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COURT OF APPEAL FOR ONTARIO

LASKIN, MOLDAVER and CRONK JJ.A.

B E T W E E N:	)	
	)	
HER MAJESTY THE QUEEN	)	Michal Fairburn,
	)	for the respondent
Respondent	)	
	)	
- and -	)	
	)	
HASSAN MOHAMAD	)	Anthony De Marco,
	)	for the appellant
Appellant	)	
	)	
	)	Heard: July 17 and 18, 2003

On appeal from the convictions entered by Justice Arthur C. Whealy of the Superior Court of Justice on March 1, 2001 and the sentence imposed on March 30, 2001.

CRONK J.A.:

[1] The appellant was convicted of two counts of possession of property obtained by crime in excess of $5,000 relating to a stolen GMC Yukon truck and a Plymouth van. He was acquitted of a similar third count relating to a Dodge van. He was sentenced to 90 days in jail to be served intermittently, followed by three years probation. One of the terms of his probation required the appellant to make restitution to two insurance companies in the total amount of $20,000 at the rate of $1,000 per month. The appellant appeals his convictions and sentence.

I. BACKGROUND

[2] In early June 1999, a Canada Customs official, who was assigned to provincial auto theft duties, became suspicious that a GMC Yukon truck that was scheduled for exportation to Amsterdam may have been stolen. The customs exportation documents identified Viamar Scilla Transport International Inc. ("VST Inc.") as the shipping company. The documents also listed 1307109 Ontario Ltd. as the owner of the vehicle, with an address of 703 Fenmar Drive, North York.

[3] The customs official opened the shipping container and examined the Yukon truck. He determined that it bore a legitimate vehicle identification number ("VIN"). He also learned, however, that duplicate ownership documents listing the 703 Fenmar Drive address had been issued for a Yukon truck with the same VIN as the VIN on the truck scheduled for delivery to Amsterdam. The customs official attended at the 703 Fenmar Drive premises, which consisted of a commercial building containing several businesses, including a used car business, large garages and an outdoor parking lot. Potros Jebo operated the used car business at that location.

[4] The customs official observed a Yukon truck on the premises that had the same VIN as the VIN declared in the exportation documents for the Yukon truck scheduled to be shipped to Europe. He then contacted the police.

[5] On June 3, 1999, the customs official again attended at the Fenmar Drive location, this time accompanied by Detective Dan Dyett, a member of the automobile squad of the Toronto Police Services. After observing the premises and the parking lot, Dyett noticed a Yukon truck being driven to the front of the building. Dyett blocked the vehicle with his car and spoke to the driver who informed him that the truck belonged to Jebo. Dyett observed that a VIN was glued to the dashboard of the truck, instead of being affixed with steel rivets in accordance with original manufacturer standards. He also noticed that the VIN of a Plymouth van, which was parked next to the Yukon truck, was also glued to that vehicle's dashboard. Dyett concluded that the original VINs had been removed and that false VINs had been attached to the dashboards of both vehicles. He confronted Jebo and told him that both vehicles were stolen. Jebo claimed ownership of the two vehicles and said that he had purchased them at auction. He denied any knowledge that they were stolen. Dyett arrested Jebo, charging him with two counts of possession of stolen property.

[6] Dyett called for police assistance and ordered two tow trucks to attend the scene to remove the Yukon truck and the Plymouth van for forensic examination. He then turned his attention to the Plymouth van.

[7] The van was unlocked and the keys to the van were in the ignition. Dyett entered the van and observed a briefcase in the back seat. He took a cursory look inside the briefcase and saw identification documents in the name of the appellant. Because he was the only police officer on the scene, Dyett then left the van for a brief period to secure Jebo's business premises. He returned shortly thereafter and began to again look through the contents of the briefcase. As he started to do so, the first tow truck arrived. Almost at the same time, Dyett was approached by the appellant, who apparently was known to Dyett. A conversation ensued during which the appellant told Dyett that the briefcase belonged to him. He claimed that he had forgotten the briefcase in the van after test-driving the vehicle an hour or so earlier. Dyett asked him what he knew about the van and the appellant told him that he was going to buy it. When asked from whom he was

going to purchase the van, the appellant gestured towards 703 Fenmar Drive. Dyett continued to look through the contents of the briefcase and discovered a dealer's licence plate, air tickets to Amsterdam in the name of the appellant and others, and documents concerning the shipping of a Dodge van to Amsterdam. The appellant acknowledged that the dealer's licence plate was his.

[8] Dyett then left to give instructions to the tow truck driver. After a few seconds, he turned back to the van and the customs officer informed him that the appellant had removed the briefcase from the van and was entering a neighbouring building at 705 Fenmar Drive. Dyett immediately entered the building, located the appellant, and told him that the briefcase had been in a stolen vehicle. Dyett told the appellant to return the briefcase to the van to permit him to review all of its contents and that after it had been searched the appellant could leave with the briefcase.

[9] The appellant returned the briefcase to the van, and Dyett recommenced his search of its contents. He found a large sealed envelope in the briefcase, which contained two smaller sealed envelopes. The three envelopes contained counterfeit VIN plates for five vehicles and counterfeit stickers and parts and certification labels used to renumber and "legitimize" stolen vehicles. One of the VIN plates matched the VIN plate affixed to the Yukon truck found in Jebo's parking lot. It also duplicated the VIN plate on the Yukon truck scheduled for exportation to Amsterdam. The appellant denied any knowledge of the plates, stickers and labels and claimed that he did not know how they came to be in his briefcase.

[10] Dyett found several other items in the appellant's briefcase including: (i) the appellant's passport and driver's licence; (ii) a blank cheque for Four M & H Auto Ltd., a company operated by the appellant, listing an address of 705 Fenmar Drive; (iii) a VST Inc. shipping bill for a 1998 Yukon vehicle being shipped by Jebo's company to Dubai; (iv) a reference letter for one of Jebo's employees on the letterhead of Jebo's used car business at the Fenmar Drive premises; (v) a telephone bill for an account in Jebo's name; and (vi) numerous additional shipping documents concerning other vehicles being shipped by VST Inc. In at least two instances, the latter documents pertained to vehicles bearing VINs identical to the VIN plates found in the envelopes inside the appellant's briefcase.

[11] Dyett arrested the appellant and charged him with two counts of possession of property obtained by crime in excess of $5,000 relating to the GMC Yukon truck and the Plymouth van. He was subsequently charged, together with Jebo, with one additional count of possession of stolen property in relation to a Dodge van that was also discovered on Jebo's premises.

[12] Jebo pleaded guilty to the three counts against him and was sentenced on June 8, 2001 to a conditional sentence of one year to be served in the community followed by

two years probation. He was also ordered to make restitution in the total amount of $20,000 to the two insurance companies.

[13] At his trial, the appellant challenged the admissibility of the evidence flowing from Dyett's search of his briefcase. That evidence was critical to the Crown's circumstantial case against the appellant. Without it, the Crown had no way to link the appellant to the stolen vehicles.

[14] At a *voir dire* held to determine the admissibility of this evidence, the appellant argued that Dyett had no authority to open or search the briefcase after he learned that it was owned by the appellant because the appellant had not been arrested, he was not a suspect in any crime and, until the briefcase was opened, no basis existed for the issuance of a search warrant. The appellant asserted that the warrantless search of the briefcase infringed his right under s. 8 of the *Charter of Rights and Freedoms* to be free from unreasonable search or seizure and that the evidence flowing from the search should be excluded from his trial.

[15] The Crown asserted that Dyett was authorized to search the van and its contents as an incident to the arrest of Jebo, that Dyett had a duty to discover and preserve evidence and that, having examined the contents of the briefcase, Dyett had reasonable grounds to arrest the appellant as a party to the same offences as Jebo. Accordingly, as the search of the briefcase was lawful, the Crown maintained that the evidence concerning the contents of the briefcase was admissible.

[16] The trial judge accepted the Crown's position. He found no violation of s. 8 of the *Charter*. In his ruling on the *voir dire* dated February 26, 2001, he stated:

> I am of the view…that it is not clear there has even been a *Charter* breach of the [appellant's] Section 8 rights. It is clear that Dyett had the authority, as an incident of the arrest of Jebo, to discover and preserve any evidence. He had seized the stolen van and had a duty to inspect it and its contents for that purpose. Had the [appellant] not appeared on the scene when he did, the contents of the briefcase would have been discovered in any event and inevitably led to the investigation of him because his passport was in the middle of the incriminating material. Did his appearance on the scene and claim of ownership of the briefcase alter the scope of Dyett's authority? I think not. The [appellant] was not a passenger in the van, in possession of the briefcase and asserting control over it simultaneously. He was, by his own admission, in the act of attempting to regain possession. I am of the opinion Dyett had authority, in these circumstances, to

> deny the [appellant] possession, at the same time as conceding ownership.

[17] The trial judge also held that if he was wrong to conclude that no breach of s. 8 of the *Charter* had occurred, the evidence concerning the contents of the briefcase should not be excluded under s. 24(2) of the *Charter*.

[18] The Crown called two witnesses at trial: the customs officer and Detective Dyett. The defence also called only two witnesses: Jebo and the appellant. Jebo testified that the appellant had purchased vehicles from him in the past. Jebo also confirmed that the appellant had test-driven the Plymouth van earlier on the day of his arrest, and that he had indicated a desire to purchase the van when he returned it. Jebo claimed that, thereafter, he checked the van and found the appellant's briefcase on the front seat and a sealed envelope on the floor of the van. According to Jebo, he placed the envelope in the appellant's briefcase.

[19] Jebo also testified at trial that he knew that the Yukon truck and the Plymouth van were stolen. He said that he provided downpayments for both vehicles to a third party vendor, about whom he knew little, who subsequently informed him that the vehicles were stolen. When questioned on cross-examination regarding what he did when he learned that the vehicles were stolen, Jebo claimed, for the first time, that he considered contacting the police but did not do so because the vendor had threatened to kill him or members of his family if he did.

[20] In his reasons for judgment, the trial judge rejected Jebo's evidence, concluding that it was "quite unbelievable" and that Jebo "is a thoroughly dishonest person".

II. CONVICTION APPEAL

[21] The appellant raises four grounds of appeal. He argues that the trial judge erred: (i) in admitting the evidence obtained from the search of his briefcase; (ii) in rejecting the evidence of Jebo, thereby resulting in unreasonable verdicts; (iii) in concluding that the appellant had constructive possession of the stolen motor vehicles; and (iv) in misapprehending the evidence.

(1) The Search of the Briefcase

[22] Section 8 of the *Charter* guarantees the right to be secure against unreasonable search or seizure. It protects against unreasonable state interference with reasonable expectations of privacy: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145. The challenge of the legality of a police search requires consideration whether the accused had a reasonable expectation of privacy and, if he had such an expectation, whether the search by the police was conducted reasonably: *R. v. Edwards*, [1996] 1 S.C.R. 128 and *R. v. Belnavis*, [1997] 3 S.C.R. 341.

(i) Reasonable Expectation of Privacy

[23] In his reasons on the *voir dire*, the trial judge did not expressly address the issue whether the appellant had a reasonable expectation of privacy in the contents of his briefcase. The existence of a reasonable expectation of privacy depends on a contextual analysis of the totality of the circumstances: *Edwards* at para. 31 and *Belnavis* at para. 20. The courts have recognized that there is a lesser expectation of privacy in a car than there is in one's home or office, or with respect to an individual's physical person: *R. v. Caslake*, [1998] 1 S.C.R. 51. In this case, the appellant does not assert a reasonable expectation of privacy in the stolen Plymouth van but, rather, in the contents of the briefcase contained within the van.

[24] During oral argument of this appeal, Crown counsel acknowledged that the appellant had some reasonable expectation of privacy in the contents of his briefcase. I agree.

[25] In the contemporary context, briefcases often house highly confidential personal and business information. They can serve, in a practical sense, as portable offices for their owners. In my view, owners of briefcases generally have a reasonable expectation of privacy in the contents of their briefcases.

[26] There may also be circumstances in which some reasonable expectation of privacy in property exists even if the property has been reported stolen. In *R. v. Law*, [2002] 1 S.C.R. 227, the accused restaurant owners reported the theft of a safe from their business premises to the police. After the police recovered the safe, a police officer, who had not been involved in the investigation of its theft, inspected the contents of the safe on the suspicion that the accused had not remitted owed taxes to Revenue Canada. He photocopied documents found in the safe and forwarded the copied documents to Revenue Canada. The photocopied evidence led to charges against the accused for alleged failure to remit goods and services taxes when due. In considering whether the accused had a reasonable expectation of privacy in the stolen safe, thereby triggering the protection afforded by s. 8 of the *Charter*, Bastarache J. reasoned at para. 18:

> In this case, the appellants did not voluntarily discard their private documents. On the contrary, the documents were locked in a safe that was stolen out of their place of business and left abandoned by the thieves in an open field. Moreover, the theft of the safe was reported to the police the morning it occurred, well before it was recovered. One can therefore infer the existence of a subjective expectation of privacy: *Edwards, supra*. *In this entire context, I cannot but conclude that the appellants retained a residual, but limited, reasonable expectation of privacy in the contents of their*

> *stolen safe.* In short, one would have expected the stolen property to remain private following its recovery, as it was before its theft [emphasis added].

[27] There is no suggestion here that the appellant intended to voluntarily relinquish, abandon or discard his briefcase. To the contrary, he claimed that after he test-drove the vehicle with a view to purchasing it, he inadvertently left the briefcase in the Plymouth van. In these circumstances, he asserted, he preserved his expectation of privacy in the contents of the briefcase. The Crown did not vigorously challenge this defence position. Rather, the Crown maintained on the *voir dire* and before this court that the search of the contents of the briefcase was lawful under the common law power of search incident to arrest. The trial judge's ruling that no breach of s. 8 of the *Charter* had occurred was based on his conclusion that Dyett had authority to search the briefcase in the circumstances. I turn now to that issue.

(ii) Search Incident to Arrest

[28] Search incident to arrest does not require a warrant or independent reasonable and probable grounds for the search. In those respects, it is an exception to the ordinary requirements for a reasonable search. Rather, the right to search derives from the fact of the arrest, which itself requires reasonable and probable grounds or an arrest warrant. If the arrest is unlawful, the search is also unlawful: *Caslake, supra*, at para. 13.

[29] In *Cloutier v. Langlois*, [1990] 1 S.C.R. 158 at paras. 60-62, the Supreme Court of Canada identified important limits on the power to search incident to arrest. They include the following: (i) because the police have some discretion in conducting such a search, they must be in a position to assess the circumstances of the case so as to determine whether a search meets the underlying objectives; (ii) the purpose of the search must be related to the objectives of the proper administration of justice; and (iii) the search must not be conducted in an abusive manner. In discussing these limits, Lamer C.J.C. commented in *Caslake* at para. 17:

> In my view, all of the limits on search incident to arrest are derived from the justification for the common law power itself: *searches which derive their legal authority from the fact of arrest must be truly incidental to the arrest in question*. The authority for the search does not arise as a result of a reduced expectation of privacy of the arrested individual. Rather, it arises out of a need for the law enforcement authorities to gain control of things or information which outweighs the individual's interest in privacy…*This means, simply put, that the search is only justifiable if the purpose of the search is related to the purpose of the arrest* [emphasis added].

[30] Thus, in order to lawfully undertake a search incident to arrest, the purpose of the search must be connected to the arrest. Lamer C.J.C. elaborated in *Caslake* at para. 19 on the meaning of this restriction:

> Whether [some valid purpose connected to the arrest] exists will depend on what the police were looking for and why. There are both subjective and objective aspects to this issue. In my view, the police must have one of the purposes for a valid search incident to arrest in mind when the search is conducted. Further, the officer's belief that this purpose will be served by the search must be a reasonable one.

[31] The appellant does not dispute that Jebo's arrest was lawful or that the police had reasonable and probable grounds to believe that the Plymouth van had been stolen. Nor does the appellant contend that the search of the briefcase was unreasonable in the sense that it was conducted in an abusive fashion or that the three occasions on which Dyett inspected the contents of the briefcase constitute three discrete warrantless searches of the briefcase. Rather, he submits that from the time that the appellant claimed ownership of the briefcase, the search of the contents of the briefcase was unreasonable and exceeded the scope of the power to search as an incident to arrest because Dyett lacked subjective and objective grounds to believe that the appellant, in contrast to Jebo, was connected to the commission of a criminal offence or that the briefcase might contain evidence of a theft. Accordingly, he maintains, it was incumbent on Dyett to attempt to obtain a warrant before searching the briefcase. I would not give effect to these submissions.

[32] The legitimate purposes of search incident to arrest extend to the protection of evidence from destruction at the hands of the arrestee or others and to the discovery of evidence that can be used at the arrestee's trial: *Cloutier, supra*, at para. 61. In *R. v. Spinelli* (1995), 101 C.C.C. (3d) 385 at para. 36 (B.C.C.A.), Southin J.A. said in connection with the search of a vehicle that had been reported to the police as stolen:

> I am not saying that the police, upon recovering a vehicle reported stolen, have an unrestricted right to search the vehicle and its contents with a view to ascertaining whether the owner possibly has committed some crime. *But to look in it for evidence which might lead to the apprehension of the thief is not a breach of the owner's rights. As between the Crown and the thief, the vehicle is real evidence* [emphasis added].

[33] Dyett testified that he looked in the briefcase for the purpose of locating evidence concerning the theft of the Plymouth van and the scheme employed to carry out the "re-

VINing" of the stolen vehicles. The following exchange occurred during the *voir dire* between Dyett and trial counsel for the Crown:

> Q. And what officer was your purpose and objective in looking through that briefcase, please?
>
> A. Well, it was in the stolen white van, so I figured you know for evidence relating to the theft of the vehicle and the way they - - Mr. Jebo or whoever was renumbering the vehicles, VIN plates for any paperwork relating to other vehicles.

[34] On cross-examination during the *voir dire*, Dyett was asked why he continued to look through the briefcase after the appellant had claimed ownership of it. He gave this evidence:

> Q. And if I understand you correctly, the reason why you continue to look through the briefcase is that it was located in a stolen van?
>
> A. Yes, sir.
>
> Q. So you feel you had the right to look through the briefcase?
>
> A. Yes, sir.
>
> Q. And the reason why you look through the briefcase is that you have a suspicion that it might contain some evidence of a theft?
>
> A. Yes, sir.
>
> ….
>
> Q. All right. And again, he asserts ownership over it. He says to you, it is mine and you told him, "Put it back. First I will look through it and then you can go."
>
> A. Yes, sir.
>
> Q. And you then proceeded to look through it again?
>
> A. Yes, sir.

> Q. And your reason is because you have a suspicion that there might be some type of evidence of a theft?
>
> A. Well, it was in the stolen van.
>
> Q. All right.
>
> A. And they had already arrested the –
>
> Q. Mr. Jebo?
>
> A. Yes, sir.

[35] In response to a question of him by the trial judge, Dyett also said that by the time that he opened the briefcase for the second time, after securing Jebo's premises, he had "seized" the van. He had arrested Jebo, secured Jebo's premises, determined that the van was stolen and called for police assistance and for tow trucks to remove the van and the Yukon truck. Dyett felt that the van was stolen and was not going anywhere.

[36] The trial judge accepted Dyett's evidence and held, as I have said, that: "It is clear that Dyett had the authority, as an incident of the arrest of Jebo, to discover and preserve any evidence. He had seized the stolen van and had a duty to inspect it and its contents for that purpose." I agree.

[37] Dyett had one of the purposes of a valid search incident to arrest in mind when he conducted his search of the briefcase, that is, the discovery of evidence concerning the charges against Jebo. It was open to the trial judge to accept Dyett's assertion of a *bona fide* subjective belief that he was authorized to search the briefcase for that law enforcement purpose. There is no suggestion that Dyett's belief changed at any point throughout the occasions when he searched the contents of the briefcase.

[38] In my view, Dyett's subjective belief that searching the contents of the briefcase might lead to the discovery of evidence concerning the charges against Jebo was a reasonable one in all of the circumstances. The Plymouth van, which contained the briefcase, was directly implicated in the charges against Jebo. The van and the briefcase were located on the premises where Jebo was arrested and Dyett searched the contents of the briefcase a short time after Jebo's arrest. The search of the briefcase, therefore, was closely connected to the arrest of Jebo.

[39] Viewed in that context, I agree with the trial judge that the appellant's attendance at the van and his claim to ownership of the briefcase did not "alter the scope of Dyett's authority" to search the briefcase. Although Dyett knew the appellant from "the past", the record before us does not indicate how he came to know the appellant or how well he knew him. There is no suggestion that his prior knowledge of the appellant was

sufficient to persuade him that the appellant's assertion of ownership of the briefcase was true or that, in light of it, the appellant was an innocent and uninvolved third party.

[40] Dyett was not obliged to simply accept the appellant's assertions of ownership of the briefcase and of an innocent explanation for its presence in the stolen van, and to terminate the search of the briefcase on the basis of those assertions. That proposition, urged by the appellant, defies common sense and, if accepted, would render the search incident to arrest power meaningless in circumstances where, but for the ownership claim, it is being lawfully exercised for the purpose of discovering or preserving evidence relating to a crime.

[41] The appellant argues that the recent decision of the Supreme Court of Canada in *Law, supra*, supports his contention that the power of search incident to arrest did not extend to a briefcase which Dyett knew belonged to the appellant. In that case, Bastarache J. stated at paras. 19 and 25:

> The existence of a residual privacy interest does not undermine the police's obligation to investigate the theft of a stolen item, or to carry out whatever law enforcement responsibility is reasonably associated with its taking. Any expectation of privacy must be reasonable. Thus, an unattended suitcase may have to be inspected for explosives, a stray wallet for identification, or a deserted vehicle for evidence of theft. More extensive investigation may be required to determine the motive of the theft, or to identify the perpetrator. However, where the police cannot reasonably conclude the property has been abandoned by its owner, they are limited in their investigation by the privacy interest of the owner as protected by s. 8 of the *Charter*.
>
> ….
>
> It is clear that the police are "lawfully positioned" in such cases inasmuch as their common law and statutory duties include the protection of property. However, the police's obligation to search a stolen car is not without its limits. As the intervener acknowledges, "a police officer might be justified in fully inspecting the driver and passenger compartment of a stolen car during the course of an investigation of the theft, but might be precluded, absent a warrant, from searching through computer files contained in a laptop computer locked in the car's trunk"; see also, *R. v.*

> *Spinelli* (1995), 101 C.C.C. (3d) 385 (B.C.C.A.), *per* Southin J.A., at para. 36.

[42] I conclude that *Law* does not assist the appellant in the manner asserted by him, for several reasons. First, *Law* expressly confirms that the obligation of the police to investigate the theft of stolen property, including a stolen motor vehicle, is not displaced by the privacy interests which may attach to the property. To the contrary, the search of unattended property was recognized as potentially necessary to achieve legitimate law enforcement aims.

[43] Second, in my view, there is a significant distinction between the warrantless search of a laptop computer locked in a stolen car's trunk, as referenced in the quoted passage from *Law*, and the warrantless search of an unlocked briefcase in an unlocked stolen vehicle. A computer can be a repository for an almost unlimited universe of information. As Crown counsel points out, Parliament has treated computers as stand-alone search locations warranting specific rules. See *Criminal Code of Canada,* R.S.C. 1985, c. C-46, ss. 487(2.1) and (2.2).

[44] Third, even in the case of the search of a laptop computer, the need for a warrant was described in *Law* as a possibility rather than as a pre-condition to a lawful search.

[45] As well, in the quoted comments from *Law*, the Supreme Court expressly endorsed the observations of Southin J.A. in *Spinelli, supra*, to which I have previously referred. In *Spinelli*, Southin J.A. suggested that the search of the entire contents of a stolen car may be permissible to search for evidence that might lead to the apprehension of the perpetrator of the theft.

[46] Finally, *Law* is distinguishable from the case at bar in one additional, and controlling, respect. In *Law*, the purpose of the challenged warrantless search of the safe was not connected to the investigation of the theft of the safe. It was undertaken for the unrelated purpose of searching for possible evidence concerning tax evasion. In my view, the suggestion in *Law* that a warrant may be required to search items of property found in a stolen motor vehicle flows from the purpose for which the search is undertaken. Where that purpose is unrelated to the investigation of the theft of the vehicle, a warrantless search may not be justified.

[47] That is not this case. Here, on each occasion that Dyett opened the briefcase, he undertook his search of its contents for the purpose of discovering evidence relating to the crimes for which Jebo had been arrested. The searches were grounded in Jebo's arrest and were carried out in a vehicle known to have been stolen.

[48] In these circumstances, I conclude that the requirements for a valid search of the appellant's briefcase under the search incident to arrest power were met. The search of the contents of the briefcase was not unlawful or unreasonable and, hence, the evidence

obtained from that search was admissible. Accordingly, it is unnecessary to address the arguments of the parties regarding s. 24(2) of the *Charter*.

(2) The Rejection of Jebo's Evidence and the Reasonableness of the Verdicts

[49] The appellant submits that the trial judge erred in rejecting Jebo's evidence and that this error led to unreasonable verdicts. In my view, this ground of appeal is unsustainable.

[50] The trial judge concluded that Jebo's testimony was "quite unbelievable" and that Jebo is "a thoroughly dishonest person". He based those conclusions on: (i) numerous internal inconsistencies and contradictions in Jebo's evidence, some of which the trial judge detailed in his reasons; (ii) the fact that it was not until almost fifteen months following the appellant's arrest and after the preliminary inquiry in his own case, that Jebo alleged for the first time that he found the large sealed envelope in the Plymouth van and placed it in the appellant's briefcase; (iii) the fact that at the time of his testimony at the appellant's trial, Jebo not only had been convicted of the charges against him concerning possession of the stolen Yukon truck and the Plymouth van, but had also been convicted of an unrelated fraud; and (iv) the fact that Jebo's claim that he and members of his family were threatened with harm by the vendor of the stolen motor vehicles was asserted, for the first time, only when Jebo was pressed on cross-examination for an explanation as to what he did when he learned that the vehicles were stolen.

[51] These factors all bore directly on Jebo's credibility and the reliability of his testimony. Based on them, it was clearly open to the trial judge to reject Jebo's evidence as not worthy of belief. Once his testimony concerning the large sealed envelope, which contained significant incriminating evidence against the appellant, was rejected, the issue was how the envelope had come to be in the appellant's briefcase. This was important because the envelope contained most, although not all, of the inculpatory documentary evidence against the appellant. The trial judge concluded: "[I]t simply overwhelms the law of probability, even the laws of coincidence, that someone unknown opened the vehicle and deliberately placed [the envelope] inside the accused's briefcase. I do not accept that that could have happened." Thus, as he was entitled to do, the trial judge rejected the appellant's assertion that he knew nothing about the envelope or its contents and how it came to be in his briefcase.

[52] Once the trial judge rejected the appellant's testimony regarding the envelope, it remained for the trial judge to determine if he was left in reasonable doubt by the appellant's evidence. If he was not, the trial judge was next required to consider whether, on the basis of the evidence which he did accept, he was convinced beyond a reasonable doubt by that evidence of the appellant's guilt: *R. v. W.(D.)*, [1991] 1 S.C.R. 742 at para. 27. In my view, the trial judge properly discharged these requirements of *W.(D.)*, for the following reasons.

[53] First, implicit in the trial judge's finding that the appellant's testimony concerning the large sealed envelope could not be believed, is the conclusion that he was not left in reasonable doubt by the appellant's evidence. This was a straightforward trial. The defence called only two witnesses. Once Jebo's evidence was rejected as unbelievable, the defence case consisted only of the appellant's testimony and the evidence which emerged on cross-examination of the Crown's two witnesses. The reasons of the trial judge make it abundantly clear that the defence case did not leave him in a state of reasonable doubt concerning the appellant's guilt.

[54] Second, the trial judge addressed the third and final branch of the *W.(D.)* test in the following terms:

> I am forced once again to look at the obvious inference that [the large sealed envelope] was in the briefcase because the accused put it there, together with the other contents that he admits were also found in it. Linking the counterfeit materials [in the large envelope] with the other contents leads irresistibly to the inference that the accused knew the Plymouth and the GMC Yukon were stolen.

[55] Counsel for the appellant in this proceeding properly conceded during oral argument that if the trial judge's conclusion that the appellant placed the large sealed envelope in the briefcase is supportable, then the Crown's case against the appellant was overwhelming. It was open to the trial judge to infer from the whole of the circumstances that the appellant placed the large envelope in the briefcase and that he knew that the Plymouth van was stolen. Based on the evidence concerning the contents of that envelope and of the remainder of the appellant's briefcase, there was ample evidence upon which a properly instructed jury, acting judicially, could reasonably have convicted the appellant: *R. v. Yebes*, [1987] 2 S.C.R. 168 at para. 23 and *R. v. Biniaris*, [2000] 1 S.C.R. 381 at para. 36. Accordingly, the verdicts are not unreasonable.

(3) Constructive Possession

[56] The trial judge concluded that the appellant had knowledge and sufficient joint control to place him in constructive possession of the Yukon truck and the Plymouth van. I do not believe that the trial judge erred in reaching that conclusion.

[57] Jebo and the appellant were both charged with possession of the stolen Yukon truck and the Plymouth van. The Crown's case against Jebo was based on actual possession of the vehicles, while its case against the appellant depended on proof of constructive possession. Jebo pleaded guilty to the charges against him, thereby admitting his actual possession of the vehicles. Consequently, in its case against the

appellant, the Crown was obliged to demonstrate that the appellant knew that the vehicles were stolen and that he had some element of control over them.

[58] In connection with this ground of appeal, the appellant does not challenge the trial judge's finding that the appellant knew that the Yukon truck and the Plymouth van were stolen. Rather, he argues that control is a constituent and essential element of constructive possession, that the Crown was obliged and failed to prove that the appellant intended to exercise control over the two vehicles, and that there was no evidence that the appellant had the requisite intent and control in this case. I disagree.

[59] Section 4(3)(b) of the *Criminal Code* provides:

> 4(3) For the purposes of this Act
>
> …
>
> (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.

[60] The trial judge recognized that constructive possession was the gravamen of the charges against the appellant. He also expressly referenced the applicable legal principles governing proof by the Crown of possession and constructive possession, stating: "[W]here two or more persons are charged with possession of the same article…at least one of the two or more persons must be in actual possession…*and the others will be in joint possession if they know what the object is and have some element of control over the disposition of the object*" [emphasis added]. As the Crown argues, this is an accurate statement of the law concerning constructive possession: see *R. v. Terrence*, [1983] 1 S.C.R. 357.

[61] As this court held in *R. v. Savory* (1996), 94 O.A.C. 318 at para. 7, control does not require that an accused in fact exercise control over the object in question. Rather, control in this context means power or authority over the object in question.

[62] In connection with the Yukon truck, the evidence established that Jebo sold a Yukon truck to the appellant who then arranged for the resale of the vehicle to a purchaser in Amsterdam. At the appellant's request, Jebo made arrangements to ship that Yukon truck to Holland. The second Yukon vehicle, discovered at the Fenmar Drive location, was stolen and was in Jebo's actual possession. When he searched the appellant's briefcase, Dyett discovered counterfeit VIN materials matching the VIN on the dashboard of the second Yukon truck at the Fenmar Drive premises and the legitimate VIN on the Yukon truck scheduled for exportation. The appellant's constructive possession of the stolen Yukon truck was thus clearly established.

[63] In connection with the Plymouth van, the appellant admitted having test-driven the van about one hour before his arrest. His briefcase was found in the van. Dyett found the appellant's passport and driver's licence in the briefcase, together with numerous documents that implicated the appellant in a joint enterprise with Jebo. The latter documents, as I have earlier outlined, included: counterfeit stickers and labels used to renumber stolen vehicles, a reference letter for one of Jebo's employees, a telephone bill for an account in Jebo's name, shipping documents and dock receipts concerning vehicles shipped to Europe by Jebo's company, and a retail sales tax receipt for Jebo's used car business. Moreover, the counterfeit VIN plate for the Yukon truck that was discovered in the large envelope in the appellant's briefcase was registered in the name of Jebo's company. This evidence clearly established a joint enterprise and common purpose between the appellant and Jebo. By itself, this was sufficient to warrant a finding of constructive possession. In addition, Crown counsel submits that the evidence of an inter-relationship between Jebo and the appellant was sufficiently powerful that the appellant's culpability might well have been based on party liability under s. 21 of the *Criminal Code*. I agree.

(4) Alleged Misapprehension of Evidence

[64] Finally, the appellant asserts that the trial judge misapprehended aspects of the evidence of Jebo and of Dyett and failed to consider other evidence. This argument may be dealt with summarily, for three reasons.

[65] First, I am not persuaded that the trial judge misapprehended the evidence of Jebo. He simply rejected it, as he was entitled to do.

[66] Second, although the Crown concedes that the trial judge misunderstood one aspect of Dyett's evidence by indicating in his reasons that the contents of the appellant's briefcase contained a counterfeit VIN plate for the Plymouth van as well as for the Yukon truck, I conclude that this misstatement was inconsequential. Once the evidence concerning the contents of the appellant's briefcase was properly admitted, as in my view it was, the Crown's case against the appellant was formidable. As I have mentioned, the appellant's counsel concedes as much.

[67] Third, the appellant's argument that the trial judge failed to consider the significance of a bill of sale and other documents found in the appellant's briefcase does not persuade me that the trial judge misapprehended the evidence before him. The trial judge was not required to detail in his reasons all of the evidence that he considered. His failure to expressly mention a particular item of physical or other evidence does not mean that he failed to consider it. In any event, in the context of all of the incriminating documents found in the appellant's briefcase, the bill of sale and the other documents relied upon by the appellant did not diminish the strength of the evidence of a joint enterprise between Jebo and the appellant.

[68] Accordingly, for the reasons given, I would dismiss the appellant's appeal from his convictions.

III. SENTENCE APPEAL

[69] Two issues arise on the appellant's appeal against sentence, namely, whether the trial judge erred: (i) in making a restitution order in the circumstances of this case; and (ii) in failing to impose a conditional sentence.

(1) Restitution Order

[70] As relevant to this appeal, s. 738(1)(a) of the *Criminal Code* provides that a court imposing sentence may order the offender to make restitution to another person: "in the case of damage to, or the loss or destruction of, the property of any person as a result of the commission of the offence…by paying to the person an amount not exceeding the replacement value of the property as of the date the order is imposed, less the value of any part of the property that is returned to that person as of the date it is returned, where the amount is readily ascertainable".

[71] The appellant submits that the restitution order was improper for three reasons. First, the actual loss allegedly suffered by the two insurance companies was not easily determinable and, on the evidence adduced by the Crown, could not be calculated as required. Second, the trial judge failed to consider, and the Crown failed to establish, the appellant's ability to make restitution during the period of his probation. Third, the loss of the two insurance companies was not occasioned by reason of the appellant's possession of the stolen motor vehicles but, rather, as a result of the theft of the motor vehicles, an offence in respect of which the appellant was not charged or convicted.

[72] The factors and objectives relevant to the imposition of a restitution order are well-established: *R. v. Devgan* (1999), 44 O.R. (3d) 161 (C.A.) and *R. v. Biegus* (1999), 141 C.C.C. (3d) 245 (Ont. C.A.). A restitution order is a discretionary order that must be made with restraint and caution. In addition, as stated by the court in *Devgan* at p. 168: "A compensation order should not be granted when it would require the criminal court to interpret written documents to determine the amount of money sought through the order. The loss should be capable of ready calculation."

[73] In this case, the appellant challenges the sufficiency of the proof adduced by the Crown of the loss with respect to which restitution was sought. The evidence of loss relied upon by the Crown consisted of: (i) a memorandum dated November 23, 2000 to Dyett from one insurance company indicating that it had paid out a total of approximately $56,000 and recovered salvage in the sum of $23,931.25 in relation to the Yukon truck; and (ii) a letter to Dyett from the second insurance company indicating that it had paid its insured the amount of $34,267.50 for "damages" concerning the theft of the Plymouth

van and had recovered salvage in the sum of $13,555, resulting in a total amount "owed" to the insurance company in the sum of $20,712.50.

[74] No evidence was led by the Crown providing a breakdown of the monies paid out by the insurance companies or demonstrating that the payouts related only to the loss of the stolen vehicles or their contents. In addition, the Crown did not tender the applicable insurance policies as evidence at the sentencing hearing or call any representative of the insurance companies to testify regarding the claimed losses.

[75] As observed by this court in *R. v. Hirnschall*, [2003] O.J. No. 2296 at para. 33, under s. 738(1)(a) of the *Criminal Code*, a restitution order is limited to "an amount not exceeding the replacement value of the property". On the evidence led by the Crown in the case at bar, the replacement value of the two stolen motor vehicles and the amounts paid by the insurers solely with respect to the loss of property were not established and were not capable of ready calculation. Consequently, in my view, sufficient proof of loss was not offered by the Crown to meet the requirements of s. 738(1)(a) of the *Code*.

[76] Accordingly, the restitution order cannot stand. As I would allow the sentence appeal relating to the restitution order on this basis, it is unnecessary to address the appellant's other grounds of attack on the restitution order.

(2) Conditional Sentence

[77] The appellant asserts that the trial judge's failure to impose a conditional sentence offends the principle of parity in sentencing given that Jebo received a conditional sentence of one year to be served in the community followed by probation for the same offences. He also argues that the trial judge erred in commenting in his reasons for sentence that a conditional sentence would deprive the appellant of the ability to earn a living and in alluding to the fact that the appellant did not inform his family of his convictions.

[78] The trial judge considered the appropriateness of a conditional sentence and correctly concluded that the appellant fit within the category of persons in respect of whom a conditional sentence might legally be imposed. He declined to impose a conditional sentence, however, on the grounds that the offences of which the appellant was convicted were serious and because, in the trial judge's view, the service of a conditional sentence within the community in this case would not carry the same stigma as it would in other cases as evidenced by the fact that the appellant's convictions were unknown both to his community and to his family. The trial judge further stated:

> [T]here are two main objects that this court should seek to accomplish by the sentence it imposes on you. The first is some recognition by you and by the public that you know and [it] knows…that you have been convicted of a serious

> offence, and the second is to mitigate as much as possible the effect of your crime on the community. …

[79] Absent error in principle, appellate courts will not lightly interfere with the exercise of discretion by a trial judge in imposing sentence. I am not persuaded that the trial judge erred in this case in declining to impose a conditional sentence. As he observed, the offences of which the appellant was convicted are serious. The appellant was an active participant in a sophisticated and organized joint enterprise designed to effect the theft, and the exportation from Canada for profit, of valuable motor vehicles. The appellant was tried, convicted and sentenced before Jebo was sentenced. Unlike Jebo, who pleaded guilty to the charges against him, the appellant was not entitled to mitigation of his sentence based on a guilty plea. In addition, the reasons for sentence of the sentencing judge in Jebo's case indicate that but for the sentence imposed on the appellant, which the sentencing judge in Jebo's case regarded as lenient, and the principle of parity in sentencing, Jebo would have been sentenced to a significant period of imprisonment. Accordingly, for these reasons, I would not give effect to this ground of appeal.

IV. DISPOSITION

[80] For the reasons given, I would dismiss the appellant's conviction appeal. I would allow his appeal against sentence, in part, by setting aside the restitution order, and would dismiss the balance of his sentence appeal.

RELEASED:

"FEB –2 2004"

"E.A. Cronk J.A."

"I agree John Laskin J.A."

"I agree M. J. Moldaver J.A."