

CANADA / JUDGMENT

R. v. Harms

2020 BCCA 242

COURT

British Columbia Court of Appeal

DECIDED

27 August 2020

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2020 BCCA 242 R. v. Harms

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Harms,

2020 BCCA 242

Date: 20200827

Docket: CA45619

Between:

Regina

Respondent

And

Daniel Lee Harms

Appellant

Before:

The Honourable Madam Justice Newbury

The Honourable Madam Justice Dickson

The Honourable Mr. Justice Hunter

On appeal from: An order of the Supreme Court of British Columbia, dated January 22, 2018 (R. v. Harms, 2018 BCSC 2350, New Westminster Docket X080519).

Counsel for the Appellant:

B.R. Anderson

Counsel for the Respondent:

L. Ruzicka

Place and Date of Hearing:

Vancouver, British Columbia

October 9, 2019

Place and Date of Judgment:

Vancouver, British Columbia

August 27, 2020

Written Reasons by:

The Honourable Madam Justice Dickson

Concurred in by:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Hunter

Summary:

The appellant was a passenger in a stolen vehicle. He appeals his conviction for possession of stolen property contrary to s. 355(1)(a) of the Criminal Code, arguing the judge erred in concluding that the arresting officer subjectively believed there were reasonable grounds upon which to arrest him and that those grounds were objectively reasonable because neither the officer nor the judge considered whether the appellant had the requisite degree of control over the vehicle. Further, the appellant contends that the judge erred in assessing objective reasonableness by relying on the Crown's trial submissions rather than the officer's testimony. Held: Appeal dismissed. When the reasons are read as a whole it is apparent that the judge: understood the elements of the offence and routes to liability; considered whether the officer had reasonable grounds to believe the appellant had the requisite level of knowledge and control to justify arresting him; and distilled the overall import of the officer's testimony. The evidence supported the judge's conclusion that the officer's belief was both subjectively and objectively reasonable.

Reasons for Judgment of the Honourable Madam Justice Dickson:

Introduction

- [1] This appeal concerns the grounds required by police to arrest a passenger found in a stolen vehicle for unlawfully possessing the vehicle. The central question is whether the officer who arrested the appellant, Daniel Harms, for possession of a stolen vehicle in which he was a passenger reasonably believed that he unlawfully possessed the vehicle. After a voir dire, the trial judge ruled the officer had reasonable and probable grounds to effect the warrantless arrest and that items located in an incidental search of Mr. Harms' person and backpack were admissible. He went on to convict him of possession of stolen property contrary to s. 355(1)(a) of the Criminal Code with respect to the stolen vehicle and of several other offences with respect to the items found in the incidental search.
- [2] Mr. Harms appeals the convictions. He contends the judge erred in concluding that the officer had sufficient grounds for the arrest because, he says, there was no reasonable basis upon which the officer could or did believe that he, Mr. Harms, knew the vehicle was stolen and had the requisite measure of control over the vehicle to possess it. As a result, he says, the arrest and search were unlawful, his rights under ss. 8 and 9 of the Charter of Rights and Freedoms were breached and the judge should have excluded the unlawfully obtained evidence under s. 24(2). Given that his convictions were based upon that evidence, Mr. Harms asks this court to allow the appeal, set aside the convictions and order a new trial.
- [3] In my view, the judge did not err in concluding that the arresting officer had reasonable and probable grounds to arrest Mr. Harms for unlawfully possessing the stolen vehicle based on the totality of the circumstances. For the reasons that follow, I would dismiss the appeal.

Background

- [4] At approximately 7:25 a.m. on October 1, 2015, the vehicle in question was stolen from outside a residence on 153rd Street in Surrey, British Columbia. The owner had left it there shortly before with keys in the ignition and the engine running to warm it up. When she returned, she found the vehicle was missing and immediately reported the theft to police.
- [5] At the time of the theft, the Surrey RCMP was conducting an anti-auto theft program known as "Project Hot Wheels". A member of the team located the stolen vehicle parked on 136th Street at 10:50 a.m., approximately three and a half hours after it was stolen from outside the owner's residence. In response, several team members established surveillance of the vehicle and its occupants and conveyed their observations via radio to their fellow team members. Constables Tsonos, Stewart and Moar were all members of the team.
- [6] At approximately 11:13 a.m., Constables Tsonos and Stewart observed Mr. Harms and another man, Dakota Maloy, approach and enter the stolen vehicle. Mr. Maloy was the driver. Mr. Harms was the passenger. They drove around Surrey for about a half hour, then parked in a back alley, exited the vehicle and briefly split up. A few minutes later, they converged by foot at a nearby intersection, where Constable Moar arrested Mr. Harms for possession of stolen property. After he was arrested, Mr. Harms was searched and several

items were located on his person and in his backpack, including two shotgun shells, a 12-gauge sawed-off shotgun and stolen licence plates.

- [7] Mr. Harms was charged with possession of stolen property with respect to the stolen vehicle and stolen licence plates, together with several firearms offences with respect to the sawed-off shotgun and shotgun shells. At the outset of the trial, Crown counsel advised the judge that the defence alleged his ss. 8 and 9 Charter rights had been breached in relation to the warrantless arrest and incidental search. As a result, a voir dire was declared on the admissibility of evidence obtained in the course of the search.

Voir Dire #1

- [8] Several police officers testified on the voir dire, including Constables Tsonos, Stewart and Moar of the Surrey RCMP. They described their observations, knowledge and actions with respect to the surveillance operation and Mr. Harms' arrest.
- [9] Constable Tsonos testified that he located the stolen vehicle parked on 136th Street at 10:53 a.m. and broadcast the discovery over the police radio. He established surveillance and, at approximately 11:13 a.m., observed Messrs. Harms and Maloy approach the stolen vehicle, enter it and "go mobile". Mr. Harms was the passenger, he said, and Mr. Maloy was the driver. Constable Tsonos also said that he followed the stolen vehicle and recognized the driver as Mr. Maloy, who had been previously arrested in a "Hot Wheels" project. He identified Mr. Maloy as the driver of the stolen vehicle over the police radio.
- [10] Constable Stewart testified that he saw two men walking toward the parked vehicle on 136th Street shortly after 11:00 a.m. and, a few minutes later, saw Mr. Maloy drive it away. At 11:32, he said, he stopped at a red light behind the stolen vehicle and noticed Mr. Maloy looking in the rear-view mirror and talking to the passenger in a manner that led him to believe they suspected they were being followed by police. At 11:41, he said, he saw the vehicle parked in an alley with two bodies moving around it, updated the team via radio and then resumed his observations, at which point he saw only one person in the alley. As he continued to update the team, he said, he saw Mr. Maloy run toward a group of houses, then saw the passenger walk out of the alley, meet Mr. Maloy and walk up the street with him. A few minutes later, he saw both men in police custody at the side of the road.
- [11] For his part, Constable Moar testified that he heard Constable Tsonos' radio report that he had located the stolen vehicle. He said he did not see the vehicle or its occupants during the surveillance operation but kept up with what was happening by listening to the police radio as Constables Tsonos, Stewart and other officers provided updates. At one point, he said, Mr. Maloy was identified as the driver of the stolen vehicle. At another, he heard the vehicle was in an alley and the driver and passenger had walked away from it, with one going in one way and the other going another way. Shortly thereafter, he said, he saw them converge at the intersection of 108th and 129th, which was near his own location.

[12] Constable Moar went on to say that he decided to make an arrest and that "I felt that I had the grounds - reasonable and probable grounds to believe that these two males were arrestable for possession of stolen property". He arrested Mr. Harms and turned him over to another officer who searched his person and backpack and located the sawed-off shotgun. In explaining why he decided to arrest Mr. Harms when he did, Constable Moar said this:

So based on the - the totality of the - the incident from start to finish, when - so I had knowledge that the vehicle was stolen first thing in the morning

As the vehicle was being driven around, there were multiple descriptions given of the driver and of the passenger. The driver was identified as Dakota Maloy

[Constable Stewart] mentioned that they had split up, and in my four years of doing auto theft, and just as a - in my opinion as a normal citizen, it's not something you see often that two males get out of a stolen car and separate, go their separate ways, and then they converge within a block or two later. So that to me is touching on, okay these males they know that this car is stolen, the recency of it, in my experience in the four plus years I'd been in auto theft prior to that I've located stolen cars within a few hours of being stolen, and more times than not, I'd say a higher percentage of times the people that we arrest in those vehicles are also the people that stole the vehicle.

So like I say, based on these factors, and the continuity that - as I say, I trusted everything Constable Stewart told me in terms of that's the driver, that's the passenger, they're here, I now see them, I'm in a residential area that's to the best of my knowledge there was nobody around everything lined up that's when I made the decision, yes these are the males that were in the stolen car, and these males are arrestable for possession of stolen property, which was the stolen car.

[13] On cross-examination, defence counsel asked Constable Moar about his experience with Mr. Maloy prior to the day he arrested him. He confirmed that he had never dealt directly with Mr. Maloy before, although he had seen his photograph and knew he was a person of interest to the "Project Hot Wheels" team. In response to the question "so safe to say you make an assumption that anybody that's travelling in a stolen vehicle with Mr. Maloy has knowledge that the vehicle is stolen?" Constable Moar replied "Good probability, yes".

[14] After the evidence was adduced, counsel made extensive closing submissions. In doing so, they outlined the law on warrantless arrests, incidental searches and possession of stolen property. Crown counsel argued that Constable Moar had subjective and objective grounds to believe Mr. Harms "had knowledge the vehicle was stolen and had some measure of control over it" based on the totality of the circumstances and, therefore, that the warrantless arrest was lawful. In other words, the Crown submitted, Constable Moar had reasonable and probable grounds to believe that Mr. Harms had committed the offence of possession of stolen property, namely, the stolen vehicle.

- [15] In support of his submission, Crown counsel emphasized the recency of the theft and Constable Moar's view that, in such circumstances, the passenger "could have been involved in the theft". He also emphasized Mr. Maloy's history as an auto theft target and the fact that Messrs. Harms and Maloy split up after exiting the vehicle and converged again within a few minutes. This, he argued, suggested "a degree of coordination or cooperation between these two men, from which it could reasonably be inferred that they were aware the vehicle was stolen and were working together in a perpetration of the crime".
- [16] In further support of his submission, Crown counsel provided the judge with two cases that "stand for the proposition that a passenger can be found guilty of possession of a stolen vehicle": *R. v. Barnhardt*, 2001 BCCA 191 and *R. v. Henderson*, 2016 ONSC 1070. He reviewed the discussion in both cases of the concepts of co-principals and parties to the offence of possession of stolen property. Then he argued there are multiple routes to liability for any criminal offence, including possession of a stolen vehicle, and that "there was ample evidence upon which the officer can conclude, on the lower standard of reasonable and probable grounds, that Mr. Harms had some involvement in the possession of this stolen vehicle in terms of knowledge and control."
- [17] Like Crown counsel, defence counsel provided the judge with full argument on all contested legal and factual issues. He argued that, while Constable Moar subjectively believed he had sufficient grounds to arrest Mr. Harms, his grounds were not objectively reasonable. This was so, he submitted, because "[i]n committing an offence of possession of stolen property, an accused must have both knowledge that the piece of property was stolen, and they must have control of that piece of property". He also argued that arresting Mr. Harms "on the basis of association with criminal behaviour does not amount to reasonable and probable grounds for arrest".
- [18] As to the knowledge element of the offence of possession of stolen property, defence counsel emphasized the presence of keys in the vehicle and the absence of damage, which, he submitted, meant there was no obvious sign that it was stolen. As to the control element, he submitted, "[t]he passenger in a motor vehicle cannot be said to have had care and control of that motor vehicle". In support of his submission, he sought to distinguish *Barnhardt* and *Henderson* from this case. For example, he emphasized that in *Barnhardt* the stolen vehicle was driven erratically and in *Henderson* the accused's fingerprint was found near the point of forced entry and, therefore, he argued, unlike this case, there was circumstantial evidence from which knowledge and control could reasonably be inferred.
- [19] The judge gave his ruling and oral reasons the day after closing submissions were made.

Ruling on Voir Dire #1: 2018 BCSC 2152

- [20] The judge began by summarizing the background facts, the issues for determination and the positions of the parties. He characterized the principal issue as "whether Cst. Moar had reasonable and probable grounds to arrest Mr. Harms on the morning of October 1, 2015" (para. 11) and outlined the legal principles that apply to warrantless arrests and searches (paras. 14-18). He did not comment on the legal principles that apply to the offence of possession of stolen property.
- [21] Next, the judge made factual findings concerning the theft of the vehicle, the surveillance operation and the arrests of Messrs. Harms and Malloy. In doing so, he found that the surveillance team members "were in communication at all relevant times via radio and conveyed their observations of the vehicle and passengers to fellow team members on an ongoing basis throughout the morning of October 1st" (para. 21). As to their observations and the arrests that followed, he noted that Constables Tsonos and Stewart observed the vehicle and its occupants several times over the course of 20 to 30 minutes after it left the 136th Street location and stated:
- [25] At approximately 11:41 hours, Cst. Stewart saw the vehicle parked in a back alley adjacent to 129th Street as he was driving north on 130th. He next observed the driver, who by that time had been identified by Cst. Tsonos as Dakota Malloy, running from a side yard on 108th Avenue...
- [26] Constable Stewart then saw the same passenger walk directly in front of him northbound on 129th Street. He then saw this individual meet up with the driver, Dakota Malloy, as they had apparently separated and then joined back together, at the intersection of 129th Street and 108th Avenue.
- [27] The passenger, Daniel Harms, was subsequently stopped and arrested by Cst. Moar on 108th Avenue west of 129th along with the driver, Dakota Malloy, who was arrested by another officer, Cst. Manning.
- [22] The judge went on to note that Constable Moar had approximately 12 years of experience as an RCMP officer. He described his knowledge of the surveillance operation and the basis upon which he decided to arrest Mr. Harms:
- [30] Constable Moar testified that he made the decision to arrest for the following reasons:
- He knew the vehicle had been stolen and had a reasonable belief that it had been parked in an alleyway a couple of blocks away.
 - He had received multiple descriptions of the driver and passenger of the vehicle via radio which was consistent with the appearance of the individuals he observed converged and travelled west on 108th Avenue.

- Constable Stewart had advised that the driver and passenger had split up after exiting the vehicle and Cst. Moar found it unusual that they converged a few moments later.
- Constable Moar was parked in a residential neighbourhood and there were not a lot of people around at that time.
- He believed, based on his experience and his knowledge of Dakota Malloy's criminal history, that the passenger in the vehicle knew that the vehicle was stolen.

[23] Then the judge turned to the principal issue, as he had framed it. He found that Constable Moar had reasonable and probable grounds to arrest Mr. Harms. After noting the defence accepted that Constable Moar subjectively had the requisite grounds and did not contest Mr. Harms' identity as the passenger, the judge said this:

[33] Mr. Harms argues that it was unreasonable for Cst. Moar to assume that Mr. Harms knew that he was a passenger in a vehicle which had been stolen. The principal evidence Mr. Harms points to in support of this argument is the fact that the vehicle did not display any signs of forced entry and was being driven using keys. As I understand the argument, Mr. Harms asserts that given that Cst. Moar knew that the vehicle was stolen with keys in place, it was unreasonable for him to assume or infer that Mr. Harms knew the vehicle was stolen and, for that reason, considered through the lens of a similarly experienced officer, should not have determined that he had reasonable and probable grounds to arrest.

[34] I reject this argument. Given the close timing between the theft of the vehicle and the time that Mr. Harms was first observed in it, that Mr. Harms and Mr. Malloy appear to have abandoned the vehicle in a back alleyway, then split up only to rejoin a few blocks later, which as the Crown suggests may indicate a degree of coordination and cooperation between them, also given Cst. Moar's knowledge of Mr. Malloy's criminal background, I consider that it was reasonable of Cst. Moar to infer that Mr. Harms had knowledge that the vehicle had been stolen.

[24] Based on the foregoing analysis "and after a careful review of the evidence heard on the voir dire, the submissions by counsel, and the relevant legal authorities" the judge concluded that Mr. Harms' Charter rights were not breached and dismissed his application for exclusion of the evidence found as a result of the search incidental to his arrest (para. 35).

Did the judge err by finding Cst. Moar had reasonable and probable grounds to arrest Mr. Harms for the offence of possession of stolen property?

Standard of Review

[25] The applicable standard of review is uncontroversial. The question of whether a particular set of facts is capable of constituting objectively reasonable grounds is a question of law, reviewable on a standard of correctness: *R. v. Payette*, 2010 BCCA 392, at para. 21, citing *R. v. Shepherd*, 2009 SCC 35 at para. 20.

Legal Framework

Possession of Stolen Property

[26] Pursuant to s. 354(1)(a) of the Criminal Code, it is an offence to possess property knowing that the property was obtained by the commission in Canada of an indictable offence. If a person commits an offence under s. 354 and the property in question has a value of more than \$5,000, pursuant to s. 355(a) the person is guilty of an indictable offence or an offence punishable on summary conviction.

[27] Section 354(1)(a) of the Criminal Code provides:

354(1) Every one commits an offence who has in his possession any property or thing or any proceeds of any property or thing knowing that all or part of the property or thing or of the proceeds was obtained by or derived directly or indirectly from

(a) the commission in Canada of an offence punishable by indictment

[28] "Possession" is defined in s. 4(3) of the Criminal Code:

(3) For the purposes of this Act,

(a) a person has anything in possession when he has it in his personal possession or knowingly

(i) has it in the actual possession or custody of another person, or

(ii) has it in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or of another person; and

(b) where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them.

[29] As Justice Frankel explained in *R. v. Wu*, 2010 BCCA 589, s. 4(3) of the Criminal Code contemplates three distinct types of possession: "personal possession", s. 4(3)(a); "constructive possession", s. 4(3)(a)(i) and (ii); and "joint possession", s. 4(3)(b): at para. 19. The essential elements of joint possession are knowledge and consent. Where both knowledge and consent are established, possession is deemed under s. 4(3)(b). However, to establish consent the co-existence of a measure of control over the property is required: *Wu* at para. 20, *R. v. Terrence*, [1983] 1 S.C.R. 357 at 364; *R. v. Chualna*, 2003 BCCA 650 at paras. 38-39.

[30] The knowledge component of s. 354 will not be satisfied by establishing mere recklessness. Rather, actual knowledge or its legal equivalent, wilful blindness, are required to prove possession: *R. v. Vinokurov*, 2001 ABCA 113 at paras. 11-14. The consent component will not be satisfied by establishing mere indifference or acquiescence. Rather, a measure of control is required because the power to consent necessarily implies the power to refuse and vice versa: *Barnhardt* at para. 66, citing *R. v. Baker*, [1976] W.W.D. 132 (B.C.C.A.); *Chualna* at

paras. 38-39. Nevertheless, evidence of individual physical control is unnecessary to establish joint possession where a joint venture to control the property is proven: Barnhardt, at paras. 71-73, citing *R. v. Kinna*, (1951), 98 C.C.C. 378 (B.C.C.A.) and *R. v. Miller* (1984), 12 C.C.C. (3d) 54 (B.C.C.A.).

- [31] For purposes of proving possession, knowledge and consent may be established either directly or by rational inference. However, to justify a conviction based on joint possession where an inference as to knowledge or consent is drawn that inference must be the only rational inference available in all the circumstances: Chualna at paras. 33-37.

Aiding or Abetting Possession of Stolen Property

- [32] In addition to committing an offence under s. 355 of the Criminal Code based on personal, constructive or joint possession of stolen property, a person may participate in its commission as an aider or abettor. Section 21 of the Criminal Code provides:

21(1) Every one is a party to an offence who

- (a) actually commits it;
- (b) does or omits to do anything for the purpose of aiding any person to commit it; or
- (c) abets any person in committing it.

- [33] As noted, in arguing that Constable Moar had reasonable grounds to believe Mr. Harms was unlawfully in possession of the stolen vehicle Crown counsel relied on Barnhardt and Henderson. In Henderson, Justice Leach summarised the principles applicable to aiding and abetting in the context of considering a possession of stolen property charge. As to abetting, he said this:

- [22] I begin with principles applicable to the various possible modes of participation in an offence

· As for abetting another to commit an offence:

o The concept refers to those who encourage others to commit an offence.

o Abetting requires actual encouragement by words and/or conduct, as well as an intention to encourage the other person to commit the offence.

o Mere presence when a crime is being committed by someone else will not suffice to constitute abetting. However, if a person knows that someone intends to commit a crime, and goes to or is present at a place to encourage that other person to commit the crime, that will suffice.

o Abetting also relates to a specific offence, in that the abettor must intend that the other person commit the offence or know that the other person intends to commit it and intends to encourage that other person to do so. Again, it does not matter, as far as the abettor is concerned, whether the person or persons he or she encouraged is or are also on trial or not.

- [34] In Barnhardt, the appellant and his co-accused, Mr. Eck, were jointly charged with theft and possession of a stolen Jeep. Mr. Eck pleaded guilty to possession of stolen property and the Crown did not proceed against him on the theft charge. At Mr. Barnhardt's trial, the judge acquitted him of theft of the Jeep but convicted him of being in unlawful possession. The Crown did not appeal the acquittal on the theft charge. Mr. Barnhardt appealed his conviction for possession of the stolen Jeep.
- [35] On appeal, a majority of this court upheld the conviction. A review of the facts helps to illuminate the divergence between the majority and minority views, which, as I understand the reasons, was rooted in the implications of Mr. Barnhardt's unappealed acquittal on the theft charge.
- [36] In summary, in Barnhardt, in the early morning hours of the day in question homeowners heard the alarm of their Jeep sounding and watched as a man maneuvered it out of their driveway. They heard the horn honk three times and saw a second man run out of the bushes and get into the passenger seat, then watched as they drove away in the Jeep, which was fitted with an anti-theft device. An officer located the Jeep within a few minutes at the side of a nearby roadway and saw two men get out. They disappeared before he could turn his police vehicle around. However, approximately 20-25 minutes later, Messrs. Eck and Barnhardt were found in a nearby ditch in the bush and placed under arrest.
- [37] The judge found that Mr. Barnhardt was one of the two occupants of the Jeep and that a police dog reverse track was "consistent with [their] flight from police in order to evade arrest". She acquitted him on the theft charge because, she found, one person stole the Jeep, there was no evidence that the second person who jumped in from the bushes aided or abetted the theft and the evidence did not establish whether he was the thief or the second person. However, she convicted Mr. Barnhardt of possession of stolen property based on the combination of circumstances which, she found, were consistent with him "having been one of two people in possession of the stolen Jeep" and inconsistent with any other rational conclusion.
- [38] Justice Finch (as he then was) concluded, on behalf of the majority, that s. 21(1)(c) of the Criminal Code provided a basis upon which the conviction could be supported. In explaining why, he emphasized the fact that Messrs. Barnhardt and Eck were the only two occupants of the stolen Jeep. He also noted that both occupants must have known the Jeep was stolen because it was fitted with the anti-theft device, that until both abandoned the Jeep it was being driven erratically and that when they abandoned it both occupants fled the scene. He went on to hold that if Mr. Barnhardt was the driver he was the principal offender, that if he was the voluntary passenger he thereby encouraged Mr. Eck in possessing the stolen Jeep and that the possession of the stolen vehicle continued up to the time of its abandonment:

- [81] As the sole occupants of the vehicle, it is evident that either the appellant or Eck was driving prior to abandonment, and therefore had the control necessary to find possession. If the appellant was the driver, he was the principal offender and the application of s. 21 need not be considered. If Eck was the driver, however, and the appellant the passenger, s-s 21(1)(c) does apply. The only reasonable inference open to the trier of fact in the circumstances described is that the appellant was a voluntary passenger in a vehicle he knew to be stolen, and that he thereby encouraged Eck in possessing the stolen property. I am unable to see any other reasonable inference on the evidence and the findings of fact.
- [82] My colleague reasons (at paragraphs 49 and 50) that the evidence fell short of establishing whether the appellant or Eck was the driver of the vehicle when it was backed out of Mr. Josic's driveway, and whether one or the other was the person who emerged from the bushes on the horn signal. Since Eck was not tried on the charge of theft, and the trial judge acquitted the appellant on the count of theft, it would be inconsistent on the same evidence to convict him for possession of stolen property. With respect I disagree.
- [83] In my view, the offences of theft and possession of stolen property need not be regarded as contemporaneous. The possession of the stolen vehicle continued after the theft and up to the time of its abandonment. The learned trial judge held the view that the evidence fell short of establishing the identity of the driver and his passenger at the time of theft. But there is no doubt that the appellant and Eck were the occupants, and in possession, of the vehicle for some period of time prior to abandonment.
- [84] It was therefore open to the trial judge to find that the appellant committed the offence of possession of stolen property, despite her conclusion that an acquittal should be entered on the theft count.
- [Emphasis added.]
- [39] Justice Rowles wrote the minority judgment. In rejecting the Crown's argument that Mr. Barnhardt's conviction was supportable on the basis that he abetted the thief's possession of the stolen Jeep, she held that s. 21(1)(c) of the Criminal Code could only apply where the offender's role is clearly delineated, which, on the facts as found, it was not. In rejecting the argument that the conviction was supportable on the basis of joint possession under s. 4(3) (b) of the Code, she held that it was not open to the Crown to establish a joint venture to possess stolen property when it had not appealed the judge's determination that Messrs. Eck and Barnhardt were not engaged in a joint venture to steal the Jeep:
- [49] The trial judge concluded that the evidence did not establish that the person who responded to the horn signal either aided or abetted the driver in the offence of theft, and the Crown cannot challenge that conclusion. When the trial judge found that the evidence fell short of establishing that the person who emerged from the bushes abetted the offence of theft, I am of the view that it is not open to this Court to find, on the same evidence, that the person abetted the offence of possession of stolen property.

- [50] Implicit in the Crown's argument is the assumption that the appellant is the person who emerged from the bushes on the horn signal. As I have said earlier, the trial judge did not make a finding that Eck was driving the Jeep. In other words, the evidence does not establish whether the appellant was the driver of the Jeep or the person who got into the Jeep on the horn signal. What was established by the evidence was that Eck and the appellant were occupants of the Jeep.
- [51] Subsections 21(1)(b) and (c) apply in cases where the role of an offender is clearly delineated by his actions. In other words, the offender's mode of participation in the offence is clearly that of either an aider or abettor or both. In this case, the appellant's role is unclear on the evidence.
- [74] In this case, there is evidence from which it would be possible to infer that the appellant and Eck were on a joint venture to steal with Jeep. However, the Crown has not seen fit to appeal the dismissal of the theft charge on the ground that the appellant and Eck were acting in concert in relation to the theft of the Jeep.
- [75] When the trial judge did not proceed on the foundation that the two men were both principals in the offence of theft, and the Crown has not appealed the appellant's acquittal on the theft charge, I would not accede to the Crown's argument that the evidence establishes a joint venture to possess stolen property. On the facts of this case, the circumstances surrounding the theft and possession cannot logically be separated.

Warrantless Arrest for Possession of Stolen Property

- [40] Pursuant to s. 495(1) of the Criminal Code, a peace officer has authority to arrest without warrant a person who has committed an indictable offence, who, on reasonable grounds, the officer believes has committed or is about to commit an indictable offence or whom the officer finds committing a criminal offence. Subsections 495(1)(a) and (b) provide:

495(1) A peace officer may arrest without warrant

- (a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence;
- (b) a person whom he finds committing a criminal offence;

- [41] An arresting officer must subjectively believe that there are reasonable grounds upon which to base an arrest, and those grounds must be objectively reasonable. The officer's subjective belief is what he or she personally believed at the time of the arrest and must include an honest belief that he or she has reasonable grounds to believe an offence has been committed, not mere suspicion: *R. v. Day*, 2014 SCC 74, affirming 2014 NLCA at para. 26; *Her Majesty the Queen v. Gerald Judson Brownridge*, 2000 BCSC 795 at para. 26. In assessing whether the grounds for arrest are objectively reasonable, the court considers the officer's observations through the lens of someone with the same experience, training, knowledge and skills and decides whether a reasonable person with the same lens would come to the

same conclusion: *R. v. Luong*, 2010 BCCA 158 at para. 24.

- [42] In *R. v. Storrey*, [1990] 1 S.C.R. 241, Justice Cory summarized the Criminal Code requirements for a warrantless arrest and the policy concerns on which they are based (at 249-251):

Section 450(1) [now s. 495(1)] makes it clear that the police were required to have reasonable and probable grounds that the appellant had committed the offence of aggravated assault before they could arrest him. Without such an important protection, even the most democratic society could all too easily fall prey to the abuses and excesses of a police state

The importance of this requirement to citizens of a democracy is self-evident. Yet society also needs protection from crime. This need requires that there be a reasonable balance achieved between the individual's right to liberty and the need for society to be protected from crime. Thus the police need not establish more than reasonable and probable grounds for an arrest.

In summary then, the Criminal Code requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest. On the other hand, the police need not demonstrate anything more than reasonable and probable grounds. Specifically they are not required to establish a *prima facie* case for conviction before making the arrest.

- [43] The standard applied by the court in assessing the grounds for a warrantless arrest is one of reasonable probability or credibly-based probability that an indictable offence has been committed. This standard is less than the criminal and civil standards of proof, but more than mere suspicion. It envisions a "practical, non-technical and common sense probability" as to the existence of the salient facts and inferences in question: *R. v. Jir*, 2010 BCCA 497 at para. 27, citing *R. v. Debot*, [1989] 2 S.C.R. 1140, *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 and *R. v. Sanchez* (1994), 93 C.C.C. (3d) 357 (Ont. Ct. (Gen. Div.)).

- [44] In assessing whether the grounds for arrest amount to a reasonable probability that an offence has been committed, the court must consider the totality of the circumstances: *R. v. Bracchi*, 2005 BCCA 461 at paras. 21-22. Reasonable grounds may be based on indirect evidence, partial information and reasonable inference drawn from personal observation or information provided by others and the key question is whether the officer's belief was reasonable at the time of arrest, not whether, in hindsight, it turns out to have been accurate: *R. v. Vance* (1979), 48 C.C.C. (2d) 507 (Y.T.C.A.) at 515; *R. v. Bush*, 2010 ONCA 554 at para. 66. In conducting the assessment, the court should not examine the evidence in isolation or a piecemeal fashion: *R. v. Whitaker*, 2008 BCCA 174 at paras. 41-42, leave to appeal refused, [2008] S.C.C.A. No. 296; *Jir* at para. 28. It should also be recalled that, as Justice Doherty stated in *R. v. Golub* (1997), 117 C.C.C. (3d) 193 (Ont. C.A.), a decision to arrest may have been made quickly, based on available information which may be less than

exact or complete.

- [45] Often, more than one officer will be involved in the events that lead up to an arrest without warrant. In such circumstances, the court is not limited to considering the observations, knowledge and testimony of the arresting officer, although the focus is on the officer who decided to effect the arrest and what that officer knew when the decision was made: *R. v. Quilop*, 2017 ABCA 70 at paras. 20, 28. To the extent that other officers may provide evidence regarding their knowledge and participation in the salient events, that evidence only relates to the grounds for arrest if it was communicated or otherwise known by the officer who effected the arrest: *Jir*, at para. 26.

On Appeal

- [46] Mr. Harms contends first that Constable Moar did not have a subjective belief that he had committed the offence of possession of stolen property when he arrested him. Despite his trial counsel's concession on the point, given the nature of the evidence he says the judge erred in finding that he did. Although Constable Moar testified that he believed Mr. Harms was "arrestable", Mr. Harms submits it is apparent from his testimony that he failed to turn his mind to the issue of control, which is an essential element of the offence of possession of stolen property. It is also apparent, he submits, that Constable Moar failed to turn his mind to whether he was a party to that offence.
- [47] In other words, according to Mr. Harms, Constable Moar may have suspected that he had committed the offence of possession of stolen property, but his failure to consider the control element of the offence undermines the reasonableness of his subjective belief that he was in unlawful possession of the vehicle. In effect, he submits, this failure reduced Constable Moar's subjective belief, at its highest, to mere suspicion. In support of this submission, he notes the judge stated that it "was reasonable of Cst. Moar to infer that Mr. Harms had knowledge that the vehicle had been stolen" (at para. 34), but argues the judge also failed to consider whether Constable Moar subjectively had reasonable grounds to believe he had the requisite measure of control over the stolen vehicle. In further support, he points out the factual distinctions between this case and *Barnhardt*, where, he emphasizes, the appellant necessarily either stole the vehicle or knowingly abetted the thief's continuing possession of stolen property by his voluntary presence in the vehicle.
- [48] Second, Mr. Harms contends, the judge erred in concluding that Constable Moar had objectively reasonable grounds to arrest him. Although the judge stated that Constable Moar based his decision on five separate factors (at para. 30), Mr. Harms submits none of them could support a reasonable belief that he had a measure of control over the stolen vehicle. In particular, he says, the first, second and fourth factors (the vehicle location and occupant descriptions) related solely to Constable Moar's belief that he and Mr. Maloy were, respectively, the passenger and driver of the stolen vehicle. He says the third factor (they split up and Constable Moar believed it was unusual that they converged a few minutes later) did not suggest a reasonable probability that the two occupants had a joint plan regarding

the stolen vehicle and, at most, related to Constable Moar's stated belief that "they" knew the vehicle was stolen. As for the fifth factor (his experience and knowledge of Mr. Maloy's criminal history), Mr. Harms emphasizes the vague and anecdotal nature of Constable Moar's testimony, the brief period of his observed association with Mr. Maloy, and the absence of any logical connection between Mr. Maloy's criminal history and Mr. Harms' own knowledge of or control over the stolen vehicle. In sum, in Mr. Harms' submission the fifth factor added nothing concrete to the reasonableness of Constable Moar's grounds for arrest, which, by his own testimony, related solely to the knowledge element of the offence.

- [49] Finally, Mr. Harms contends that the judge erred further in assessing the objective reasonableness of the grounds for arrest by relying on the Crown's trial submissions rather than on Constable Moar's testimony. In support of this contention, he emphasizes Constable Moar did not testify that the driver and passenger splitting up and later converging led him to believe there may have been "a degree of coordination and cooperation between them", as the judge stated at para. 34 of his ruling. Rather, he notes, Constable Moar testified that these actions led him to believe "they know that this car is stolen". Citing Whitaker, Mr. Harms argues that Constable Moar's grounds must be assessed based on what he actually believed at the time of the arrest and not on what, in hindsight, he might have believed.

Discussion

- [50] Despite counsel's able submissions, I am not persuaded that the judge erred in finding that Constable Moar subjectively believed there were reasonable grounds upon which to arrest Mr. Harms or that those grounds were objectively reasonable.
- [51] Appellate courts adopt a functional approach when assessing reasons, which are reviewed in the context of the record, the issues and the arguments of counsel. For reasons to be sufficient, the factual and legal basis for a decision must be intelligible so that the pathway to the ruling or verdict is discernible. However, a judge is not obliged to discuss all of the evidence and argument presented or relied upon in support of a decision. In addition, and importantly, reasons should be read as a whole: *R. v. Dinardo*, 2008 SCC 24 at paras. 27-32; *R. v. Villaroman*, 2016 SCC 33 at para. 15.
- [52] In this case, the voir dire lasted three days and the judge gave brief, but intelligible, oral reasons the day after counsel made thorough closing submissions on the legal and factual issues for determination. In their submissions, both counsel outlined the essential elements of the offence of possession of stolen property, including the elements of knowledge, consent and a measure of control. In addition, both counsel discussed the requirements of reasonable grounds for effecting a warrantless arrest and the reasonable grounds required to arrest a suspect without warrant for unlawfully possessing stolen property. Further, both counsel made submissions on Barnhardt and the concepts of co-principal and party liability in the context of the offence of possession of stolen property and both related their submissions to the evidence presented on the voir dire. As noted, in doing so Crown counsel argued that there were "multiple routes" to liability for possession of stolen property and

ample evidence upon which Constable Moar could conclude Mr. Harms had "some involvement in the possession of this stolen vehicle in terms of knowledge and control."

- [53] The judge is presumed to know the law, including the essential elements of the offence of possession of stolen property and the requirements of principal and party liability. He also expressly referred to counsel's submissions and the relevant authorities as part of the basis upon which his decision was made (para. 35). Although he did not set out the elements of possession of property or directly relate each of them to Constable Moar's grounds for arresting Mr. Harms, in my view, when his reasons are read as a whole it is clear that the judge did not fail to consider whether Constable Moar had reasonable grounds to believe he had the requisite level of knowledge and control to justify arresting him for possession of stolen property. It is also clear that the facts, as the judge found them, were capable of constituting objectively reasonable grounds for the arrest of Mr. Harms either as a co-principal or a party to the offence.
- [54] Quite apart from counsel's concession that Constable Moar subjectively believed there were reasonable grounds upon which to arrest Mr. Harms for possession of stolen property, there was a basis in the evidence to support this conclusion. As noted, Constable Moar testified "I felt that I had the grounds -- reasonable and probable grounds to believe that these two males were arrestable for possession of stolen property". In other words, there was evidence that Constable Moar honestly believed at the time of the arrest he had reasonable grounds to believe Mr. Harms and Mr. Maloy, acting together in a joint venture, had committed the offence of possession of stolen property: see Day and Brownridge. The real question on appeal is whether the judge erred when he found that those grounds were objectively reasonable.
- [55] In my view, the judge did not err in finding that Constable Moar had objectively reasonable grounds to arrest Mr. Harms for committing the offence of possession of stolen property based on the totality of the circumstances. As he determined, those grounds were objectively reasonable taking into account the cumulative effect of Constable Moar's own knowledge, experience and observations, including the information he received via police radio "on an ongoing basis" throughout the surveillance operation. To repeat, the judge stated:
- [34] Given the close timing between the theft of the vehicle and the time that Mr. Harms was first observed in it, that Mr. Harms and Mr. Malloy appear to have abandoned the vehicle in a back alleyway, then split up only to rejoin a few blocks later, which as the Crown suggests may indicate a degree of coordination and cooperation between them, also given Cst. Moar's knowledge of Mr. Malloy's criminal background, I consider that it was reasonable of Cst. Moar to infer that Mr. Harms had knowledge that the vehicle had been stolen.
- [56] I see no error in the foregoing analysis. While terse, it reflects the sort of "practical, non-technical and common sense probability" contemplated by the authorities.

- [57] The judge's finding that the circumstances could indicate "a degree of coordination and cooperation between" Messrs. Harms and Maloy did not ignore, alter or supplement Constable Moar's testimony, nor did it amount to a determination of what, in hindsight, he might have believed when he arrested Mr. Harms for possession of stolen property. Rather, it distilled the overall import of Constable Moar's testimony in the context of a determination on whether he had reasonable grounds to effect the arrest. When he was asked why he arrested Mr. Harms, the import of Constable Moar's testimony was that he believed Mr. Maloy, a known auto thief, was the driver of the recently stolen vehicle, that Mr. Harms was the passenger and that, given their joint presence in the vehicle and seemingly coordinated actions in abandoning it in the alley, separating and converging within a block or two, there was a "good probability" they both knew it was stolen and together may have stolen it. In other words, the overall import of Constable Moar's testimony was that he believed Messrs. Harms and Maloy were engaged in a joint venture knowingly to possess the recently stolen vehicle. While the driver, Mr. Maloy, had physical control, on that view its legal possession was shared.
- [58] In my view, assessed through the lens of an experienced officer, there was an objectively reasonable probability in all of the circumstances, viewed cumulatively, that Messrs. Harms and Maloy had together committed the continuing offence of unlawfully possessing the stolen vehicle prior to its abandonment in the alley. This was so regardless of whether Mr. Harms was apparently in joint possession of the vehicle with Mr. Maloy as a joint-venturer and co-principal or whether, as an apparently voluntary passenger, he encouraged and thus abetted Mr. Maloy in his unlawful possession of the vehicle, as explained by Justice Finch in Barnhardt. Further, in my view, this analysis would apply on either the majority or minority approach in Barnhardt, because, in the reasonable grounds for arrest context, there could be no potentially disqualifying determination as to whether Mr. Harms was or was not involved in the theft.

Conclusion

- [59] For all of these reasons, I would dismiss the appeal.

"The Honourable Madam Justice Dickson"

I AGREE:

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Mr. Justice Hunter"

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Prepared on 28 October 2026 · Esheria