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# CRIMINAL FOCUS

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## 1+1 = 2: Double Your Reading Pleasure

This quarter's issue of *Criminal Focus* comes together with the January 2001 issue, the printing and mailing of which was postponed for "technical reasons". I hope you find both issues entertaining and useful. The plan for the near future is to produce and distribute binders\* for this newsletter, so don't lose your old copies (back issues are available at a small charge).



(\*not exactly as illustrated...)

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## 1+1 = 21(1)(c) (?): The Court and Implied Abetting

*R. v. Barnhardt*, 2001 BCCA 191

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In this appeal, the Court was asked whether it was reasonable for a trial judge to have convicted the accused, who had been found to have been an occupant in a recently stolen vehicle, for possession of stolen property. The case provides a useful framework for an examination of the party liability provisions of the *Criminal Code*, and in particular the possibility of conviction as an abettor, based on mere presence.

The appellant, along with a co-accused named Eck, had been charged with theft and possession of stolen property after a Jeep was stolen from the driveway of a residence and then abandoned nearby. Investigating officers had caught the two accused in the vicinity of the abandoned vehicle a little while later, and a significant body of evidence had linked them back to it.

By the time of the appellant's trial, Eck had pled guilty to possession, and the Crown had stayed the theft charge against him.

The appellant had been acquitted of theft, the trial judge finding there was insufficient evidence to place him in the driver's seat. The Jeep's owners had witnessed the theft from their windows, and had given a detailed description of the driver that was inconsistent with the appearance of the appellant. They had, nevertheless, identified the appellant in court. In the circumstances the trial judge had not felt able to rely on such evidence. The Crown did not appeal the theft acquittal.

The judge had felt able confidently to convict the appellant for possession, though as Rowles J.A. put it in her dissenting judgment:

The foundation for the finding of criminal liability against the appellant on the possession charge is not clear from the trial judge's reasons...

The extracts from the trial judge's reasons quoted by Rowles J.A. indicate that, after declining to convict for theft, he had found as a fact that the appellant had been one of the two occupants who had run from the abandoned Jeep, and had then said:

... I find the combination of these circumstances to be consistent with Barnhardt having been one of two people in possession of the stolen Jeep, beside the road at 148th and 87A and I find the combination of these circumstances to be inconsistent with any other rational conclusion.

Therefore, I find that the circumstantial evidence in your trial, Mr. Barnhardt, proves you guilty beyond a reasonable doubt of Count 2, the possession of stolen property.

On appeal, the Crown asserted that the verdict against the appellant was supportable via the party provisions found in either paragraph 21(1)(c) or subsection 21(2) of the *Criminal Code*, or by attributed or constructive possession under paragraph 4(3)(b) (see sidebar).

Regarding subsection 21(2), the Crown argument was expressed in this way:

In this case, both the driver and the Appellant at the very least intended to be occupants of a vehicle knowing that it had been taken without the owner's consent, an offence under s. 335 of the Criminal Code. The Appellant knew or ought to have known that a probable consequence of occupying the vehicle, was the driver's possession of stolen property (to which Mr. Eck pleaded guilty). The Appellant thus became a party to the offence of possession of stolen property by operation of s. 21(2) of the Criminal Code. It was not necessary that he personally control the stolen vehicle, much less that he aid or abet the theft.

## The Majority

Finch J.A. wrote for the majority, Mackenzie J.A. concurring, and wasted little ink. Having stated his agreement with the conclusion of Rowles J.A. that Eck and the appellant had been the sole occupants of the stolen vehicle, Finch J.A. stated the issue as follows:

The question arising on these facts is whether the appellant was properly convicted as a party to the offence of possessing stolen property, as one who abetted or encouraged the other occupant in the commission of the offence.

Both individuals, he stated, must have known the Jeep

## STATUTORY PROVISIONS

*Criminal Code* s. 4:

- (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.

*Criminal Code* s. 21:

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.
- (2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

*Criminal Code* s. 335:

- (1) Subject to subsection (1.1), every one who, without the consent of the owner, takes a motor vehicle or vessel with intent to drive, use, navigate or operate it or cause it to be driven, used navigated or operated, or is an occupant of a motor vehicle or vessel knowing that it was taken without the consent of the owner, is guilty of an offence punishable on summary conviction.
- (1.1) Subsection (1) does not apply to an occupant of a motor vehicle or vessel who, on becoming aware that it was taken without the consent of the owner, attempted to

*continued on page 28*

was stolen. If the appellant was the driver, then of course he was guilty of possession as a principal, the act of driving establishing the requisite element of control. If he was the passenger, wrote Finch J.A., then he was guilty as an abettor, via s. 21(1)(c) of the *Code*:

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.

The appeal was dismissed.

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*“...the appellant was a voluntary passenger in a vehicle he knew to be stolen, and ... he thereby encouraged Eck in possessing the stolen property”*

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### The Dissent

Madam Justice Rowles in dissent first dealt with the application of *Code* subsections 21(1) and (2). The effect of section 21, she wrote,

is to make equally culpable: (i) the person who actually commits the offence, (ii) anyone who aids or abets in committing the offence, and (iii) persons who form an intention in common to carry out an unlawful purpose leading to the commission of the offence charged: *R. v. Dunlop*, [1979] 2 S.C.R. 881, 47 C.C.C. (2d) 93, 8 C.R. (3d) 349.

Regarding potential joint liability as a principal under paragraph 21(1)(a), it was noted that the Crown was not pursuing that possibility, and had not appealed the theft acquittal, which could potentially have been attacked on the basis that individuals participating in offences together can each be convicted as a principal: *R. v. Corak*, [1994] B.C.J. No. 330 (Q.L.) (B.C. C.A.).

Turning then to paragraph 21(1)(c), upon which the majority based their judgment, Rowles J.A. wrote:

The Crown's submission that the appellant's conviction on the possession charge is supportable under s. 21(1)(c) rests on the proposition that the appellant's mode of participation in the possession offence was as an abettor.

The word "abets" in s. 21(1)(c) means, among other things, to encourage. The actions of a person who abets in committing the offence must have been intended to further the commission of the crime: see *Prudential Exchange Co. v. Edwards* (1938), [1939] S.C.R. 135, 71 C.C.C. 145. As

Dickson J. explained in *R. v. Dunlop*, supra, at 891 (S.C.R.):

Mere presence at the scene of a crime is not sufficient to ground culpability. Something more is needed: encouragement of the principal offender; an act which facilitates the commission of the offence, such as keeping watch [or] enticing the victim away, or an act which tends to prevent or hinder interference with accomplishment of the criminal act,...

Rowles J.A. seems to have ruled that the appellant could not be said conclusively to have aided or abetted, since the evidence did not establish that he was not in fact the driver. Whether that was really the basis for her statement that “the Crown cannot rely on s. 21(1)(c) to uphold the verdict against the appellant on the possession count”, the authority she cites is clearly sufficient in itself. The only evidence linking the appellant to the driver's possession was the appellant's presence in the vehicle, combined with a reasonable inference of knowledge that it was stolen. Without more, as Dickson J. wrote, this “mere presence ... is not sufficient to ground culpability”.

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*“Mere presence at the scene of a crime is not sufficient to ground culpability”*

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Moving on to consider the applicability of subsection 21(2), Rowles J.A. noted that the subsection

applies to circumstances where the common unlawful purpose formed by two or more persons results in another offence being committed: see *R. v. Howard and Trudel* (1983), 3 C.C.C. (3d) 399 (Ont. C.A.); *R. v. Simpson*, [1988] 1 S.C.R. 3, 38 C.C.C. (3d) 481, 62 C.R. (3d) 137.

The authorities make it clear that this other offence must indeed be something other than the offence comprising the “common unlawful purpose”: *R. v. Simpson*, supra.

The Crown on this appeal contended that the common unlawful purpose here was the offence of taking a motor vehicle without consent under *Code* s. 335, and the incidental offence committed was possession of stolen property.

The problem for this argument, as far as Rowles J.A. was concerned, was that the Crown, because Eck was not present for the appellant's trial, had not established that anyone had committed the incidental offence of possession as principal. Therefore, the appellant could not be made a party to it:

leave the motor vehicle or vessel, to the extent that it was feasible to do so, or actually left the motor vehicle or vessel.

*Criminal Code* s. 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; or
- (b) an act or omission anywhere that, if it had occurred in Canada, would have constituted an offence punishable by indictment.

Under subsection 21(2), the external elements the Crown must establish consist of: (a) the formation of the unlawful common intention; and (b) the commission of a further offence as a consequence of carrying out the unlawful intention. The mental element consists of: (a) an intention to carry out an unlawful purpose and to assist each other therein; and (b) knowledge that the commission of the collateral or incidental offence would be a probable consequence of carrying out the common purpose.

Unless there is a common unlawful purpose, s. 21(2) has no application. Section 21(2) makes a person guilty of a consequential offence but without a common unlawful purpose there can be no consequential offence.

Control is an essential element of possession: see *R. v. Hess* (No. 1) (1948), 94 C.C.C. 48, 8 C.R. 42 (B.C.C.A.) and *R. v. Beaver*, [1957] S.C.R. 531, 118 C.C.C. 129. If it were clear from the evidence that it was Eck who was driving the Jeep, the Crown could be taken to have established that Eck had control and therefore possession of the Jeep. However, the evidence falls short of establishing which of the two men was the driver with the result that the Crown comes up against the problem of not being able to prove that the consequential offence was committed. If the commission of the consequential offence is not established, the appellant cannot be convicted of it.

Finally, Rowles J.A. considered the applicability of paragraph 4(3)(b), which deals with “joint” or “constructive” possession. She cited the Court’s adoption, in *R. v. Baker*, [1976] W.W.D. 132 (B.C.C.A.), of the following statement of the law on this topic:

It follows that 'knowledge and consent' cannot exist without the co-existence of some measure of control over the subject matter. If there is the power to consent there is equally the power to refuse and vice versa. They each signify the existence of some power or authority which is here called control, without which the need for their exercise could not arise or be invoked. The principle of 'sufficient reason' applies. For example it would be an irrational act for A to attempt to consent to or refuse B the use of C's motor car unless A has some measure of control over it.

That view of the requirements for constructive possession was confirmed by the Supreme Court of Canada in *R. v. Terrence* (1980), 47 N.R. 13, 55 C.C.C. (2d) 183, 17 C.R. (3d) 390 (Ont. C.A.), affd. [1983] 1 S.C.R. 357, 47 N.R. 8, 4 C.C.C. (3d) 193, 33 C.R. (3d) 193 (S.C.C.):

... a constituent and essential element of possession under s. 3(4)(b) [now s. 4(3)(b)] of the Criminal

Code is a measure of control on the part of the person deemed to be in possession by that provision of the Criminal Code....

In *Baker and Terrence*, as in the case on appeal, the accused had been a passenger in a car he knew was stolen. Absent more, this had been insufficient to found a conviction for possession.

The Crown on this appeal cited cases in which there had been evidence from which it could reasonably be inferred that the individuals in question were engaged together in a venture to profit from the illicit goods. In *R. v. Kinna* (1951), 98 C.C.C. 378 at 383 (B.C.C.A.), the group had been trying to pawn a stolen typewriter. In *R. v. Miller* (1984), 12 C.C.C. (3d) 54 at 85-86 (B.C.C.A.), they had conspired together to import a cargo of marijuana.

The evidence regarding Mr. Barnhardt, by contrast, was simply that he had ridden in a vehicle, knowing it was stolen. While it might have been possible, in the circumstances, to infer a joint venture of theft, Barnhardt had been acquitted on that charge, and the Crown had not appealed the acquittal:

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.

## Commentary

It would seem that this was a case that should have been argued, at trial and on appeal, on the issue of whether the evidence established that the appellant had been a principal, jointly with Eck, in the theft of the Jeep. He had apparently been hiding in the bushes while Eck took the vehicle, and jumped aboard following a horn signal from the driver once he was under way. Whether conclusive or not, those facts at least tend to establish actual participation in theft.

Since the case had not proceeded on that basis, as Rowles J.A. makes clear in her judgment, it was not open to the Crown to argue that the appellant could still be considered guilty of possession as a principal, via the provisions of subsection 4(3). Either the theft and the subsequent possession, which “could not logically be

separated”, were a joint venture of the two accuseds, or they were not.

Similarly, where no such joint venture of theft is made out, the party provision of subsection 21(2) does not apply. Surely it would be inconsistent to find that an accused was guilty as a party of some incidental offence, where he was not implicated in the (necessary) common unlawful purpose. On the other hand, if the common unlawful purpose and the incidental offence are, in effect, one and the same (as the Crown argued here), the requirements of the subsection and the case law interpreting it are not met.

Eliminating subsections 21(2) and 4(3), and paragraph 21(1)(a), a conviction of Mr. Barnhardt had to be based on either paragraph 21(1)(b) or (c). He had to be shown to have aided or abetted possession. The established facts were that he had ridden in a vehicle that was obviously recently stolen, that the vehicle had soon after been stopped and abandoned, and that he had run from the scene in the company of the driver.

While no-one seems to have suggested that these acts supported an inference of aiding possession, the majority of the Court ruled that there was no other reasonable inference but that the appellant had “thereby encouraged” Eck in the offence of possession.

With respect, it is not clear how the link from mere presence to encouragement was drawn. While one might, in the circumstances, be able reasonably to infer approval, how does one infer actual encouragement? If mere presence in a stolen vehicle were proof of abetting, then it would seem that any debate over the applicability of the doctrine of constructive possession in such circumstances would be moot.

It is well established that proof of abetting requires proof both of acts or words of encouragement, and of a conscious purpose of encouragement: *R. v. Greyeyes*, [1997] 2 S.C.R. 825; *R. v. Curran* (1977), 38 C.C.C. (2d) 151 (Alta. C.A.). To be convicted as a party, the accused must have done something to encourage or facilitate the commission of the offence, or have held himself in readiness to assist. Mere presence is not enough: *Prudential, Dunlop, supra*.

Such overt encouragement need not be great, but it must exist as something beyond mere attendance and approval. In *R. v. Black*, [1970] 4 C.C.C. 251 (B.C.

C.A.), for example, the accused was convicted for laughing and yelling encouragement as the principal assaulted the victim.

In this case there was no evidence of any words spoken by the appellant, or any act done by him from which one could logically infer anything more than a voluntary presence in the vehicle. His apparent attempt at escape after the vehicle was dumped implies a consciousness of guilt, but after all, he was guilty—of the s. 335 offence. With respect, to infer acts or words of encouragement from the evidence before the trial court seems an exercise in speculation, rather than in logic.

It would be this writer’s submission that subsection 21(1) should not be used as a convenient back door to permit convictions where subsection 4(3) would not. For motor vehicles, Parliament has drafted a provision (s. 335) specifically to cover such situations, and that provision should be applied where appropriate, rather than distorting party liability law to convict an accused where the Crown has failed properly to proceed against him.

Evidence that merely brings an accused together with a principal who is in possession of stolen property, even where it is also established that the accused knew the property was stolen, should not be sufficient for a possession conviction. One plus one does not equal 21(1)(c)... ❖

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