38/87

SUPREME COURT OF NEW SOUTH WALES — COURT OF CRIMINAL APPEAL

R v SMALE

Lee, Maxwell and McInerney JJ

15 August 1986

CRIMINAL LAW – THEFT OF MOTOR VEHICLE – FOUND IN ACCUSED'S POSSESSION 3 OR 5 MONTHS AFTER THEFT – DOCTRINE OF RECENT POSSESSION – WHETHER APPLICABLE – WHETHER TIME LIMIT FOR RECENCY – WHETHER NATURE OF PROPERTY RELEVANT TO QUESTION OF RECENCY.

A motor vehicle stolen in October 1984 was found at S's premises in March 1985. S said that the vehicle was brought to his premises by another person approximately in January 1985. S was charged with theft of the vehicle and convicted. On appeal —

HELD: Appeal dismissed.
(1) The doctrine of recent possession involves a relationship between the theft and the possession which falls within the notion of recency. There is no fixed period of time which in all cases constitutes recent possession; it depends on the nature of the property or goods found in the accused's possession.
***R v McCaffery* [1911] VicLawRp 23; (1911) VLR 92; 17 ALR 40; 32 ALT 105, applied.**

(2) Where the property was a particular kind of motor vehicle found in the accused's possession three or five months after its being stolen, it was open to the Court to find that the property was recently stolen, the doctrine of recent possession applied and that the accused was guilty of theft.

LEE J: (with whom Maxwell and McInerney, JJ agreed) *[after setting out the facts continued]*: … **[3476]** His Honour, in summing the case up to the jury, directed the jury on what is often called the doctrine of recent possession and a number of submissions have been put to us here in Regard to his Honour's directions. Counsel had also addressed the jury on recent possession.

The first ground of appeal is that his Honour erred in refusing the appellant's application at the end of the trial for a directed verdict of acquittal on the charge of larceny, and it was put to us that on the evidence, this was not a case in which the doctrine of recent possession should have been availed of by the judge or, for that matter, counsel in their addresses as the necessary finding of "recency" could not be made. **[3477]** The basis of this submission is that the time-lapse between the theft of the vehicle in October 1984 and its coming into possession of the appellant, either by reference to the day when the police went there, March 23, 1985, or a couple of months before that, as the appellant admitted to police, could not be regarded as "recent" in relation to the theft.

It is said that looking at the matter from whichever of the two times I have mentioned, the theft was not recent, the directions were wrongly given, and the appellant should have been acquitted, for lack of evidence, of larceny. At the outset, I would say that the very expression "Doctrine of recent possession" contains within itself an inversion of what it is seeking to convey, because the word "recent" is attached to the word "possess; What must be recent for the doctrine to apply is the theft. There must be a time relationship between the theft and the possession which falls within the notion of recency.

Whether there is the required recency is a matter for the jury to determine unless the judge himself rules that upon the evidence, the feature of recency cannot be regarded as having been established. The notion of recency is not one which has any absolute connotation so far as time relationship is concerned. The *Shorter Oxford Dictionary* defines "recent" as follows: "Lately done or made; that has lately happened or taken place; belonging to a (past) period of time comparatively near to the present; of a point or period of time; not much earlier than the present; not long past". The *Concise Macquarie Dictionary*, Revised Edition, defines the word as: "Of late occurrence, appearance, or origin; lately happening, done, made, etc; not long past, as a period; belonging to such a period; not remote or primitive".

The doctrine is concerned with possession of stolen property and at its base is the proposition that possession of stolen property of itself can, in certain circumstances, point the finger of suspicion to the accused, in the sense that it suggests that he may be the thief or the receiver. Unless, therefore, he accounts for his possession, that is that it is a lawful possession, the inference is open to the effect I have just mentioned. The law permits the inference to be drawn when the accused is then in possession of property which has recently been stolen and not accounted for, but it recognises that the very nature of the goods can relate to the reasonableness of requiring that the accused be able to account for his possession.

So the element of recency may, so far as the application of the doctrine of recent possession is concerned, have a different time **[3478]** significance in different cases. Where the property is, for instance, a note of money, a $2 note which has been stolen and can be identified, its possession by the accused even shortly after the theft may, in the circumstances, not be sufficiently close to the theft to require that the accused should be able to account for his possession. In other cases where the property is not of such a nature but is of a kind that it would be expected that the accused would be able to account for his possession, the degree of recency need not be nearly as close to the theft as in the case that I first mentioned. That understanding of the doctrine of recent possession which I have set out accords with the approach which was taken in *R v McCaffery* [1911] Vic Law Rp 23; (1911) VLR 92; 17 ALR 40; 32 ALT 105 by the Victorian Full Court. At p95, their Honours said:

> "That term, however, is a relative term. There is no fixed period of time which in all cases will constitute recent possession. The period is relative to the subject-matter which is found in the prisoner's possession. The length of the period is subject to other considerations also. For example, in the case of a commonplace thing like a piece of money, which, even if it were marked, might still pass in the ordinary course of exchange unnoticed, or in the case of those classes of commodities which would challenge nobody's attention when bought in the open market or at the door, the period would be very short. It would be going too far to say that in such a case a person found in possession of the particular thing should be called upon to account for his possession except within a very brief period after it was lost.
>
> If, on the other hand, the thing found is a thing not commonly passing from hand to hand – a thing which would challenge inquiry and fix itself in the memory of a man into whose possession it came – in that case the period of time which would be 'recent possession' would be a much longer period. One can easily understand that there are commodities as to which possession of five, ten or even twenty years might not be considered too long a period to be 'recent possession'. But in any case there is no definite period which a judge is bound to say is too long for this kind of charge."

In *R v Brain otherwise Jackson* (1919) 13 Cr App R 197, Avery J in delivering the judgment of the court, said this:

> "It is quite true that if a man is found in possession of recently stolen property, it may give rise to a presumption either that he is the person who actually stole it or that he received it knowing it to have been stolen. What 'recent' stealing is depends on the character of the goods. Some naturally change hands quicker than others."

His Honour, it would seem, had the same concept of the doctrine of recent possession as that expressed in this judgment and by the Victorian Full Court in the decision I have just mentioned. Each case must be looked at by reference to the actual property the subject of the indictment. Counsel for the appellant referred to *R v Bellamy* (1981) 2 NSWLR 727 at 731; 3 A Crim R 432, where the Chief Justice said:

> "Again the stealing may be so remote in point of time as not to be capable of being Regarded as recent."

I agree with his Honour's observation but would say that in most of the cases that are likely to come before the courts, it will be appropriate to let the question of "recency" go to the jury because it is not a word of any precise significance so far as time is concerned, and it can legitimately mean different things to different people. The jury should therefore rule upon it, not the judge. It is certainly not to be understood as importing the notion of "very recently" except where the nature of the property requires that view. In the present case, the property the subject of the indictment was a particular kind of motor vehicle which I have already described and it seems to me beyond argument, that whether one Regards the appellant's possession as having been proved five months after the theft or three months after the theft, ordinary usage of English permits it sensibly to be

said that the vehicle was "recently" stolen – indeed "quite recently" I would have thought.

It follows therefore the challenge to the summing-up upon the ground that his Honour was in error in directing the jury upon the basis that the case was appropriate for the application of the doctrine of recent possession fails, as does the contention that his Honour should have directed a verdict of acquittal for lack of evidence of larceny.

The next submission which is made in Regard to his Honour's directions relating to recent possession is that his Honour should have dealt with the particular features or character of the goods which were relevant to the question of recency. In my view, there is no substance in that submission. The goods were in fact a motor car. The jury knew the date of the theft and they had a full description of the vehicle and photographs thereof and, as I have already indicated, it was only a matter of the application of ordinary English to determine whether the theft of the vehicle was to be regarded as recent in relation to the subsequent possession thereof ...

[His Honour dealt with other matters not relevant to this report and dismissed the appeal]. [Judgment reprinted with kind permission, from Petty Sessions Review (NSW) *Vol. 7, No. 5, p3475].*
