

CANADA / JUDGMENT

Knight v. British Columbia

2021 BCCA 251

COURT

British Columbia Court of Appeal

DECIDED

21 May 2021

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2021 BCCA 251 Knight v. British Columbia

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Knight v. British Columbia,

2021 BCCA 251

Date: 20210521

Docket: CA47043

Between:

James Stephen Knight

Appellant

(Plaintiff)

And

Her Majesty the Queen in Right of the Province of British Columbia

Respondent

(Defendant)

Before:

The Honourable Mr. Justice Willcock

The Honourable Madam Justice Fisher

The Honourable Mr. Justice Abrioux

On appeal from: An order of the Supreme Court of British Columbia, dated

September 10, 2020 (Knight v. British Columbia, 2020 BCSC 1338,
Vancouver Docket S187255).

Oral Reasons for Judgment

The Appellant, appearing in person
(via videoconference):

J. Knight

Counsel for the Respondent
(via videoconference):

M.J. Kleisinger

K.M. Fast

Place and Date of Hearing:

Vancouver, British Columbia

May 21, 2021

Place and Date of Judgment:

Vancouver, British Columbia

May 21, 2021

Summary:

The appellant was arrested and charged with threatening and possessing a weapon when RCMP officers attended at his place of residence to assist the owners in effecting an eviction. His claim against the Crown founded upon an allegation of malicious prosecution was dismissed on a summary trial. He appeals the dismissal. Held: Appeal dismissed. The malicious prosecution claim was suitable for summary adjudication. There was no merit to the submission that the Crown required proof of the legality of the eviction before approving charges. There was no evidence Crown counsel had not properly exercised prosecutorial discretion, and no evidence of improper motive. Potential defences do not alter the propriety of the exercise of that discretion.

WILLCOCK J.A.:

Introduction

[1] On September 10, 2020, for reasons indexed at 2020 BCSC 1338, Justice Iyer dismissed the appellant's claim against the respondent Crown on an application brought pursuant to the summary trial rule, R. 9-7. Mr. Knight appeals both the decision to hear the summary trial and the resultant dismissal of his claim against the Crown.

Background

- [2] On January 25, 2017, RCMP officers attended at the Creekside Campground on the Sunshine Coast Highway, near Sechelt, to assist the owners in evicting the appellant, then living in a modified school bus on the site. The appellant waved a stick at the site manager and the RCMP when they entered the bus. He was arrested and taken into custody. The next morning, having reviewed a Report to Crown Counsel ("RTCC"), Crown Counsel approved two charges: one count of carrying, using or threatening to use a weapon or imitation weapon, contrary to s. 267(a) of the Criminal Code, R.S.C. 1986, c. C-46; and one count of carrying or possessing a weapon (a stick), for a purpose dangerous to the public peace or for the purpose of committing an offence, contrary to s. 88(1) of the Code.
- [3] The appellant was released on bail on terms that precluded his return to the site, except to claim his belongings. An eviction was effected while he awaited trial.
- [4] The charges were stayed on August 23, 2017 when the manager expressed an unwillingness to testify because she did not want to be identified to the appellant.
- [5] On June 27, 2018, the appellant commenced an action against the property owner and the property manager, the Minister of Public Safety as the minister responsible for the RCMP and the Attorney General, and the Minister of Public Safety and Solicitor General of British Columbia. He contended that the Crown's prosecution enabled the other defendants to evict him, and the prosecution was malicious and a breach of his Charter rights.
- [6] In response to the claim against the Province, the Attorney General argued:
- a) The Crown Counsel were appointed by the Attorney General and at all times were acting within the scope of their usual and customary employment;
 - b) Crown Counsel are afforded prosecutorial discretion to decide whether or not to initiate or continue prosecutions. The discretion is constitutionally entrenched, and not subject to judicial review;
 - c) Crown Counsel reviewed the underlying facts supplied in the RTCC as well as the evidence supplied by the RCMP, applied the charge approval standard, and properly approved charges in this case;
 - d) There were reasonable and probable grounds to approve and continue all charges against the appellant, and there was a substantial likelihood of conviction;
 - e) The charges against the appellant were stayed on August 23, 2017, because, in all of the circumstances, it was determined that it was no longer in the public interest to maintain the prosecution;
 - f) The Crown acted in good faith, without malice, and for the proper purpose of carrying the law into effect; and

- g) There was no actionable wrong that might give rise to a Charter remedy.

Motion

- [7] By motion filed in December 2019, the respondent sought the summary dismissal of the claim against the Crown. In support of the application, Crown relied upon the affidavits of two Crown Counsel, including sworn testimony to the effect that:
- a) the police recommended the plaintiff be charged with offences contrary to ss. 88(1) and 267(a) of the Criminal Code;
 - b) Crown Counsel reviewed the RTCC, applied the British Columbia Prosecution Service's (BCPS) charge assessment guidelines and approved the charges recommended by the police;
 - c) there were reasonable and probable grounds to approve and continue all charges against the appellant and there was a substantial likelihood of conviction;
 - d) charges against the appellant were stayed on August 23, 2017 because Crown Counsel determined it was no longer in the public interest to maintain the prosecution because the complainant did not want to disclose her last name and was concerned for her safety; and
 - e) Crown Counsel were not involved in the criminal investigation of the appellant or in the eviction and neither of the Crown Counsel involved in the case had any personal dealings with the appellant.
- [8] In his reply to the motion, the appellant argued he had been prosecuted for the unlawful purpose of effecting his eviction by defendants who believed he was a sexual predator. He relied upon an affidavit, in which he deposed that he had examined the RTCC and believed it did not establish a reasonable prospect of conviction. He asserts that there was no legal basis for his eviction and that the Crown acted "without diligence" by failing to seek witnesses other than the RCMP and by failing to challenge the RCMP's view that they could lawfully assist with the eviction.
- [9] Appended to the appellant's affidavit filed on that motion is a Review Hearing Decision issued by the Dispute Resolution Services of the Residential Tenancy Branch on December 23, 2016. The review confirmed an arbitrator's decision that the Manufactured Home Park Tenancy Act, S.B.C. 2002, c. 77 does not apply to the appellant's tenancy. The Residential Tenancy Branch concluded it did not have jurisdiction to cancel a Notice to End Tenancy issued by the respondent to the appellant on September 16, 2016.
- [10] The respondent opposed the application to strike the claim against the Crown as premature, and the case was too complex for resolution in a summary fashion.

Summary Judgment

- [11] The judge found the distinct claim against the respondent to be suitable for summary adjudication. Although examinations for discovery had not been completed, the appellant had not taken any steps to schedule discovery of the Crown between the filing of the motion for a summary trial in December 2019 and the August 2020 hearing. The appellant had full Crown disclosure and had the opportunity to put relevant evidence before the court. The suggestion that "something might turn up on discovery" is insufficient to defeat a summary trial application.
- [12] The judge considered the allegations against the Crown to be serious allegations that should be addressed in a timely way. The issues were not legally or factually complex. Summary trial would avoid the additional costs associated with proceeding to a full trial against this defendant. Litigating in slices was not a concern.
- [13] Addressing the second question, whether the appellant had proved his case, she considered the evidence in the RTCC to provide reasonable and probable grounds for the charges approved. Crown Counsel subsequently learned more about the background, in particular the acrimonious relationship between the appellant and Creekside, but the judge did not consider any such evidence to diminish the weight of the evidence about the incident that gave rise to the charges.
- [14] The judge considered but dismissed the appellant's submission that it was unreasonable to call "a stick a weapon" and to call "self-defence an assault".
- [15] She held, at para. 28, citing *Miazga v. Kvello*, 2009 SCC 51 at para. 75, that "Once it has been established that reasonable and probable cause existed to commence or continue a criminal prosecution from an objective standpoint, the inquiry need go no further".
- [16] Nevertheless, she addressed in detail, at paras. 33-42 of her reasons for judgment, the appellant's submissions in support of his contention the Crown had an improper motive.
- [17] The appellant also alleged violations of specific Charter rights, but the trial judge's view confirmed that all of his Charter claims against the Crown arose out of the malicious prosecution claim.

Grounds of Appeal

- [18] On this appeal, acting on his own behalf, without the assistance of counsel, Mr. Knight contends the judge made five errors:
- a) Denying him his right "to face his accusers";
 - b) Erroneously concluding he could be lawfully evicted from the property upon which he was living;
 - c) Making findings with respect to his eviction without an evidentiary basis;

- d) Failing to consider his evidence; and
- e) Making "many errors of fact".

[19] In his reply factum, he says it is an error to say he "charges malice" as against the Crown and he denies that he confirmed that his Charter claims arise out of the malicious prosecution claim. He says:

28 - the respondent states that i need to prove malice, and then goes on to define malice, whereas i do not claim malice against Crown, and am in fact claiming Charter breaches, as outlined in my evidence. my argument is that Crown were motivated (quoting respondent factum paras 11.a.ii and 16.4) "by a primary purpose other than that of carrying the law into effect".

[20] In his submissions today, Mr. Knight says we should look to principles described in Miazga and in particular the passage at para. 7 of the judgment in that case where Justice Charron for the Court said:

[7] Just as immunity from judicial review is subject to the doctrine of abuse of process in public law, the Attorney General and Crown attorneys do not enjoy absolute immunity from a suit for malicious prosecution in private law. A person accused of a criminal offence enjoys a private right of action when a prosecutor acts maliciously in fraud of his or her prosecutorial duties with the result that the accused suffers damage. However, the civil tort of malicious prosecution is not an after-the-fact judicial review of a Crown's exercise of prosecutorial discretion. Under the strict standard established in Nelles, malicious prosecution will only be made out where there is proof that the prosecutor's conduct was fuelled by "an improper purpose or motive, a motive that involves an abuse or perversion of the system of criminal justice for ends it was not designed to serve" (Nelles, at p. 199). In other words, it is only when a Crown prosecutor steps out of his or her role as "minister of justice" that immunity is no longer justified.

[Emphasis by underlining added; emphasis by italics in original.]

[21] Mr. Knight refers us to paras. 21-22 of the respondent's factum where the respondent makes what he considers to be the concession that there is a dispute with respect to his right to remain at the property (that is, that it is not a settled question). This is really the same point I have described above, that Crown approved charges against him when it was uncertain he could be lawfully evicted from the property.

[22] Mr. Knight says that if he is given leave to adduce new evidence he can establish the judge relied upon perjured evidence.

[23] Finally, he seeks a stay of the appeal, to avoid the necessity of two appeals if his surviving claim against other defendants is dismissed.

Analysis and Discussion

[24] In my view, the judge did not err in finding the action was appropriate for summary adjudication, and she did not err in law in dismissing the claim against the respondent. The claim has no apparent merit. Mr. Knight's grounds of appeal can be dealt with summarily.

Denial of the right "to face his accusers"

[25] The judge referred to and applied a principled approach to the exercise of her discretion to adjudicate the dispute in accordance with the procedure set out in R. 9-7, and considered in *Gichuru v. Pallai*, 2013 BCCA 60 at paras. 28-35. The summary trial process is an appropriate means of fairly adjudicating claims on their merits in a summary fashion: *Hryniak v. Mauldin*, 2014 SCC 7. There was no error in its application in this case.

Erroneous consideration of whether the eviction was lawful

[26] The judge only addressed the legality of the eviction when she was considering malice (a question she was not required to address but canvassed to make clear there was no merit in the claim). She did not expressly conclude the eviction was lawful, but rather that the appellant had not established it was unlawful. Considering the appellant's evidence, she held:

[37] These facts do not prove that the Crown acted with malice or for an improper purpose in prosecuting Mr. Knight. There is no evidence demonstrating whether Creekside's eviction of Mr. Knight was lawful. The Residential Tenancy Board decision simply declines jurisdiction. It does not say that Creekside cannot evict Mr. Knight.

[Emphasis added.]

[27] The statement I have highlighted is not incorrect.

Making findings with respect to eviction without an evidentiary basis

[28] This ground of appeal refers specifically to the conclusions in para. 37 of the reasons for judgement, cited above. It appears to be founded upon the misapprehension that it was necessary for the judge to conclude the landlord could lawfully evict the tenant before concluding there was reasonable and probable cause to commence or continue a criminal prosecution from an objective standpoint. In his reply factum, the appellant says, "my argument is that Crown could not have convicted me without proof of the right to evict". Today, he says the Crown wrongly relied upon the legal opinion provided to the police with respect to their right to assist the property owner.

[29] It is not the case that the Crown required proof of the legality of the eviction process before approving charges. It was not necessary for the Crown to rely upon the advice given to the police by their counsel. As the respondent submits at para. 24 of its factum:

The appellant does not contest that he swung the stick at the site manager and the RCMP. Rather, he suggests he was justified in doing so. Presumably, he would have defended the charges based on this justification if the matter proceeded to trial. However, as the chambers judge found, potential defences do not alter the propriety of Crown Counsel's exercise of prosecutorial discretion in approving charges against him.

Failing to consider evidence

[30] The appellant submits his evidence was "laid out in affidavit before the court", but none of his assertions "were entered or considered". In my view, the judge fully considered the material before her on the summary trial application. That is evident in the discussion of the appellant's allegations of improper motive, even though that consideration was unnecessary.

Making "many errors of fact"

[31] The appellant does not identify any material errors.

Reliance upon perjured evidence

[32] The appellant says his former lawyer "perjured himself" by failing to advise him of the Crown decision to stay the charges in a timely manner. He apparently misunderstands what amounts to perjury. The facts he seeks to prove by leading new evidence will have no bearing upon the dismissal of his action against the Crown. It does not come close to meeting the standard for admission of new evidence described in *Palmer v. The Queen*, [1980] 1 S.C.R. 759.

Dismissal of the Charter claims

[33] The appellant says it was a mistake for the chambers judge to say he confirmed that all his Charter claims against the respondent arise out of malicious prosecution. In my view, it is possible to address this argument without reviewing the manner in which the concession was made on the hearing of the motion. The only act now said to give rise to a Charter remedy other than the laying of charges is the staying of the charges. The appellant's position, as set out in his reply factum, is that the staying of charges left him without "any chance of answering them at trial". This argument is founded upon a misapprehension: that the rights set out in s. 11 of the Charter, specifically the right of a person charged with an offence to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal, limit the prosecutorial discretion to stay charges. That is not the case. Regardless of what was confirmed by the appellant on the motion, he now alleges no actionable wrong that might found a claim for Charter damages.

The role of counsel

[34] Today, Mr. Knight challenges the propriety of the Attorney General, charged with the administration of justice, appearing on behalf of the Crown respondent. The Attorney General appropriately participates in these proceedings as the responsible minister of the Crown respondent and properly participates as a litigant in these proceedings with an interest adverse to the appellant.

Bail

[35] Mr. Knight says the Crown acted with the improper motive of seeking bail conditions that precluded his return to the camp to protect his property. The Crown correctly responds (at its factum at para. 30) that it was the court--not the prosecutors that granted bail conditions on the appellant's undertaking. The pleadings do not allege any misconduct in relation to the bail application. In fact, bail is not referred to in the pleadings, except to the extent Mr. Knight says in para. 42 that the landlord improperly and in breach of the terms of his bail, refused to let him return to the property to protect his possessions.

Stay of the appeal

[36] Last, the appellant seeks a stay of this appeal to avoid the necessity of two appeals if his surviving claim against other defendants is dismissed. At this point, in my view, a stay would waste, rather than save resources.

[37] I would dismiss the appeal.

[38] FISHER J.A.: I agree.

[39] ABRIOUX J.A.: I agree.

[40] WILLCOCK J.A.: The appeal is dismissed.

"The Honourable Mr. Justice Willcock"

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