

DISTRICT COURT OF QUEENSLAND

CITATION: *R v McFarlane [2020] QDC 314*

PARTIES: **THE QUEEN**
(plaintiff)
v
VICTOR JOHN MCFARLANE
(defendant)

FILE NO: 2707/19

DIVISION: Criminal

PROCEEDING: Judge alone trial

ORIGINATING COURT: District Court, Brisbane

DELIVERED ON: 4 August 2020

DELIVERED AT: Brisbane

HEARING DATE: 3, 4 August 2020

JUDGE: Judge Farr SC

ORDER: **1. Count 11: Guilty.**
2. Sentence adjourned until Friday 27 November 2020.
3. Defendant is remanded in custody.

CATCHWORDS: CRIMINAL LAW – JUDGE ALONE TRIAL – PROPERTY OFFENCES – BURGLARY AND STEALING – where the defendant pleaded guilty to counts 1 and 9, receiving tainted property; counts 2, 4 and 10, fraud; counts 3 and 6, stealing; count 5, breaking and entering premises and wilful damage; count 7, burglary and stealing; counts 8 and 12, entering premises with intent to commit an indictable offence – where the defendant pleaded not guilty to count 11, burglary and stealing – whether the defendant (1) entered the dwelling of the complainant and (2) therein stole the jewellery the property of the complainant – where the prosecution case is circumstantial in nature – where to bring a verdict of guilty, guilt must be the only rational inference that could be drawn from the circumstances.

LEGISLATION: *Criminal Code Act 1899*

COUNSEL: A Stannard for the crown.
G Elmore for the defendant.

SOLICITORS: Office of the Director of Public Prosecutions for the crown.
Ashkan Tai Lawyers for the defendant.

- [1] This is a trial by Judge alone. The application for it to be conducted in this manner was approved some time ago. The defendant is charged that on the 25th day of May 2018 at Bulimba in the State of Queensland he entered the dwelling of the complainant and stole jewellery, the property of the complainant, in the dwelling. He says he is not guilty. My role is to determine if he is guilty or not guilty.
- [2] He is presumed to be innocent and will remain so unless and until I am satisfied of his guilt beyond reasonable doubt. The burden of proof rests on the Crown at all times, and there is no burden on the defendant to prove anything.
- [3] The offence requires the prosecution to prove each of the following elements beyond reasonable doubt: (1) that the defendant entered the dwelling of the complainant, and (2) and therein stole the jewellery the property of the complainant.
- [4] There is no dispute that jewellery was stolen, noting, as I do, the legal definition of stealing as set out in section 391 of the Criminal Code. The jewellery was taken without the consent of the owner by someone who had an obvious intent to permanently deprive the owner of it. The real issue requiring resolution in this trial is whether I am satisfied beyond reasonable doubt that the defendant was the person who did it.
- [5] I must reach my verdict on the evidence and only on the evidence. The evidence is constituted by the testimony of the witnesses and the exhibits and the admissions made. The prosecution case is circumstantial in nature. Circumstantial evidence is evidence of circumstances which can be relied on not as proving a fact directly, but instead is pointing to its existence.
- [6] To bring a verdict of guilty based entirely or substantially on circumstantial evidence it is necessary that guilt should not only be a rational inference but also that it should be the only rational inference that could be drawn from the circumstances. If there is any reasonable possibility consistent with innocence it is my duty to find the defendant not guilty, and that simply follows from the requirement that guilt must be established beyond reasonable doubt.
- [7] The defendant did not give or call evidence, and that is his right. He is not bound to give or to call evidence. He is entitled to insist that the prosecution prove the case against him if it can. The prosecution bears the burden of proving the guilt of the

defendant beyond reasonable doubt, and the fact that the defendant did not give evidence is not evidence against him. It does not constitute an admission of guilt by conduct and it may not be used to fill any gaps in the evidence led by the prosecution. I, of course, do not assume that because he did not give evidence that adds in some way to the case against him. It simply cannot be considered at all when deciding whether the prosecution has proved its case beyond reasonable doubt. It can't change the fact that the prosecution retains the responsibility to prove the defendant's guilt beyond reasonable doubt.

- [8] I turn then to the evidence. The complainant and her husband lived in a unit complex at Bulimba at the relevant time. It has 52 apartments. Their apartment was on level 3. The only entrance to their particular apartment was through their front door. It had a regular front door which could be locked, and a Crimsafe security door which could also be locked. Each of those doors required different keys to lock and unlock them. The complex itself also had security doors that required a key or swipe card to gain access, and a car park gate that also required a key or swipe card to gain access.
- [9] The complainant's uncontested evidence was that each individual apartment's front door key would also unlock security doors in the general access areas of the apartment block itself, but would not unlock any other apartment's front door.
- [10] The complainant did not at first realise that her apartment had been burgled, but after she did, she and her husband quickly realised that the only time that such an event could have occurred was during a four-hour window of time on the 25th of May 2018, somewhere between the hours of 10.30am to 2.30pm. Neither the complainant nor her husband were home during that time period. That was the only time during the relevant period that neither of them were home.
- [11] The complainant testified that it would have been impossible for the offence to have occurred when one or the other of the complainant or her husband were at home without that person knowing about it. That evidence was not in any way challenged nor disputed.
- [12] The complainant also testified that both the front door and the Crimsafe security door to her apartment was locked during that four-hour window of time on the 25th of May 2018. Subsequent police investigations found no signs of forced entry, and both of

those doors were locked when the complainant returned to her apartment that day at 2.30pm. The only inference which can be drawn from those facts is that the intruder used two keys to enter the apartment, to unlock each door and then lock them as he or she left.

- [13] Relevantly, admissions to the following effect were made during the course of the trial. Admission 2, that from 3 May 2018 to 9 May 2018 Ms ABC visited her brother, the complainant's husband, and sister-in-law, the complainant. Admission 3: during the visit, Ms ABC stayed at the complainant and her husband's unit. Admission 7, that during the visit Ms ABC was given two keys by the complainant and her husband. Admission 9: on 9 May 2018, Ms ABC returned to her home in Victoria. Admission 10: whilst unpacking, Ms ABC realised that she had taken the keys. And admission 11, that at some time between 11 May 2018 to 14 May 2018 Ms ABC posted in an envelope to the address of the complainant and her husband's unit the keys through regular Australia Post, from Waurin Ponds Post Office, Victoria; (a) Ms ABC wrapped the keys in brown paper, taped them inside a thank you card, and secured all sides of the card with sticky tape, creating a complete seal. The keys were flat inside the card; (b) the envelope was addressed to the complainant and her husband at their unit.
- [14] The complainant and her husband never received the envelope containing those keys. Those keys could unlock the complainant's front door and general access security doors to the complex, as well as the complainant's Crimsafe security door.
- [15] It is also admitted that CCTV footage, which is exhibit 2 before the Court, taken from a security camera or taken by a security camera located inside the front security door of the complex shows that the defendant entered that front door of the complex with a key, or by use of a key, at 12.32 pm on 25 May 2018. That footage shows that, before entering the building, the defendant pressed an intercom buzzer button or buttons on two or three occasions, and waited for any response on each occasion before entering the building using a key. The defendant did not reside at that building. He had a reasonably large backpack on his back at the time. The footage does not show where he went after entering the foyer. There is no footage of him leaving the building.
- [16] The building manager checked the front entranceway CCTV security footage for the four-hour period on the day in question, that is, from 10.30 am to 2.30 pm. The

defendant did not leave the building through that door during that time period. That was not the only means of exit, however, from the building. It is not known when he exited the building and by which door.

[17] The letterbox for each of the apartments were contained or located together outside the front security door of the building complex itself, and were accessible to the general public. Each letterbox had a lockable flap access panel.

[18] I turn then to submissions. The prosecution submit that I would be satisfied beyond reasonable doubt that the only reasonable inference open on the evidence was that the defendant had accessed the keys that had been posted to the complainant from the complainant's letterbox, and then used one key to enter the building and to then used them both to unlock the apartment's front door and security door to gain access.

[19] The prosecution relies on the following evidence in that regard: (1) the defendant entered the building when he was not a resident during the four-hour window of time; (2) he did so by use of a key; (3) he did so only after buzzing the intercom a number of times and waiting, thus it is submitted it can be inferred that he was checking to see if anyone was home; (4) only residents were supposed to have keys; (5) the envelope containing the keys to the complainant's apartment contained the apartment number on its face and the address block, thus allowing anyone to immediately know which apartment they likely applied to; (6) given the date that the envelope was posted it should have arrived by or before 25 May 2018; (7) that such envelope never arrived as far as the complainant and her husband was aware; and (8) that whoever entered the apartment and stole the jewellery entered via the use of two keys.

[20] The prosecution submit that the overwhelming inference is that the defendant took the envelope containing the keys from the letterbox and then used those keys to enter the building, after first ensuring that no one was home in the apartment, and then used those keys to enter the complainant's apartment. It submits that there is no other reasonable inference open consistent with innocence.

[21] The defendant submits that there is another reasonable inference open consistent with innocence, that is, that someone else entered the complainant's apartment and stole the jewellery. He submits that the following is relevant in that regard: (1) the letterbox area is accessible to both the general public as well as the other residents of

the apartment complex itself; (2) that any person could have taken the envelope from the letterbox; (3) that there is no fingerprint or DNA evidence incriminating the defendant; (4) that the CCTV footage only shows the defendant entering the foyer of the building and nothing more; (5) that there is no evidence as to which apartment's buzzer he pressed on the intercom panel; and (6) that no stolen property or other incriminatory evidence was found in his possession by police. In fact, the stolen jewellery has never been recovered.

- [22] I then turn to my conclusion. Of course, circumstantial evidence should not be considered in a piecemeal fashion. One should look at the full effect of the totality of such evidence. In my view, upon adopting that approach, the inference that the defendant was the offender is overwhelming. His behaviour in buzzing the intercom and waiting before using a key in his possession to enter the building, when considered in combination with the other evidence, allows for no reasonable inference consistent with innocence. He had possession of a key to the building, something he should not have had, and used it to enter within the reasonably tight timeframe in question. He did this at a time when a key to the building and to the complainant's apartment was missing in the post and which should have arrived by that stage.
- [23] There is no evidence before the Court that the defendant knew anyone that lived in that building, nor is there any evidence as to how he came to be in possession of a key that allowed access to the building. I appreciate that no onus of proof rests on the defendant, but the consequence of an absence of such evidence is that it is not reasonable to infer, as submitted by Defence counsel, that a friend of the defendant's, for instance, lived at that building at that time and had given the defendant a key sometime prior to 12.32 pm on 25 May 2018. To accept such a submission or for it to cause a reasonable doubt would require the Court to not draw an inference reasonably open on the evidence, but, rather, to speculate, something which is of course expressly prohibited.
- [24] Hence, it follows that I am satisfied beyond reasonable doubt that (1) the defendant took the envelope containing the keys from the letterbox; (2) learned from the address on the envelope that the keys were likely keys for an apartment of the particular number within that complex; (3) that at 12.32 pm on 25 May 2018 he buzzed that apartment before entering the building to check if anyone was home; (4) then used

one key to enter the building; (5) then used both keys to enter the apartment; (6) stole the jewellery the subject of this charge; and (7) locked both the front door and the security door to the apartment as he left.

[25] I am therefore satisfied that each element of the offence has been proved beyond reasonable doubt and I find the defendant guilty.
