

CANADA / JUDGMENT

R. v. Bus

2020 BCCA 278

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 278 R. v. Bus COURT OF APPEAL FOR BRITISH COLUMBIA Citation: R. v. Bus, 2020 BCCA 278 Date: 20201013 Docket: CA46249 Between: Regina Respondent And Nicolae Bus Appellant Corrected Judgment: The cover page of this judgment was corrected on December 10, 2020. Before: The Honourable Madam Justice Saunders The Honourable Madam Justice Fenlon The Honourable Madam Justice DeWitt-Van Oosten On appeal from: An order of the Provincial Court of British Columbia, dated May 14, 2019 (conviction) (R. v. Bus, Richmond Docket 62650-1K). Counsel for the Appellant: R.A. McConchie Counsel for the Respondent: C.L. Morgan Place and Date of Hearing: Vancouver, British Columbia June 23, 2020 Place and Date of Judgment: Vancouver, British Columbia October 13, 2020 Written Reasons by: The Honourable Madam Justice Saunders Concurred in by: The Honourable Madam Justice Fenlon The Honourable Madam Justice DeWitt-Van Oosten Summary: The appellant appeals from his conviction on one count of breaking and entering his former residence with intent to commit an indictable offence. The judge found there was no evidence to rebut the presumption under s. 348(2) of the Criminal Code that the appellant intended to commit an indictable offence. Held: Appeal allowed. There was evidence capable of rebutting the presumption under s. 348(2). The judge's reasons for judgment are not adequate in that they omit discussion of a body of evidence relevant to the intent to commit an indictable offence which, properly considered, is capable of leading to an inference rebutting the presumption in s. 348(2) of the Criminal Code. As there was no evidence adduced by the Crown of the accused's intent to commit an indictable offence, the verdict is not supported by evidence and is unreasonable. The offence as particularized does not allow for a conviction on the included offence of mischief. The verdict is set aside and an acquittal is entered. Reasons for Judgment of the Honourable Madam Justice Saunders:

- [1] Mr. Bus appeals from conviction on one count of breaking and entering his former residence on or about June 23, 2018, with intent to commit an indictable offence, contrary to s. 348(1)(a) of the Criminal Code.
- [2] Section 348 of the Code establishes the offence of breaking and entering a dwelling house with intent to commit an indictable offence, complete with a rebuttable presumption of intent: 348 (1) Every one who
- (a) breaks and enters a place with intent to commit 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, and ...
- (2) For the purposes of proceedings under this section, evidence that an accused
 - (a) broke and entered a place or attempted to break and enter a place is, in the absence of evidence to the contrary, proof that he broke and entered the place or attempted to do so, as the case may be, with intent to commit an indictable offence therein;
- [3] On appeal Mr. Bus contends:
 - 1. the judge's reasons for conviction are insufficient on the question of his intent to commit an indictable offence; and
 - 2. the verdict is unreasonable.
- [4] For the reasons that follow, I conclude that the judge's reasons for judgment are not adequate in that they omit discussion of a body of evidence relevant to the intent to commit an indictable offence which, properly considered, is capable of leading to an inference rebutting the presumption in s. 348(2). As there was no evidence adduced by the Crown of the accused's intent to commit an indictable offence, the verdict is not supported by evidence and is unreasonable. The Circumstances
- [5] Mr. Bus and Ms. Danao met online in 2008, and in person in 2009. They cohabited for a period of time and have three children together born in 2010, 2012, and 2015. Sometime in 2015 they married. Also in 2015, Ms. Danao and Mr. Bus ceased cohabitation for a period of time.
- [6] Mr. Bus has been a heavy drinker. In March 2015, representatives of the Ministry of Children and Family Development told Ms. Danao they would remove the children from her home if she continued to reside with Mr. Bus. As a result, Ms. Danao and the children resided elsewhere for a time. Ms. Danao, Mr. Bus, and the children resumed cohabitation on his promise to change his ways. In or about July 2017, the family moved to the residence in issue.
- [7] In May 2018, representatives of the Ministry learned that Ms. Danao had reconciled with Mr. Bus and that, with the children, she was residing with him. The Ministry then formally removed the children from their parents' care, and Ms. Danao told Mr. Bus that she wanted him to leave the premises. She testified that Mr. Bus agreed to leave the premises by the end of May 2018, and that they discussed the need to have the premises rented only in her name in order for the children to return to her care. Mr. Bus and Ms. Danao discussed the change to the lease agreement. Mr. Bus advised Ms. Danao he had found an apartment to rent, and asked her for money for the damage deposit he needed for his new residence. The judge described these and subsequent events:

- [10] [Ms. Danao] produced as Exhibit 1, a June 3rd, 2018 Residential Tenancy Agreement with their landlord. It is in her name alone. It is for a one-year lease. She testified that on June 18th, 2018, she had a telephone call with Mr. Bus at which time he informed her he had found a two-bedroom apartment for himself but he needed some money to pay for the damage deposit. He requested the Child Tax Credit from her.
- [11] Her evidence was that on June 20th, 2018, between noon and 1:00 p.m., he attended at the home at 9871 Seavale Road to pick up the money she gave him, and that she told him at that point he was no longer allowed in the house. At that point, he left his key to the house on the kitchen table and he took the money from her. The evidence of Ms. Danao was certainly from that point on (June 20, 2018) it was her expectation that Mr. Bus would not be attending back at the home and that he knew he was not welcome there.
- [12] The incident that led to the charges occurred June 23rd, 2018, at around midnight. When Ms. Danao came home from work, she noticed that the glass pane on her front door was broken. She saw Mr. Bus's van in the driveway. She remained outside the home and called 9-1-1. She testified that Mr. Bus came out of the house and tried to convince her to stop making the call to the police. She continued and the police arrived.
- [13] Ms. Danao testified that between June 20th and June 23rd, she had changed the locks on the door for her safety. Various photos showed that the glass from the front door had in fact been broken. There were a number of photos from the interior of the home showing beer bottles, of the type that Mr. Bus was accustomed to drinking, left in the garbage and lying around. Ms. Danao said that when she left for work that day, there was no broken glass on her front door and there were no such beer bottles or cans inside of her home.
- [8] The judge found that Mr. Bus continued to receive mail delivered to the home after June 20, 2018, that from time to time he visited the home between May 15 and June 23, 2018, that he left clothing at the home, and that nothing was stolen from the home on the night of the incident. The judge discussed evidence of Mr. Bus having a makeshift bed in his van and Ms. Danao's assumption that he was living in his van until he moved into the apartment he had secured. The Reasons for Judgment
- [9] The trial was in the morning and the brief reasons for judgment were delivered that afternoon. They record Mr. Bus's contention that it was not proved beyond a reasonable doubt that he had neither a right nor a lawful excuse to occupy the residence in question, and his submission that there was "some evidence to the contrary to rebut the presumption created by s. 348(2) of the Criminal Code, including the mail that continued to be received at the home". The judge rejected Mr. Bus's submissions and convicted him, saying:

- [20] I accept the evidence of Ms. Danao, in particular with respect to what occurred on June 20th, 2018. I find as a matter of fact, that there was a conversation between herself and Mr. Bus that day, that she gave Mr. Bus money for a deposit on other accommodation, that she told him he was no longer welcome at the home located at 9871 Seavale Road, and he gave her the key to that home. I find that action occurred and that by Mr. Bus handing over the key to the home, he knew that he no longer had the right to occupy it.
- [21] Although it is true that no one saw how the window on the front door was opened, I find that the circumstantial evidence causes me to determine that there is no other reasonable explanation for the broken pane on the front door other than Mr. Bus being there. He had, obviously, consumed a certain quantity of alcohol, evidenced by the number of alcohol bottles that were found, three in the garbage and another two that had not been there when Ms. Danao left for work, causing me to find that he had been there for a while that evening, and he had no key, having given it up on June 20th.
- [22] It is logical, in my view, there is no other reasonable explanation for how he got into that home other than he broke the front pane of the door to enter, and I find that he did in fact do so.
- [23] I also find that Mr. Bus was aware, as a result of the communication he had with his wife on June 20th, 2018, that he was no longer welcome there and that there had been discussion between them about her renewing the lease in her name alone so that she could secure the return of their children to her care from foster care.
- [24] I do not find that there is evidence to the contrary to rebut the presumption under s. 348(2) of the Criminal Code and therefore I find that Mr. Bus did in fact break and enter into the premises located at 9871 Seavale Road with intent to commit an indictable offence, contrary to s. 348(1)(a) of the Criminal Code, and he was there without any lawful excuse to be there.
- Discussion The Adequacy of Reasons for Judgment
- [10] In a full field of cases, the three leading ones on the approach an appellate court must take to a challenge to the adequacy of reasons are *R. v. Sheppard*, 2002 SCC 26, *R. v. Dinardo*, 2008 SCC 24, and *R. v. R.E.M.*, 2008 SCC 51. In *R. v. Sadler*, 2008 BCCA 491, Madam Justice Smith helpfully summarized the jurisprudence at paras. 30-38, and I will not repeat all that she said. It includes the observation that in assessing the adequacy of reasons, this court must read the reasons in their entirety in the context of all that is properly known to the court - evidence, submissions, and case history - and we must consider whether they are sufficient to meet their main purposes of 1) telling the parties why the decision was made; 2) providing public accountability for the decision; and 3) permitting effective appellate review. The jurisprudence establishes that adequacy of reasons is a functional and contextual question, and only where they are inadequate and the functional needs for appellate review are not satisfied may this court conclude, variously, that the verdict is unreasonable, there is an error of law, or there is a miscarriage of justice, under s. 686(1)(a) of the Criminal Code: *Sheppard* para. 55; *Sadler* para. 36.

- [11] The issue of intent is an issue of mens rea. The intent of committing an indictable offence referred to in s. 348(1) of the Code is often referred to as the secondary intent. The jurisprudence considering the application of s. 1 of the Canadian Charter of Rights and Freedoms to s. 348(2) has recognized as constitutional its "evidentiary assist", relying upon the high number of unsolved break and enter offences and the practical difficulty of proving the secondary intent where there has been a breaking and entering without actual commission of an indictable offence: *R. v. Nagy* (1988), 45 C.C.C. (3d) 350 (Ont. C.A.); *R. v. Singh*, 2005 BCCA 591. The point of the presumption in s. 348(2) is that it applies only where the record is devoid of evidence contrary to the intent to commit an indictable offence, and it is a provision that addresses the evidentiary burden but does not shift the burden of proof: *The Queen v. Proudlock*, [1979] 1 S.C.R. 525.
- [12] In this ground of appeal, Mr. Bus contends that the judge's reasons on the issue of the secondary intent are simply conclusory and are insufficient in that they fail to address the spectrum of evidence in the record concerning his conduct, from which inferences could be drawn that raise a reasonable doubt. He submits it is not possible to discern the judge's reasons for rejecting the possibility that he lacked the intent to commit an indictable offence.
- [13] The Crown refers to the judge's recitation of many of these points of evidence and acceptance of Ms. Danao's evidence, saying her para. 24 is sufficient to demonstrate that she considered all of these matters in finding no evidence to the contrary. It says, further, correctly, that the absence of theft, or absence of the commission of an indictable offence on its own, is not evidence to the contrary: *R. v. Rodney*, 2007 ONCA 314; *R. v. Singh*. It is, however, a circumstance that may combine with other evidence before the court to permit an inference sufficient to displace the presumption in s. 348(2).
- [14] In *Sadler*, this court considered a similar situation of reasons for judgment that did not address a "broad spectrum of evidence" that "could give rise to different inferences regarding [the accused's] state of mind", in the context of a statutory presumption of intent to escape civil or criminal liability by failing to remain at the scene of an accident. Justice Smith observed that the judge had not addressed the mens rea issue at all, and so did not demonstrate that he had turned his mind to the specific intent required for the offence. She concluded that the reasons showed no discernible connection between the verdict and the basis for conviction, in the context of an earlier discussion on the need for reasons to permit meaningful appellate review. In the result the verdict was set aside and a new trial was ordered.
- [15] The reasons for judgment in this case acknowledge Mr. Bus's submission that there was evidence to rebut the presumption, unlike the reasons of the trial judge in *Sadler*. However, her reasoning was then confined to her reasons for rejecting Mr. Bus's submissions on the actus reus element of the offence and her finding that he broke the window of the door to gain entry knowing he no longer had the right to be there. The judge omitted any explanation as to why various circumstances mentioned in her recitation of the evidence

was not evidence to the contrary of his intent to commit an indictable offence. The evidence includes that he received mail at the house, that his van was parked in plain sight outside her home on the evening in issue, that he had visited Ms. Danao after she told him she wanted him out by the end of May, that he appeared to be living in his van on June 23, that he had left clothing at the residence, that on June 23 he had been in the house for some time, and that nothing was stolen that evening.

- [16] The evidence just listed, in my view, is capable of supporting an inference that Mr. Bus lacked the requisite intent to commit an indictable offence. As was the case in *Sadler*, I conclude that this is not a case in which the record can fill the "gap" in the reasoning. It is not possible for us to explain why the evidence was rejected. Nor is this a case in which one can say that the judge, turning her mind to the substance of these features, could not have found the presumption in s. 348(2)(a) rebutted. That is, I cannot say that the result would necessarily have been the same had the judge addressed the thrust of the evidence as it related to Mr. Bus's intent to commit an indictable offence. On this conclusion, there is an error in law, and the verdict must be set aside under s. 686(1)(a)(ii). Unreasonable Verdict
- [17] The conclusion that the reasons for judgment are insufficient for their purposes could lead to an order for a new trial. Mr. Bus goes further, however, and submits that the evidence, properly considered, cannot support a conviction of break and enter with intent to commit an indictable offence. He says that consideration of the evidence accepted by the judge can only lead to a conclusion that there was evidence to the contrary of his intent that was sufficient to rebut the statutory presumption, thus putting the onus on the Crown to prove his intent to commit an indictable offence without the assistance of the presumption. There being no such evidence, he says there is no basis to support a conviction under s. 348(1), that is, the verdict is unreasonable within the meaning of s. 686(1)(a)(i) of the Code: *R. v. Biniaris*, [2000] 1 S.C.R. 381.
- [18] I agree that the various aspects of the evidence - the delivery of Mr. Bus's mail to the home, the presence of his personal possessions in it, his parking of his vehicle in plain sight in the driveway, his presence in the house for some time, his prior attendance at the house after the date he had promised to leave, his own lack of a residence, and his living situation in his van without bathing facilities - rebut the presumption. There being, then, no evidence adduced by the Crown of his intent to commit an indictable offence, I conclude that the appeal must be allowed on the basis that the verdict is not supported by the evidence (s. 686(1)(a)(i)) and is unreasonable. Lesser Included Offence? - *Mischief*
- [19] On the conclusion that the conviction of Mr. Bus for breaking and entering with intent to commit an indictable offence must be set aside, the question becomes whether a conviction on an included offence should be entered: 662 (1) A count in an indictment is divisible and where the commission of the offence charged, as described in the enactment creating it or as charged in the count, includes the commission of another offence, whether punishable by indictment or on summary conviction, the accused may be convicted

- (a) of an offence so included that is proved, notwithstanding that the whole offence that is charged is not proved;
- [20] The potential candidate in this case for an included offence is mischief: 430 (1) Every one commits mischief who wilfully
- (a) destroys or damages property;
- (b) renders property dangerous, useless, inoperative or ineffective;
- (c) obstructs, interrupts or interferes with the lawful use, enjoyment or operation of property; or
- (d) obstructs, interrupts or interferes with any person in the lawful use, enjoyment or operation of property.
- [21] The theory of included offences is described in *R. v. Simpson* (No. 2) (1981), 58 C.C.C. (2d) 122 (Ont. C.A.) and *Lockett v. The Queen*, [1980] 1 S.C.R. 1140, summarized by Justice Rosenberg in *R. v. Beyo* (2000), 144 C.C.C. (3d) 15 at paras. 29-30 (Ont. C.A.). In *Beyo*, Justice Rosenberg discussed and rejected the possibility that mischief under s. 430(1)(c) and (d) could be an included offence of s. 349(1), which makes mere entry of a dwelling-house with intent to commit an indictable offence, an offence. Justice Rosenberg explained:
- [30] A way to determine whether one offence is included in another as it is described in the Criminal Code is to ask whether the main offence may be committed without committing the "included" offence. Put another way, does the commission of the main offence as described in the enactment necessarily include the other offence? In accordance with *Simpson* and *Lockett*, mischief as described in s. 430 would be an included offence of unlawful entry into a dwelling house if that offence necessarily included any of the offences described in s. 430.
- [22] Justice Rosenberg concluded that the offence in s. 349(1) of entry for the purpose of committing an indictable offence did not have as an included offence mischief under either s. 430(1)(c) or (d), because mere entry does not necessarily obstruct or interrupt lawful use, enjoyment, or operation of property as would be required by those subsections. In reaching his conclusion, Justice Rosenberg declined to follow *R. v. S.E.* (1993), 80 C.C.C. (3d) 502 (N.W.T.C.A.) to opposite effect. I agree with the reasoning of Justice Rosenberg. That reasoning is equally apt to the s. 348(1) offence of breaking and entering with intent to commit an indictable offence. Of the two remaining possibilities under s. 430(1), s. 430(1)(b) (rendering property dangerous, useless, etc.) obviously does not come within s. 348(1). That leaves s. 430(1)(a) as a potential candidate for mischief as an included offence of s. 348(1).
- [23] That application of s. 430(1)(a) as a possible included offence of s. 348(1) engages the definition of "break" in s. 321 for the purposes of s. 348(1): break means
- (a) to break any part, internal or external, or

(b) to open any thing that is used or intended to be used to close or to cover an internal or external opening;

[24] In the case before us, an allegation that Mr. Bus gained entry to the residence by breaking the window of the front door would come within s. 430(1)(a) as damaging property. However, the offence charged did not particularize the offence in a way that excluded subsection (b) of the definition under s. 321. This means that the offence charged of breaking and entering could have been committed by opening the dwelling-house without causing damage or destruction of property as is required for an offence of mischief under s. 430(1)(a) of the Code. Accordingly, as in *R. v. Drake* (1974), 16 C.C.C. (2d) 505 (N.S.C.A.), the indictment here did not charge the included offence of mischief under s. 430(1)(a). In the result, no portion of s. 430 can apply to this indictment.

[25] At the hearing of the appeal the issue of mischief was canvassed with counsel. Neither counsel opposed the entry of a conviction of mischief. Counsel for Mr. Bus proposed only that, in the event we substituted for the conviction under s. 348 a conviction under s. 430, that his sentence be adjusted to reduce the probationary term to one year. However, on my conclusion that, in law, the offence as charged does not allow for conviction on the included offence of mischief, I consider this alternative is not available to us.

Conclusion

[26] I have earlier explained that I consider that a conviction on the offence charged is not available on the record, and there being no included offence on which a conviction may be entered notwithstanding the damage done and the wrongful entry of Mr. Bus into Ms. Danao's home, I would allow the appeal, set aside the conviction, and enter a verdict of acquittal. "The Honourable Madam Justice Saunders" I agree: "The Honourable Madam Justice Fenlon" I agree: "The Honourable Madam Justice DeWitt-Van Oosten"

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