IN THE DISTRICT COURT
AT AUCKLAND

CRI-2016-004-004496
[2018] NZDC 3334

THE QUEEN

v

BRETT GRANT PATCHETT

Date of Ruling:	23 February 2018
Appearances:	S Waalkens for the Crown E Priest for the Defendant
Judgment:	23 February 2018

RULING 6 OF JUDGE K J GLUBB
The concept of possession

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[1] The defendant, Brett Patchett, is on trial for possession of drugs and receiving stolen property. As part of the summing up, the jury was provided with a question trail for each charge.

[2] While in deliberation, the jury asked the following question relating to possession and the formulation of the question trail:

> "Referring to charge 3, question 1 (b) be aware that the item has been stolen. Is that correct, because it means that no one can be held to be recklessly taking possession, if they do not satisfy the requirement to know that it is stolen in order to be found to have possession of stolen property"

[3] As it related to the receiving charges 3, 4 and 5; question 1 and the guidance within the question trail was as follows:

1. Are you sure that Mr Patchett had possession of the Apple MacBook found on the work bench?

To have possession of stolen property a person must: a) Be aware that the item is where it is; b) Be aware that the item has been stolen; c) Be in actual or potential control of the item; and d) Have an intention to exercise control over the item.

[4] The contents of the guidance box, as included, was drawn faithfully from the Court of Appeal decision in *Cullen v R*[1] at paragraph [24]. That provided:

> [24] Nor was there a fulsome explanation of the concept of "possession". While the word "possession" is in common usage, in legal terms it involves two distinct legal elements,[26] which can usefully be sub-divided into four for the purpose of the receiving charge:
>
> (a) awareness that the item is where it is;
>
> (b) awareness that the item has been stolen;
>
> (c) actual or potential control of the item; and
>
> (d) an intention to exercise that control over the item.
>
> (footnote included – R v Cox)

[5] The Court when identifying those 'distinct legal elements' placed reliance on an earlier Court of Appeal decision, *R v Cox*.[2] In that judgment, the Court was dealing with the issue of possession in a Misuse of Drugs Act prosecution. The Court held:

> Turning to the issue of possession, in this legislation at least possession and purpose are quite distinct matters. Possession involves two, not three elements. The first, often called the physical element, is actual or potential physical custody or control. The second, often described as the mental element and which may be called the element of mens rea, is a combination of knowledge and intention: knowledge in the sense of an awareness by the accused that the substance is in his possession (which is often to be inferred or presumed), and an intention to exercise possession.

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[1] *Cullen v R* [2012] NZCA 413 at [24].
[2] *R v Cox* [1990] 2 NZLR 275.

…

> A charge of possession of a controlled drug also requires proof of knowledge by the accused that what is in his possession is a controlled drug, although he need not know the exact nature. [3]

[6] In formulating their concept of possession as it related to a receiving charge, it is notable that the Court of Appeal in *Cullen v R* was not referred to the permanent Court of Appeal's decision in *R v Kennedy*.[4] That was a case dealing with the concept of possession as it related to a charge of receiving. The question framed for that appeal was: "Does the test for possession of drugs also apply to s 260 Crimes Act 1961? If not, what is the test for possession or control under that Act?"

[7] The Court of Appeal was referring to s 258 and 260 Crimes Act 1961. The issue before the Court was:

> [2] The question of law as stated relates to the word "possession" as used in s 260 of the Crimes Act 1961. That provision is to be read with s 258(1) which defines the offence of receiving:
>
> **258. Receiving property dishonestly obtained** — (1) Every one who receives anything stolen, or obtained by any other crime, by any act wherever committed which, if committed in New Zealand, would constitute a crime, knowing that thing to have been stolen or dishonestly obtained, is liable –
>
> (a) To imprisonment for …
>
> **260. When receiving is complete** — The act of receiving anything unlawfully obtained is complete as soon as the offender has, either exclusively or jointly with the thief or any other person, possession of or control over the thing, or aids in concealing or disposing of it.

[3] Ibid at page 278.

[4] *R v Kennedy* [2001] 1 NZLR 314.

[8] The statute as it then was, has since been amended and the provisions of s258 and 260 combined respectively within s246(1) and (3), which provide:

> **[**246 **Receiving**
> (1) Every one is guilty of receiving who receives any property stolen or obtained by any other **[[**imprisonable offence**]]**, knowing that property to have been stolen or so obtained, or being reckless as to whether or not the property had been stolen or so obtained.
> …
> (3) The act of receiving any property stolen or obtained by any other **[[**imprisonable offence**]]** is complete as soon as the offender has, either exclusively or jointly with the thief or any other person, possession of, or control over, the property or helps in concealing or disposing of the property.

[9] While recklessness is now an express mental element under s246(1), I see no distinction in terms of the wording change as it relates to the issue of possession within s246(3).

[10] The Court of Appeal in *R v Kennedy* assessed the rationale for the distinction in terms of Misuse of Drugs Act 1975 offences at paragraph [13] as follows:

> [13] The various decisions on the Misuse of Drugs Act 1975, which concern the criminal liability of the person in possession of controlled drugs, are of little relevance in the present context. Three features of that legislation distinguish it from the present situation. First, by contrast with the crime of receiving, the crime of possession of a controlled drug does not contain any express guilty mental element: see the Misuse of Drugs Act, s 7; see also s 29. Instead, the guilty mental element of knowledge that the item possessed is a controlled drug has been read as implied in the legislation, consistently with its purpose; *R v Metuariki* [1986] 1 NZLR 488. Second, possession in the drugs context is plainly concerned with a continuing state of affairs: the person in possession commits an offence during the (knowing) period of possession. Third, to reinforce the point made in para [12] about the innocent "receiver", it is a defence to the crime of possession of a controlled drug if the person charged can prove that their possession was for the purpose of preventing another from committing an offence or for returning the drug to someone lawfully entitled to have possession of it: the Misuse of Drugs Act, s 7(3). Thus, the policy factors which tell against the reading given to s 260 of the Crimes Act in the lower Courts do not apply in the drugs context.

[11] In answer to the question, the Court held:

> [14] To return to the question stated by the High Court, we accordingly conclude that the tests for the possession of drugs do not apply to s 260 of the Crimes Act. Rather the provisions of s 260 are to be applied in their own terms: the act of receiving is complete as soon as the alleged offender (among other things) has possession or control over the thing. That test requires both factual and mental elements, with the latter being limited however to the knowledge

> that the person possesses or controls the thing and the intention to exercise possession or control, and not that the person knows that it has been stolen or dishonestly obtained. The question should be answered in those terms.

[12] There is a conflict between these two judgments, and both approaches to the 'concept of possession' cannot be correct. In contrast, the answer to the question in *R v Kennedy* was the *ratio.* The guidance provided in *Cullen v R* was *obiter*. It appears that the inclusion of "(b) awareness that the item has been stolen;" at paragraph [24] of *Cullen v R* has resulted from a consideration of *R v Cox*, which was a Misuse of Drugs Act appeal. That saw this phrase adopted, when it was not a requirement for the concept of possession for the receiving charges that were under consideration.

[13] The leading authority from the Court of Appeal on the concept possession for a receiving charge is the decision of *R v Kennedy.* It was not referred to by the divisional Court in *Cullen v R,* and it has not been either expressly or implicitly overruled. This Court is bound by the ruling in *R v Kennedy*.

Conclusion

[14] When considering the concept of possession, and the exercise of possession or control by a defendant over the property in question, it is unnecessary to include the mental element of knowledge or recklessness that the item was stolen within the definition of possession.

[15] That mental element needs to be proven and it is assessed at the time the item is received. However, this is addressed expressly at question 4 of the question trail, as follows:

> Are you sure that at the time that Mr Patchett received the AppleMac Book he knew it was stolen or was reckless as to whether or not it was stolen?

[16] The inclusion of knowledge within the definition of possession in the question trail was a duplication and rightly confused the jury. Knowledge of the provenance of the property possessed is not necessary for possession to be established, rather that is the separate *mens rea* element for a receiving charge. I propose deleting paragraph (b). Counsel agree with this approach, although helpfully suggested it could also be

dealt with by adding recklessness to that paragraph. That formulation could be as follows: (b) awareness that the item has been stolen *or being reckless about that*.

[17] As held in *R v Kennedy,* I am satisfied that the correct way of directing the jury on the concept of possession requires the removal of the reference to knowledge from the guidance box in the question trail. I will re-direct the jury accordingly and reiterate the temporal requirement dealt with at question 4.

[18] I rule that "(b) awareness that the item has been stolen" is to be deleted from the question trail.

K J Glubb
District Court Judge