang had brought the trailer to her property the previous weekend. He had cleaned up her section over a period in total amounting to some two days. She had helped. The trailer had been left on the section for about a week before it was discovered. She said she knew the person only by the name "Bulldog". She had no way of contacting him and assumed he came from Porirua. She said she had been surprised when he had arrived but she did help clean out the shed although she did not put rubbish on the trailer. She said her vehicle did not have a tow-bar so that she could not have towed the trailer.

In the course of the trial, virtually at the end of the evidence for the Crown, application was made to the Judge for a ruling as to evidence of a previous conviction for receiving and, after hearing argument, he ruled that the evidence could be given in accordance with s 258 (2)(b) of the Crimes Act 1961.

The appellant did not give evidence. One witness was called for the defence and his evidence merely confirmed the date and some of the circumstances of the arrival of the trailer at the appellant's property.

Five matters were argued on the appeal. Three of these relate to the Judge's ruling against the objection to the proof of the previous conviction. Section 258 of the Crimes Act states:

> "(1) Every one who receives anything stolen, or obtained by any other crime, or by any act wherever committed which, if committed in New Zealand, would constitute a crime, knowing that thing to have been stolen or dishonestly obtained, is liable -
>
> (a) To imprisonment for a term not exceeding 7 years if the value of the thing so received exceeds the sum of $300:
>
> (b) To imprisonment for a term not exceeding one year if the value of the thing so received exceeds the sum of $100 and does not exceed the sum of $300:
>
> (c) To imprisonment for a term not exceeding 3 months if the value of the thing so received does not exceed the sum of $100.
>
> (2) Except as provided in subsection (3) of this section, where any one is being proceeded against for an offence against this section, the following matters may be given in evidence to prove guilty knowledge, that is to say, -
>
> (a) The fact that other property obtained by means of any such crime or act as aforesaid was in the possession of the accused within the period of 12 months before the date on which he was first charged with the offence for which he is being tried:
>
> (b) The fact that, within the period of 5 years before the date on which he was first charged with the offence for which he is being tried, he was convicted of the crime of receiving:
>
> Provided that the last-mentioned fact may not be proved unless there has been given to the accused, either before or after an indictment has been presented, 7 day's notice in writing of the intention to prove the previous conviction, nor until

> evidence has been given that the property in respect of which the accused is being tried was in his possession.
>
> (3) Nothing in subsection (2) of this section shall apply in any case where the accused is at the same time being tried on a charge of any offence other than receiving."

There was no question of any failure by the Crown to comply with the notice requirement in the proviso to subs (2)(b), but it was put to the Judge that the other requirement had not been met; that of evidence, or evidence of sufficient quality, that the property in respect of which the accused was being tried was in her possession. It was further argued that in this case if there was such evidence, the previous conviction should be excluded in the Judge's discretion on the ground that its likely prejudical impact clearly would outweigh its probative value. The Judge ruled that the evidence of the prior conviction could be given.

In this Court the first point advanced was that the evidence given at the time of the ruling did not establish control of the trailer by the appellant and therefore could not establish possession. It was said that the mere fact that it was found on the property of which she was the responsible occupant did not establish possession and that it was not shown that she exercised control over it but rather it was established that she could not do so because her car had no tow-bar.

Mr Campbell relied upon *R v Cavendish*

[1961] 1 WLR 1083 and cited a passage from the judgment of Lord Parker CJ at p 1085:

> "Certain propositions are quite clear. It is quite clear, without referring to authority, that before a man can be found to have possession, actual or constructive, of goods, something more must be proved than that the goods have been found on his premises. It must be shown either, if he was absent, that on his return he became aware of them and exercised some control over them or - and this was the case sought to be made here - that the goods had come, albeit in his absence, at his invitation or by arrangement."

In that case the goods were delivered to the premises of the accused in his absence. The reference to exercising some control over the goods when he became aware of them was clearly directed to the assumption of possession of the goods already there. In this case the appellant was present when the trailer was placed on the property. The elements of possession, namely custody with actual or potential control and knowledge of his presence could be inferred. That her car did not have a tow-bar does not exclude actual or potential control. We do not accept that no evidence of possession of the trailer by the appellant had been given.

Mr Campbell's next point was that the evidence must establish possession to the standard of beyond reasonable doubt before the requirement of the proviso is met. The Judge held that the evidence of possession should reach a prima facie standard - such that a jury properly directed could find that she had possession.

The proviso itself is silent on any standard of proof. It merely requires the giving of evidence of possession. The task of the trial judge is to satisfy himself that such evidence has been given. He is not required to find possession proved to any standard.

In practice, bearing in mind the discretion the Judge has to exclude evidence of previous convictions (of which more will be said) he or she should ensure that there is probative and admissible evidence that tends to prove the elements of possession and we consider that the approach taken by the Judge in this case is not open to objection.

Mr Campbell submitted that the section should be interpreted in such a way as to protect the rights of the accused. He said that the proof should be to the standard of beyond reasonable doubt bearing in mind that possession is an element of the offence of receiving. He sought to invoke s 6 of the Bill of Rights Act in support of his interpretation. He also cited three cases. The first was *R v Rangi* CA 43/91, 19 July 1991 in which this Court was influenced by the affirmation of the presumption of innocence in the Bill of Rights Act in its approach to the burden of proof of elements of a statutory offence. The second case was *Police v Anderson* [1972] NZLR 233 in which this Court emphasised that even though matters necessary for determination in the

procedure of the case may be decided on the lower balance of probabilities test the elements of the offence all must be proved beyond reasonable doubt. The third case was *R v* ***McCuin*** [1982] 1 NZLR 13 in which, as a matter of policy, it was decided that voluntariness of confessions must be established beyond reasonable doubt before evidence of the confessions can be given. Those cases were not analogous to this case. The proviso to s 258 (2)(b) does not require proof of any fact, merely the giving of evidence. Any threshold standard is a matter for practical consideration in the circumstances of the case. The Judge must be satisfied only that evidence has been given and, as we have said, the approach the Judge took was appropriate. We think a closer analogy may be the admission of evidence of statements made by co-conspirators in the furtherence of a conspiracy. That will be admitted only when the Court is satisfied that there is other evidence of a concerted design. See e.g. ***R v Buckton*** [1985] 2 NZLR 257 where the standard of the balance of probabilities was adopted.

For these reasons we cannot accept this point advanced for the appellant.

The third ground was that the Judge was wrong not to exclude the evidence in his discretion. In *R v Rogers* [1979] 1 NZLR 307, 311 it was said by this Court:

> "The Court has an overriding discretion to exclude evidence rendered admissible by subs (2); the test being whether its prejudicial effect would make it virtually impossible for the jury to take a dispassionate view of the crucial facts, particularly when guilty knowledge is not a real issue in the case."

and at p 312.

> "To avoid any possible misunderstanding let it be added explicitly that when evidence of previous convictions qualifying under the statute is available, there is usually no reason to exclude it. The prosecution always has to prove guilty knowledge and very often there may be a real possibility that the defence will raise absence of sufficient proof of it as a separate issue - even if only as an alternative defence or only belatedly."

In this case there were clearly two main grounds of defence; that the appellant was not proved to be in possession and that she was not proved to have had the necessary guilty knowledge when she came into possession of the trailer.

The Judge took the view that guilty knowledge was the dominant issue. Mr Campbell has submitted that possession was the dominant issue.

It is sufficient to say that guilty knowledge clearly was a substantial issue. When interviewed by the police the appellant had maintained that she did not "come by the trailer". That it was left there by the person clearing up her section. In cross-examination of one of the police officers her counsel was careful to bring out the that fact that the number plate was missing

was not apparent from the back door of the house. This is a quite different case from *Rogers* where guilty knowledge was not in issue.

In each case the trial Judge must exercise the discretion as to whether the facts are such that proof of the previous conviction, which the statute says may be given, will be unfairly prejudicial. Merely because proof of possession is in issue will not necessarily be sufficient. The Judge will, of course, need to direct the jury as to the purpose for which the evidence is given and there is no suggestion that that was not done in this case. Accordingly, we see no ground for interfering with the exercise of the Judge's discretion.

The remaining two grounds of appeal can be dealt with together. It was submitted that the Judge should have acceded to an application under s 347 of the Crimes Act to discharge the appellant at the time of the ruling as to the evidence of the previous conviction and secondly that the verdict was against the weight of evidence.

The evidence of possession has been reviewed and we are satisfied that was sufficient to go to the jury. It was a clear case of recent possession calling for an explanation. Guilty knowledge on the Crown's case was a matter of inference which was open. The delivery of the trailer by the gang member to the appellant's house, its

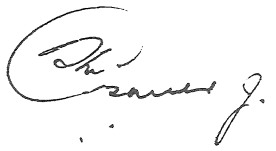
location at the rear of the house out of sight of the road, the absence of a number plate, the fact that it was used, filled with rubbish and remained there for a period all are factors from which a jury could infer that it was received with the requisite knowledge.

The plausibility of the explanation given by the appellant was not a matter that required assessment on a s 347 application. We are satisfied that the Judge clearly was right to allow the matter to go to the jury. Once the evidence was before the jury it was open to them to reject the appellant's explanation given to the police and to return a verdict of guilty.

Mr Campbell argued that because the explanation was uncontested, plausible and consistent with proved facts the Judge should have directed the jury to acquit. He relied upon ***R v Ketteringham*** (1926) 19 Crim App R 159. That was a case of misdirection and the summing up in this case is not challenged. Undoubtedly the jury should have been told that if they found as a reasonable possibility that the appellant's explanation was true they should find her not guilty. There is no indication they were not so told. Clearly they rejected the explanation. They were entitled to do that. We are satisfied that a jury properly directed could convict on the evidence given.

The appeal, therefore, is dismissed.

The sentence of periodic detention is to be served. The appellant is to report to the Warden at the Upper Hutt Centre on Friday 17 January 1992 at 6 p.m.



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