COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
MCCrApp. No. 172 of 2022

B E T W E E N

JOHNATHAN PIERRE

Intended Appellant

AND

COMMISSIONER OF POLICE

Intended Respondent

BEFORE: **The Honourable Sir Michael Barnett, President**
The Honourable Madam Justice Charles, JA
The Honourable Mr. Justice Smith, JA

APPEARANCES: **Intended Appellant appeared Pro Se**

Mrs. Eurika Coccia, Counsel for the Intended Respondent

DATES: **1, 12, 29 February 2024**

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Criminal appeal – Extension of time - Housebreaking – Stealing – Recent possession - Presumption of guilt of person found in possession of property recently stolen - Section 91 of the Evidence Act

On 25 May 2022 the Henfields noticed that their home had been broken in to and tools which were locked away therein had been stolen. The police were called. While waiting for the police the Henfields noticed a man, whom they identified as the intended appellant, moving away from their home. They followed him and asked him where are the tools that he stole from their home. The intended appellant denied that he stole any tools from the home of the Henfields.

When the police arrived the intended appellant's home was searched and a number of the items which had been reported stolen were discovered. The intended appellant advised that the items belonged to him. The intended appellant was arrested, following a struggle. While in police custody the intended appellant directed officers to a bushy area where more stolen items were found. As a result, the intended appellant was charged with housebreaking, stealing and resisting arrest. He was convicted and sentenced for all of the offences with which he was charged. He now seeks an extension of time to appeal his convictions.

Held: application for an extension of time dismissed; convictions and sentences affirmed.

This intended appeal must be considered bearing section 91 of the Evidence Act in mind. That section provides that: "Where a person is found in the possession of property proved to have been recently stolen he shall be presumed to have stolen it, or to have received it knowing it to have

been stolen according to the circumstances of the case, unless he shall give some satisfactory explanation of the manner in which it came into his possession." The intended appellant was found in possession of the stolen items on the day that the housebreaking and stealing occurred. Once the Magistrate, as the trier of fact, rejected the intended appellant's evidence that he was not in possession of the stolen items, the law permitted him to find that the intended appellant was guilty of both housebreaking and stealing.

R v Kowlyk [1988] 2 SCR 59 applied
R v Loughlin (1951) 35 Cr. App. R. 69 applied

J U D G M E N T

Judgment delivered the Honourable Sir Michael Barnett, P:

1. This is an application for an extension of time by Johnathan Pierre ("Pierre") to appeal his convictions in the Magistrates Court for housebreaking, stealing and resisting arrest. He does not seek to appeal against his sentences.

2. He was charged with the following counts:

> **"HOUSE BREAKING: Contrary to Section 362 (1) of the Penal Code Chapter 84**
>
> **Particulars Are:**
>
> **That you on Monday 25th, May, 2022 at Freeport, Grand Bahama, did unlawfully break and entered (sic) the dwelling house of Ulyn Hendfield at #34 Man-O-War Circle (sic) intent to steal therein.**
>
> **STEALING: Contrary to Section 345 (1) of the Penal Code Chapter 84**
>
> **Particulars Are:**
>
> **That you on Monday 25th May, 2022 at Freeport, Grand Bahama. Did steal (1) Yellow Air Compressor, (1) Jig Saw, (1) Flashlight, (3) Plyers, (1) Power Drill, (1) Electric Meter Tester, (1) Orange Power Cord valued at $800.00 the property of Ulyn Henfield.**
>
> **RESISITING ARREST: Contrary to section 247 of the Penal Code Chapter 84**

Particulars Are:

That you on Monday 25th May, 2022 at Freeport Grand Bahama, did resist the lawful arrest of Inspection (sic) Evans, while acting in the execution of duty."

3. The trial began on 25 August 2022. Pierre represented himself at his trial.

The Evidence

4. Ulyn Henfield testified that on 24 May 2022 at about 5 pm he was in his yard with his wife watering the grass. The intended appellant came up to them and asked if they were hiring persons. He told him "no". The following day when they came home, they discovered that the house had been entered into and various tools which belonged to them and had been in the house were missing. Mr. Henfield and his son, Ulano, went after a man they saw running toward Metro Station. They approached the man who he identified as Pierre and Ulano asked Pierre **"where the tools you took from the house".** Pierre replied, **"You'll got the wrong person twice", "why are you harassing me".** The Henfields reported the matter to the police. He saw the police had "captured" Pierre. The police asked the elder Mr. Henfield to identify some tools and he identified them as his. He also testified that he saw the police pass his house with Pierre and went to a bushy area. He saw an air tank and drop cord belonging to him in the bush. Under cross examination he admitted that he did not see Pierre break into his home. He said that he was not present when the police entered Pierre's apartment.

5. Ulano Henfield gave evidence as well. He said that on 25 May 2022 he and a few coworkers locked up tools belonging to them in their home. All the windows and doors were locked. He said that they came home and saw that the tools were missing, and he called the police. He said that he saw Pierre on a bike and followed him. He asked Pierre why he went into their house. He said that he saw the police find their tools **"inside the meter room of the complex".** That is the complex where Pierre was living. He said the police also took him to a bushy area where he saw other items. Under cross examination Ulano admitted that he did not see Pierre enter their home. He also said that he did not see the police take any items out of Pierre's home.

6. ASP Steven Rolle gave evidence. He said that on 25 May 2022 he and Inspector Garth Evans whilst in a police vehicle went to an apartment block after receiving certain information. He said that he saw Pierre whom he knew. Pierre started to run after seeing the vehicle. Pierre ran into an apartment unit and tried to lock the door. A struggle ensued and Pierre was subdued by Inspector Evans and him. He was placed under arrest on suspicion of housebreaking. He said that Pierre was shown a search warrant, and a search of Pierre's home was conducted in Pierre's presence. He said a number of items were found in the apartment and he asked Pierre about them. Pierre said that the items belonged to him. He said Pierre was taken to the police station and whilst there Pierre gave them certain information. As a result of that Pierre directed them

to a bushy area where they found other items which included an air compressor. He marked all of the items that he found for identification.

7. Inspector Garth Evans gave evidence. He said that as a result of information he received he an ASP Rolle went on mobile patrol to Sunset Apartments on Sergeant Major Road. He said that he saw Pierre and as he approached Pierre, he told him that he was wanted for housebreaking. He was able to gain entrance to Pierre's apartment. He arrested Pierre who attempted to resist him; he and ASP Rolle had to subdue him. While in the residence, Inspector Evans said that they collected a number of items that they believed were stolen. They took Pierre to the police station. After Pierre gave them **"additional information"** they took Pierre to a bushy area where Pierre pointed out to them a yellow and black air compressor. He said that he placed his initials on all of the items for identification. Insp. Evans also testified that they had a search warrant which was produced for Pierre to see.

8. Another police officer, Sergeant Daniel Gibson, also gave evidence that he was with ASP Rolle and Inspector Evans when Pierre took them to the bushy area and pointed out to them a yellow and black air compressor. He said that the compressor was not visible from the road.

9. Pierre gave evidence at the close of the prosecution's case. He said that he did not break into the house of the Henfields. He said that the police did not have a search warrant. He said that the police found some tools in his apartment but that they belonged to him. Under cross examination Pierre admitted that he had passed by the Henfield's home to ask for a job. He agreed that the stolen items were found **"at the property".**

10. After hearing the evidence, the Magistrate gave a decision in the following terms:

> **"The Court having heard all the evidence in this case hereby accepts the case for the prosecution. The court rejects the case for the defendant and that the defendant explanation given regarding how he came to discover the items in question to be unbelievable. The case for the defendant is rejected. Therefore on count 1 the court finds the defendant guilty. On count 2 the court finds the defendant guilty."**

11. There was no mention in the decision of count 3.

12. Pierre was invited to make submissions prior to sentencing but said nothing. The Magistrate then imposed the following sentences:

> **"COUNT: 1**
>
> **HOUSE BREAKING: Contrary to section 362 Penal Code 84**

Convicted - sentence to 36 months at BDCS within (sic) effect from Friday 27th May 2022

COUNT: 2 STEALING: Contrary to section 345 (1) of the Penal Code Chapter 84

Convicted and sentence to 36 months within (sic) effect from Wednesday May 27th 2022 (sic)

COUNT: 3 RESISTING ARREST: Contrary to Section 247 of the Penal Code Chapter 84

Convicted and sentence to 3 months within (sic) effect from Wednesday 27 May 2022 (time spent)

ALL SENTENCES TO RUN CONCURRENTLY."

13. Pierre now seeks to appeal his convictions. A Notice of Appeal was first filed in December 2022. It was out of time and the Motion for an extension of time was filed in March 2023. Pierre (who represents himself in this appeal) has proffered six grounds of appeal. They are:

"1. The police who searched my apartment did not have a search warrant whilst searching my apartment. This was made evident from the conflicting dates and times set forward on the police reports.

2. Police found no stolen items at my apartment, the virtual complainant was on site whilst my apartment was being searched and stolen items were found at the rear of my apartment which consist of twenty (20) units, which they attested to. Police said they found items in my apartment which was a lie seeing that virtual complaints (sic) had conflicting statements.

3. Police failed to produce exhibits in court of stolen items. They claimed that the items were returned to complainants. The complainants claimed that their belongings were initialed, however this could not be substantiated seeing that they were never made available at trial. Police photographers took photos of items found in my apartment (bed pump, skill saw etc.) and items found at the rear of my apartment complex, however these photos were never made available due to a lack of media to display them which I am not liable for. Had they been made available (photos of items stolen and my personal belongings) I could have made a

distinction between what was found in my apartment and what was recovered somewhere else.

4. Magistrate Laing claimed that I led police to stolen items which implicates me as the culprit, however I was not allowed to explain how I had knowledge of the whereabouts of the air compressor. The house that was claimed to be broken into is located one corner roughly 200 m from my apartment and I frequently pass by it on my way to buy cigarettes. I told police whilst passing the afternoon before my arrest I saw the machine on the side of the road. Photos were taken of its location however police never produced this evidence in court.

5. I pleaded guilty to second count of stealing not as an admission of guilt but as means to have the case heard in a less partial court.

6. Police had no eyewitnesses neither any fingerprint nor DNA evidence to use against me in court. They also misguided the courts when asked where did they find the alleged stolen items they manipulatively stated whilst at my residence instead of at my 20 unit apartment complex. I have no control and am (sic) not liable for any items found or placed on the outside of my apartment complex."

14. Before proceeding to deal with the specific grounds of appeal, it is necessary to set out the legal background against which the charges must be considered.

15. Section 91 of the Evidence Act provides:

> **"91. Where a person is found in the possession of property proved to have been recently stolen he shall be presumed to have stolen it, or to have received it knowing it to have been stolen according to the circumstances of the case, unless he shall give some satisfactory explanation of the manner in which it came into his possession."**

16. This is known as the doctrine of recent possession. It is found throughout the common law world, although the use of the word "doctrine" has been the subject of some criticism.

17. The "doctrine" was considered by the Supreme Court of Canada in **R v Kowlyk** [1988] 2 SCR 59. In that case:

"Appellant was charged with break, enter and theft under s. 306(1)(b) of the Criminal Code. His brother had admitted to committing the three burglaries in question and the police had found items from the burgled houses in the house appellant shared with his brother, some in his bedroom. On entering the house with the police, appellant's brother shouted, "They got us"; appellant tried to leave by his bedroom window but was deterred by a police officer stationed outside. Appellant was convicted on an application of the doctrine of recent possession and the Court of Appeal upheld that conviction. At issue here is the legal significance to be attributed to possession of recently stolen property."

18. On the appeal to the Supreme Court of Canada, that Court, by a majority, made the following statements of law:

"7. 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.

8. 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. This point was reviewed in this Court in R. v. Lovis; R. v. Moncini, supra. In that case, the accused were charged with two offences: robbery, and possession of a stolen automobile. In the automobile at the time of its theft were certain articles of personal property which were found in the possession of the accused after the robbery had taken place and the car had been used as the get-away vehicle.

Martland J.A., speaking for a unanimous full Court, dealt with this question commencing at p. 303. He quoted from Reference re Regina v. Coffin, supra, and, as well, the words of Pollock C.B. in the early English case of R. v. Exall, supra, at pp. 924-27 F. & F., 851-52 E.R., quoted above, which were specifically approved in Coffin, supra, by Kellock, Rand and Fauteux JJ., and supported by Kerwin and Taschereau JJ. in a separate concurring judgment. Martland J. said, at p. 305:

> **In the light of these statements as to what may be the effect of recent possession of stolen articles, not only in relation to a theft of the articles themselves, <u>but also in relation to the evidence as to the commission of another crime,</u> I do not think that it is a valid ground for upsetting the jury verdict because the trial judge may have stressed the requirements of s. 3(4) for establishing possession of the four articles to which he referred. Here, as in the Coffin reference, a rule relating to possession of certain articles is used to link the accused to pieces of evidence in respect of a crime in which their possession is not, otherwise, a material element.**

In addition, see, as well, R. v. Langmead, supra, and R. v. Nickerson, supra." [Emphasis added]

19. And later the court said:

> **"12. 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."

20. In this case, the prosecution led evidence that Pierre was in possession of the stolen goods on the same day as the theft. Pierre did not provide any explanation for his possession of those goods. His position was that he was never in possession of those items which were stolen from the Henfield house. His position was that no stolen items were found in his apartment. His evidence was that the items were found in a meter room of a 20-unit complex to which persons other than him had access. He said that he did take the police officers to the bush where the compressor was found but that was because he saw them on the road when he was passing by earlier and that they were not in his possession or under his control.

21. Notwithstanding the brevity of his decision, the Magistrate clearly accepted the evidence of the police officers as to Pierre's possession of the stolen items. He did not accept the evidence of Pierre that he was not in possession of the items.

22. Ex facie, having regard to the provision of section 91 of the Evidence Act, there was a basis upon which the Magistrate could have found that the prosecution's case was proved.

23. The hearing of the application for an extension of time focused on the intended appellant's prospects of success. I now proceed to the proposed grounds of appeal.

Ground One - The police who searched my apartment did not have a search warrant whilst searching my apartment. This was made evident from the conflicting dates and times set forward on the police reports.

24. This is an issue of fact. Both ASP Rolle and Inspector Evans gave evidence that they had a search warrant. ASP Rolle said: **"the search warrant was shown to him"** and Inspector Evans said: **"yes we had a search warrant".** Pierre suggested that they could not obtain a warrant so quickly. Rolle said that the warrant was brought by a second car. The search warrant was introduced into evidence through ASP Rolle.

25. Whilst it would have been preferable for the Magistrate to have made a specific finding on the issue of the search warrant, he clearly accepted the evidence of the prosecution witnesses over that of Pierre.

26. This proposed ground simply has no merit.

Ground two - Police found no stolen items at my apartment, the virtual complainant was on site whilst my apartment was being searched and stolen items were found at the rear of my apartment which consist of twenty (20) units, which they attested to. Police said they found items in my apartment which was a lie seeing that virtual complaints had conflicting statements.

27. This is a complaint about a finding of fact. This Court is not a trial court. The police officers testified that stolen items were in fact found in Pierre's apartment. The Magistrate accepted that evidence. He did not accept the evidence of Pierre on this fact. It is not for this Court to determine where the items were found. Suffice it to say that both the police officers and Pierre testified that the air compressor was found in the bushy area and that Pierre took the officers to the area. Indeed, Sergeant Gibson testified that the items in the bush could not be seen from the road. This was contradictory to Pierre's statement that he saw the items whilst passing on the road.

28. This proposed ground has no merit.

Ground three - Police failed to produce exhibits in court of stolen items. They claimed that the items were returned to complainants. The complainants claimed that their belongings were initialed, however this could not be substantiated seeing that they were never made available at trial. Police photographers took photos of items found in my apartment (bed pump, skill saw etc.) and items found at the rear of my apartment complex, however these photos were never made available due to a lack of media to display them which I am not liable for. Had they been made available (photos of items stolen and my personal belongings) I could have made a distinction between what was found in my apartment and what was recovered somewhere else.

29. The evidence at the trial of the stolen items was given by police officer Gayshell Russell. She said:

> **"My duties are crime scenes investigations photography and latent print examination. On Monday May 25 2022 while on duty at the Criminal Records Office received information via telephone from #3436 Gibson of North East Police Station in reference to receiving stolen property. As a result I went to the North East Police Station I got update from Gibson he pointed out items and I photographed the same for further identification concluded involvement after photos. Sergeant Gibson and I hook up my camera to computer and burnt images. I took to computer image uploaded on burnt disk. I sealed the disk my signature is on disk. I burnt one disk and I also burnt 2 additional disk when I got the summons I mark all 3 disk the defendant looked at the signature on the disk**

> **witness pointed out signature on the disk, disc-exhibited in evidence as "GR 1" for further identification."**

30. Pierre did not cross-examine officer Russell.

31. The Notes do not support the allegation that the disc could not be played or that Pierre wanted or attempted to identify the items on the disc to show what was found in his apartment and what belonged to him. The disc was admitted without objection.

32. I see no basis upon which this proposed ground can be upheld.

Ground Four - Magistrate Laing claimed that I led police to stolen items which implicates me as the culprit, however I was not allowed to explain how I had knowledge of the whereabouts of the air compressor. The house that was claimed to be broken into is located one corner roughly 200 m from my apartment and I frequently pass by it on my way to buy cigarettes. I told police whilst passing the afternoon before my arrest I saw the machine on the side of the road. Photos were taken of its location however police never produced this evidence in court.

33. This ground has no factual predicate to support it. It was not the Magistrate who claimed that Pierre led the police officers to an air compressor in the bush. It was the evidence of the three police officers who accompanied Pierre who told the Magistrate that fact. Indeed, as I pointed out earlier, Gibson said that you could not see the compressor from the road. It was necessary to go into the bush to find it. Pierre gave evidence and told the court that:

> **"…they took me to the station and questions (sic) me and showed me the compressor. I know the area and I passed the track road. The night before I noticed somethingnot in the bush but on the side of the building next to the school garbage bin in the track road …I … notice (sic) it on my way back…".**

34. The suggestion **"I was not allowed to explain how I had knowledge of the whereabouts of the air compressor"** is belied by the record. He did explain how he came to know about the air compressor. The Magistrate simply did not believe his evidence.

35. There is nothing of merit in this proposed ground.

Ground five - I pleaded guilty to second count of stealing not as an admission of guilt but as means to have the case heard in a less partial court.

36. There is nothing to support the suggestion that he pleaded guilty to any of the three counts for which he was convicted and is the subject of this appeal. Rather, the Magistrate's Record

indicates: **"Defendant appeared and arraigned elected magistrate court on count 1 not guilty count 2 not guilty…"**

37. This proposed ground has no substance.

Ground six - Police had no eyewitnesses neither any fingerprint nor DNA evidence to use against me in court. They also misguided the courts when asked where did they find the alleged stolen items they manipulatively stated whilst at my residence instead of at my 20 unit apartment complex. I have no control and am not liable for any items found or placed on the outside of my apartment complex.

38. It is accepted that there is no direct evidence that Pierre broke in the home of the Henfields. No evidence was adduced of any fingerprints of Pierre that were found in the home. Indeed, none of the police officers were asked if any attempt was made to obtain fingerprints.

39. The prosecution's case was based on the fact that all of the stolen items were found in Pierre's apartment or in the bushy area to which Pierre led them. They assert that the stolen items were found in Pierre's possession immediately after they were stolen. In fact, on the same day. The evidence was not that only some of the items were found in Pierre's possession. All of them were. This militates against any inference that he was simply a receiver of the goods. The prosecution also relies on the circumstantial evidence that Pierre was seen by Ulyn Henfield by the house the day before, ran when he saw the officers approach him and resisted being arrested. The items were in his apartment, which apartment he was trying to prevent the police officers from entering.

40. The prosecution's case is that given the provision of section 91 of the Evidence Act, the Magistrate on all of the prosecution's evidence, which he accepted as true, was entitled to find that Pierre was guilty of both theft and housebreaking. He was entitled to make that finding of guilt notwithstanding that there was no eyewitness evidence of his entering the Henfield home and no evidence of Pierre's fingerprints being found in the Henfield's home.

41. In **R v Loughlin** (1951) 35 Cr. App.R. 69 Lord Goddard, CJ said:

> **"If it is proved that premises have been broken into, and that certain property has been stolen from those premises, and that very shortly afterwards a man is found in possession of that property, that is certainly evidence from which the jury can infer that he is the housebreaker or shopbreaker and, if he is, it is inconsistent to find him guilty of receiving, because a man cannot receive from himself . . . . <u>It is perfectly good evidence of the prisoner being the housebreaker that he is</u>**

found in possession of property stolen from a house quite soon after the breaking." [Emphasis added]

42. In my judgment, this proposed ground must also fail.

43. In my view, once the Magistrate, as the trier of fact, rejected Pierre's evidence that he was not in possession of the stolen items, the law permitted him to find that Pierre was guilty of both housebreaking and stealing.

44. In my judgment, for the reasons set out above, this application for an extension of time must be dismissed and Pierre's convictions and sentences affirmed.

Postscript

45. As a postscript to this judgment, it is a matter of regret that the Magistrate was so brief in his written reasons for his decision. It is imperative that judicial officers give adequate reasons that properly explain their decision. This assists in ensuring fairness, accountability and transparency in the decision-making process. The obligation is a salutary one. It reinforces public confidence in the judgment and fairness of the tribunal.

The Honourable Sir Michael Barnett, P

46. I agree.

The Honourable Madam Justice Charles, JA

47. I also agree.

The Honourable Mr. Justice Smith, JA