In the Court of Appeal of Alberta

Citation: R v No Chief, 2023 ABCA 345

Date: 20231201
Docket: 2201-0171A
Registry: Calgary

Between:

His Majesty the King

Respondent

- and -

Jonathan Wade No Chief

Appellant

The Court:

The Honourable Justice Peter Martin
The Honourable Justice Bernette Ho
The Honourable Justice Anne Kirker

Memorandum of Judgment of the Honourable Justice Martin

Memorandum of Judgment of the Honourable Justice Ho and Justice Kirker Concurring in the Result

Appeal from the Conviction by
The Honourable Justice P.G. Pharo
Convicted on the 4th day of November, 2021
(2021 ABPC 276, Docket: 200501435P1)

Memorandum of Judgment

Martin, J.A.:

[1] The appellant was charged with break and enter and commit mischief, and breach of a recognizance. He pleaded guilty to the breach charge. Following trial, he was convicted of the break and enter charge. He appeals that conviction.

Background

[2] The relevant facts are these.

[3] At the time of the incident the appellant, Mr. No Chief, and his partner, Ms. Bird, had been in a tumultuous relationship for about 1 ½ years. They lived together in a duplex in Lethbridge. Both were gainfully employed, and both had signed the lease as co-tenants. Mr. No Chief contributed financially to the rent and to household expenses. Ms. Bird's mother, Ms. Yellowface, lived in the adjoining duplex. She testified that Mr. No Chief was "very polite ... very respectful", when sober but that when he was intoxicated "he doesn't know what he's doing". Ms. Yellowface testified that she counselled her daughter "for them to stay away from drinking because that's when problems arose". The volatility of the relationship occasionally led to police involvement.

[4] In September 2019, Mr. No Chief was charged with assaulting Ms. Bird pursuant to section 266 of the *Criminal Code*. He was released on a recognizance with conditions prohibiting him from being within 100 meters of the residence he shared with Ms. Bird, and that he have no contact with her. Notwithstanding those conditions, and Ms. Bird's awareness of them, he returned to the residence and lived there with her consent.

[5] A day or two prior to the incident in question, Ms. Bird and Mr. No Chief had a dispute which culminated with Ms. Bird telling Mr. No Chief to leave the duplex, which he did.

[6] The evening before the offence, Ms. Bird spent the night "having a few" at a friend's house because she didn't want to be alone.

[7] On the morning of the incident, Mr. No Chief was dropped off at the duplex by a woman with whom he was having an affair. As he explained at trial, he engaged in that relationship in retaliation for Ms. Bird's cheating on him with another man.

[8] Mr. No Chief was in rough shape when he entered the home, tired, hung-over and still somewhat intoxicated; he estimated his state of sobriety at a 5 out of 10. He used his key to access the duplex, which was unoccupied. He began playing music through his Xbox which was hooked up to the TV. He then made himself a sandwich, cutting his hand with a knife in the process, likely because he was still intoxicated. He went to the balcony to smoke a cigarette, where he was confronted by Ms. Bird's mother who told him he was not to be there and that she would be calling the police. He then left the duplex. Ms. Yellowface called her daughter, Ms. Bird, who phoned the police.

[9] When the police arrived, they observed the TV lying damaged on the living room carpet and two holes in the wall. Of interest, Mr. No Chief subsequently replaced the TV.

[10] Mr. No Chief testified at trial. He explained that Ms. Bird had told him to leave the duplex following an argument over their respective infidelities. He testified that he returned on the morning in question because he had nowhere else to go.

[11] It was the position of the Crown that Mr. No Chief committed a break and enter pursuant to section 348(1)(b) of the *Criminal Code*, with reliance on section 350(b)(ii), and then committed mischief by damaging the TV. The relevant break and enter sections provide:

> **348(1)(b)** Everyone who …(b) breaks and enters a place and commits an indictable offence therein … is guilty (d) if the offence is committed in relation to a dwelling house, of an indictable offence and liable to imprisonment for life.
>
> …
>
> **350(b)(ii)** for the purposes of section 348 and 349, a person shall be deemed to have broken and entered if, (ii) he entered without lawful justification or excuse by a permanent or temporary opening.

[12] Notably, the trial judge found Mr. No Chief did not enter the home with the intent to commit an indictable offence, rather that he damaged the TV once he was inside the residence, likely because he was still upset with Ms. Bird.

[13] The trial judge concluded Mr. No Chief was not responsible for the damage to the wall, finding that had occurred earlier. With regard to the break and enter, the trial judge found that Mr. No Chief used his key to enter the residence, that he did not have Ms. Bird's consent to be there and that he knew he was prohibited from being there by a condition of his recognizance. I will return to this issue later, however, suffice it to say at this stage that the only legal prohibition for Mr. No Chief being at the residence was the recognizance.

Grounds of Appeal

[14] Mr. No Chief appeals, arguing that the trial judge erred:

i. by conflating knowledge of a breach of a recognizance and the wishes of a co-occupant with *mens rea* for the offence of break and enter; and
ii. by failing to explain his findings that the colour of right asserted by the appellant was of a moral rather than legal nature.

Analysis

[15] In brief, Mr. No Chief asserts that neither the wishes of Ms. Bird, which the trial judge referred to repeatedly, nor the recognizance extinguished his property interest as a lessee and tenant, and that neither negated his lawful justification for entering or being in the home.

[16] I agree that without a court order, the wishes of Ms. Bird that he leave the residence did not legally oblige him to do so. Simply put, without a court order Ms. Bird had no more legal authority or right to expel him from the home than he had to expel her.

[17] The recognizance is another matter. It contained an order prohibiting Mr. No Chief from being within 100 yards of the home. Absent a successful challenge to the validity of that order, (which did not occur in this case), it did negate the appellant's legal right to attend the residence, no matter his status as a co-tenant and a signatory to the lease. Similar orders are commonly issued by courts as a means of ensuring domestic peace in the form of, for example, an Emergency Protection Order, a Restraining Order, or Orders granting exclusive possession of a home to one domestic partner, even where the other is a signatory to the lease or the lawful owner.

[18] No matter the form, the effect is the same, the subject of the order no longer has a lawful justification or excuse to enter or be in the residence in question.

[19] In this case, Mr. No Chief acknowledged the existence of the recognizance, that it was a legal order forbidding him from attending the home, that he could be charged criminally if he breached the order, and that he had promised to abide by the order.

[20] That acknowledgement extinguished Mr. No Chief's legal right and justification to attend and enter the home and defeated his colour of right defence, which, to be sustained, required an honest belief that he was legally entitled to attend the home. See *R v Pena* (1997), 148 DLR (4th) 372, (BCSC). Mr. No Chief admitted he had no such belief.

[21] Accordingly, the appeal must be dismissed.

[22] That said, I would not wish my adjudication of this appeal to be taken as an endorsement of the Crown's discretion to charge Mr. No Chief with the break and enter offence in these unusual circumstances. I accept that the Crown has an almost unfettered discretion in deciding who to charge and with what, but I do not agree with the decision in this case.

[23] To explain, in support off its position that Mr. No Chief was guilty of break and enter, the Crown relied on *R v McFarlen*, 2008 BCSC 1848, and *R v Fontaine*, 2020 ABCA 193. In *McFarlen* the appellant was the complainant's common-law spouse, co-tenant and joint mortgagor. A restraining order prohibited him from attending the residence they shared. Nonetheless he went there against the complainant's wishes and attacked her. In *Fontaine* the appellant broke into the complainant's residence at 3:00 in the morning, allegedly to retrieve some of his belongings and to

speak to the complainant about reconciling, while subject to an Emergency Protection Order prohibiting him from being within 200 meters of the home.

[24] The situation before us is not like that. Here, Ms. Bird, knowing the recognizance prohibited Mr. No Chief from contacting her or being near their home, encouraged him to continue to live with her. Indeed, on the day following this offence she texted him, asking him to return home. He did and the two continued to co-habit there until their relationship ended two months later. I say this only to note that this was not a situation where Ms. Bird found herself trapped, as are many women in volatile domestic relationships. That, in my opinion, was significant factor in determining the appropriate charge.

[25] The offence of break and enter a residence and committing an indictable offence therein, is one of the most serious in the *Criminal Code* as evidenced by the maximum penalty – life imprisonment. A conviction for that offence will weigh against bail being granted if the appellant is subsequently charged with another offence and will aggravate any sentence imposed when next convicted of an offence.

[26] Equally important, Mr. No Chief's is an Indigenous person. Although we do not have counsel's submissions or the material tendered at the sentencing hearing, I note that upon conviction, counsel requested a *Gladue* report because "there were a number of *Gladue* considerations present in Mr. No Chief's background".

[27] Parliament and the Supreme Court of Canada have expressed concern about the over-representation of Indigenous people in our justice and prison system and have stressed the obligation to address that issue by considering alternatives to imprisonment. See section 718(2)(e) of the *Criminal Code*, *R v Gladue*, [1999] 1 SCR 688, and *R v Ipeelee*, [2012] 1 SCR 433.

[28] The Crown shares that responsibility and an important step in achieving that objective is to carefully consider the appropriate charge particularly in non-violent offences when Indigenous offenders are involved.

[29] The gravamen of Mr. No Chief's offence on this occasion was that he violated a recognizance by returning to the house and then breaking a TV. Those offences, in these unusual circumstances, would have been fully captured by the breach of recognizance charge, (to which he pleaded guilty), and a charge of mischief. The break and enter charge, which the Crown referred to as a "constructive break and enter", was, in my opinion, not in keeping with our general obligation to minimize the exposure of Indigenous people to penal consequences, particularly in non-violent offences. I note that in this case Mr. No Chief was sentenced to one month imprisonment for breaching his recognizance and three months intermittent for the break and enter.

[30] The appeal is dismissed.

Appeal heard on June 12, 2023

Memorandum filed at Calgary, Alberta
this 1st day of December, 2023

Martin J.A.

Memorandum of Judgment Concurring in the Result

Ho J.A. and Kirker J.A.:

[31] We agree with our colleague, Martin J.A., that the appeal must be dismissed for the reasons stated in paragraphs 1-21. We also agree that the Crown has virtually an unfettered discretion in deciding who to charge and with what offence. We prefer not to comment on whether that discretion was exercised appropriately on this occasion.

[32] The appeal is dismissed.

Appeal heard on June 12, 2023

Memorandum filed at Calgary, Alberta
this 1st day of December, 2023

I concur:

Authorized to sign for: Ho J.A.

I concur:

Kirker J.A.

Appearances:

I. Kuklicz
for the Respondent

A.A. Sanders
for the Appellant