EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS]

IN THE DISTRICT COURT
AT GISBORNE

I TE KŌTI-Ā-ROHE
KI TŪRANGANUI-A-KIWA

CRI-2021-016-000441
[2022] NZDC 5948

THE QUEEN

v

[RYAN PARRY]

Hearing:	5 April 2022
Appearances:	L Marshall for the Crown V Thorpe for the Defendant
Judgment:	7 April 2022

JUDGMENT OF JUDGE W P CATHCART

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[1] Mr [Parry] faces one charge of receiving. The Crown alleges that on 14 January 2021 at Gisborne Mr [Parry] received a coffee machine, till and coffee products being reckless as to whether or not that property had been stolen.

[2] I was informed that the primary issue at trial was identity. However, counsel for Mr [Parry], Ms Thorpe, advised me at the commencement of the trial that proof of the reckless state of mind was also in issue. And that if I was satisfied the Crown had proved the identity element beyond reasonable doubt, I needed to still address the reckless state of mind element. The Crown did not suggest it was prejudiced by the framing of trial issues in that way.

[3] For reasons which follow I was sure the key identification witness, [witness A], correctly identified Mr [Parry] as the potential accomplice who assisted Mr Maraki in delivering the stolen property to [Witness A]'s address for safekeeping on or about 14 January 2021. But I was not satisfied the Crown had proved the reckless element beyond reasonable doubt.

Common ground

[4] [The victim] was the owner of a coffee cart containing a Faema coffee machine, till and assorted coffee products. Between 5 pm on 12 January and 8.30 am on 13 January the cart and its contents were stolen. On 16 January 2021 the coffee cart was located on a rural property in Whangara with its contents missing. Subsequently, Mr Matene Maraki was convicted of burglary in relation to the taking of the cart and its contents.

[5] [Witness A] is Mr Maraki's [relative]. He would visit her property but not often. And around January 2021 she did not have regular contact with Mr Maraki.

[6] On 14 January 2021, whilst cleaning her home, Mr Maraki knocked on her door. He asked [Witness A] if he could store the coffee machine and associated items at her property before he moved to Ruatōria. Unsurprisingly [Witness A] asked her [relative] where he got the items from. Mr Maraki told her—likely in the presence of another male who came with him—that the items were for his partner who was, he claimed, to shortly start a coffee business.

[7] After that brief introduction, Mr Maraki returned with the male assisting him to carry the rather heavy coffee machine with the associated items on top. The coffee machine was carried by both men into [Witness A]'s kitchen. She understood from Mr Maraki that he would come back in a few days to pick up the items.

[8] The stolen property remained at [Witness A]'s property for about a month. And during that period she managed to shift that property into her caravan parked in the carport next to her house.

[9] As the weeks went by, [Witness A] decided to make her own inquires. Through Facebook searching, [Witness A] became aware that [the victim]'s coffee cart and contents had been stolen. By chance [Witness A] knew [the victim's sister]. The latter attended the same local gym as [Witness A].

[10] On 22 February 2021, [Witness A] telephoned [the victim's sister] and explained apologetically her position that the items she had were likely the ones stolen. [The victim's sister] later went to [Witness A] and picked up the stolen property. The next day she reported the matter including handing over the property to the police for investigation.

[11] On 24 February 2021, [Witness A] underwent police interview and made a written witness statement.

[12] When interviewed on 2 March 2021, Mr [Parry] denied any involvement with burglary let alone the coffee machine and items. He denied ever touching such items and was emphatic that he had nothing to do with it. When [Witness A]'s allegation as to identification was put to him, he suggested to the officer she was lying.

[13] Also, it is accepted there was no independent evidence such as fingerprints linking Mr [Parry] to the delivery of the stolen items to [Witness A]'s place on 14 January. Of the six fingerprint lifts obtained, two were of no value. The other four were checked against the database but produced no hits.

[14] The Crown's case on identification therefore depended largely on the honesty and reliability of [Witness A]. I turn to that issue now.

[Witness A]'s trial evidence—the identity issue

[15] [Witness A] testified that she did "not like" the idea of the items being left at her property but accepted her [relative]'s explanation for his possession of the items as initially legitimate. The defence did suggest that [Witness A]—as an alternative to the mistaken identity case theory—had given fabricated evidence to frame Mr [Parry]

because, as the defence claimed, she was worried she may have been implicated as a receiver.

[16] Having heard her evidence I rejected that allegation. There was nothing about the content of her candid evidence that suggested embellishment or fabrication. And the honesty of her evidence was supported by her actions in subsequently contacting the owner of the property via [the victim's sister] who she knew.

[17] As to identification of the other male, [Witness A] said she recognised that person as being linked to an address at [address 1], Gisborne. She did not know his name but had seen him briefly on two or three occasions prior to 14 January. She said this person would generally meet her [relative] at the gateway of [address 1] whenever she drove him there. Also, she had seen him prior to 14 January selling crayfish to her family. A proposition supported by her written comments annexed to the photo board montage on 25 February 2021. It was also common ground that she completed the montage process having identified Mr [Parry] as the potential accomplice.

[18] Also, the officer in charge who conducted the formal identification process, told me that [Witness A]'s statement description of the second man was "pretty vague" and she had described him as small in stature but had linked him to [address 1].

[19] During cross-examination, [Witness A] was emphatic that she had correctly identified the man in the montage and rejected the possibility of mistake. Whilst relevant, such confidence was not, and never is, determinative because an honest witness can make mistakes as to identity. And case history is replete with such miscarriages of justice.

[20] In sum, the totality of the evidence suggested that [Witness A] had recognised this male person as Mr [Parry] rather than identifying a complete stranger.

Determination of the identification issue

[21] Determination of the identity question required consideration of the principle in s 126(3) of the Evidence Act 2006. Because Mr [Parry] disputed the identification

evidence, I was required and did bear in mind the need for caution before convicting Mr [Parry] in reliance on [Witness A]'s evidence. And in particular, was required to, and did, bear in mind the possibility she may have been mistaken.

[22] Essentially, this was recognition evidence because [Witness A] said she knew this other person before the event to which the identification related. That event was brief given it would not have taken both men much time to carry the stolen items into [Witness A]'s kitchen and then leave. Also, she had only seen this second person on two or three brief occasions prior to that event but mainly in the company of her [relative]. Overall, they were brief occasions. The risk of mistaken identity was therefore possible. And I proceeded with caution taking into account that possibility, especially in the face of Mr [Parry]'s denials.

[23] Whilst the encounters, including the identification event, were for short periods, I was in the end sure [Witness A] correctly recognised Mr [Parry] on 14 January because she had seen the same person several times in the company of her [relative], Mr Maraki. And she had recognised Mr [Parry] as the person who had previously sold crayfish to [Witness A]'s family. Whilst there was always a possibility of mistaken identity, the scope for error here was objectively reduced because I was satisfied the cumulative effect of these events excluded a reasonable possibility of a mistaken identity event. This included an unqualified positive identification of Mr [Parry] during the formal process.

[24] Augmenting this evidence was a meaningful circumstantial thread. As noted, [Witness A] had linked the other man to the property at [address 1]. And the undisputed evidence from the officer in charge was that his investigation and police intelligence searches confirmed Mr [Parry]'s link to that address. Moreover, Mr [Parry] was spoken to by the officer in charge at that address when the latter went there during his investigation. The circumstantial link between this aspect of identification evidence and Mr [Parry]'s connection to [address 1] was telling. I was thus also satisfied that this independent circumstantial link amplified proof of identification.

[25] In short, I was sure [Witness A] had correctly identified Mr [Parry] as the man who assisted her [relative] in dropping off the stolen items at her property on 14 January 2021. The primary issue was therefore resolved in favour of the Crown.

[26] However, that was not the end of the matter.

Mental element of recklessness not proved to required standard

[27] Under s 246 of the Crimes Act 1961 a receiver relevantly must have the mental element of recklessness at the time the property is received. Recklessness later, after the property has been received, is insufficient.[1]

[28] The Court of Appeal in *Cullen v R* discussed the elements of recklessness applicable to charges of receiving. The Court observed:[2]

> …Generally, the concept of the term "recklessness" is regarded, in New Zealand criminal law, as the conscious taking of an unreasonable risk. A complete indifference about whether goods were or were not stolen would itself, be enough. It seems reasonably clear that if someone receives the property the source of which is unknown then a conscious risk is taken in determining not to make further enquiries.

[29] Thus, if a defendant does not know the property has been stolen he or she can still be guilty of receiving it if at the time of receiving he or she was reckless as to whether it had been stolen or obtained by a crime. And *if the source of the property is unknown to the receiver* then he or she takes a conscious risk in turning a blind eye by not making further reasonable enquiries.

[30] In the normal run of receiving cases, a prosecutor often relies on inferences from circumstances to establish if a defendant was reckless as to the possibility the property had been stolen. Common features include purchase at gross undervalue, secrecy in the receiving, receipt at an unusual time or place or in an unusual way, concealment of the goods, removal of identification marks or lying statements as to the source of goods and date of acquisition. Whilst one strand may be insufficient to

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[1] *R v Kennedy* [2001] 1 NZLR 314 at [11]; *Cullen v R* [2014] NZCA 325 at [26(c)].
[2] *Cullen v R* [2012] NZCA 413 at [23].

establish the recklessness element, combination of them may be sufficient to establish recklessness beyond reasonable doubt.

[31] The combination of available threads here were insufficient to inferentially establish recklessness beyond reasonable doubt. I explain my reasoning below.

[32] Mr [Parry] uttered lies to the officer in charge during his (unchallenged) interview with the officer in charge. When asked whether he had any involvement with the coffee machine and assorted items, Mr [Parry] said he had "nothing" to do with them and never "touched" them. Given my findings above, those answers were lies. Mr [Parry] helped carry those stolen items into [Witness A]'s kitchen on 14 January 2021. And the fact no fingerprint hits were obtained does not detract from that finding.

[33] Under modern New Zealand law a lie uttered by a defendant may be relied upon by a jury as circumstantial evidence of a defendant's guilt.[3] But here I am the fact finder. And s 124(4) of the Evidence Act 2006 is engaged. This provision is a "self-reminder" requirement for judges sitting alone much like s 122(5) which deals with *prima facie* unreliable evidence. More particularly, s 124(4) places an obligation on the judge to have regard to the matters set out in s 124(3) before placing "*any* weight" on evidence of a defendant's lie. The highlighted language suggests there may be cases were *no* weight should be placed on a defendant's lie. And thus likely excluding the capacity to use the evidence as circumstantial evidence of guilt in a judge-alone trial.[4] However, that does not exclude use of the lies on *veracity* grounds.

[34] Here, the lies were uttered because my central findings point to no other conclusion. In simple terms, Mr [Parry] lied when he said he never touched the stolen items. But where did those lies take me here? It was unlikely I could have used them as circumstantial evidence of Mr [Parry]'s guilt. But they were available as a basis to reject the veracity of his denials. Having reached that juncture in my analysis, as I did here, my rejection of his explanation added no extra thread of evidence to the Crown's case on the recklessness element.

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[3] *R v Dewar* [2008] NZCA 344 at [17]; *McLaughlin v R* [2015] NZCA 339 at [43].
[4] This appears to be the view of the authors of *Adams on Criminal Law (Evidence)* at 124.03(3).

[35] Moreover, on the paucity of evidence I could not exclude the reasonable possibility Mr [Parry] lied for other reasons, including mere stupidity or panic at being accused. No proper basis existed from which I could infer he was necessarily guilty. In short, the s 124(3) factors took me no further towards proof of the crime.

[36] In the end, I placed Mr [Parry]'s denials to one side albeit the lies also raised suspicions about his true state of knowledge about the stolen items. In the end, proof of the recklessness element had to rest on the remaining Crown evidence.

[37] As to that body of evidence, there was nothing about the stolen items that would have put Mr [Parry] on enquiry as to their source on 14 January 2021. Also, the only evidence that could be properly attributed to Mr [Parry]'s state of knowledge about how Mr Maraki came into possession of the items was limited to the latter's explanation to [Witness A], likely in front of Mr [Parry]. And given the principle in s 124(4) there was no evidence from which I could properly infer Mr [Parry] was aware that explanation was a lie. Nor that he was aware the source of the property was unknown. Nor aware of the earlier burglary by Mr Maraki.

[38] And even [Witness A] believed the Maraki explanation, at least initially. That explanation was therefore plausible on face value. And in the face of it there was nothing in the Crown's evidence from which I could properly infer Mr [Parry] was aware on 14 January 2021 the source of the property he carried into [Witness A]'s home was unknown or suspect such as to place an obligation on him to make enquiries.

[39] Whilst a complete indifference about whether those items were or were not stolen would itself be enough, there was no evidential foundation upon which I could infer such indifference in the face of the explanation given to [Witness A] on 14 January 2021.

[40] For these reasons, the charge is dismissed.

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Judge W P Cathcart
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 7/4/2022