

CANADA / JUDGMENT

R. v. Morine

2024 BCCA 231

COURT

British Columbia Court of Appeal

DECIDED

23 April 2024

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2024 BCCA 231 R. v. Morine

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Morine,

2024 BCCA 231

Date: 20240423

Docket: CA48482

Between:

Rex

Respondent

And

Lucus Anthony Morine

Appellant

Before:

The Honourable Mr. Justice Willcock

The Honourable Madam Justice Fisher

The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Provincial Court of British Columbia, dated
April 13, 2022 (conviction) (R. v. Morine, Courtenay Docket 43095-2C).

Oral Reasons for Judgment

Counsel for the Appellant:

K.A. Kirkpatrick

Counsel for the Respondent:

M.A. Street

Place and Date of Hearing:

Vancouver, British Columbia

April 23, 2024

Place and Date of Judgment:

Vancouver, British Columbia

April 23, 2024

Summary:

The appellant was charged with eight offences relating to events which occurred in October 2021. He plead guilty to Counts 4, 6, and 8, and was tried on the remaining counts. During closing submissions, defence counsel addressed the application of the rule against multiple convictions set out in *R. v. Kienapple*. The Crown deferred its submissions until after the judge made her findings of fact. The judge acquitted the appellant on Count 2, and convicted him on Counts 1, 3, 5, and 7. Unfortunately, neither counsel nor the judge ever returned to the *Kienapple* issue. He was sentenced globally in relation to Counts 1, 3, 4, 5, 6, 7, and 8.

On this conviction appeal, the appellant and the respondent Crown agree that Count 1 ought to have been conditionally stayed pursuant to the *Kienapple* principle. The Crown further says that Count 6 ought to have been conditionally stayed. The appellant adopts that submission. Held: Appeal allowed. Given the factual and legal nexus between Counts 1 and 3, registration of convictions for both offences offends the rule against multiple convictions. Count 3 ought to have been conditionally stayed. Registration of convictions for both Counts 5 and 6 similarly offends the rule against multiple convictions. Count 6 ought to have been conditionally stayed. The convictions on Counts 1 and 6 are thus set aside and conditional stays of proceedings are entered in place.

WILLCOCK J.A.:

Introduction

[1] This is the judgment of the Court.

[2] The appellant was charged with the following eight offences relating to events that occurred on October 26 and 28, 2021:

- Count 1: October 26th, 2021 - Carried or had in his possession a weapon (axe) for a purpose dangerous to the public peace or for the purpose of committing an offence, contrary to s. 88(1) of the Criminal Code, R.S.C. 1985, c. C-46;
 - Count 2: October 26th, 2021 - Uttered or conveyed a threat to cause death or bodily harm to Darren Mancuso, contrary to s. 264.1(1)(a) of the Criminal Code;
 - Count 3: October 26th, 2021 - In assaulting Darren Mancuso, carried, used or threatened to use a weapon (axe) or an imitation weapon, contrary to s. 267(a) of the Criminal Code;
 - Count 4: October 26th, 2021 - Committed mischief by wilfully damaging a motor vehicle (property of Robert Leighton) not in excess of \$5,000, contrary to s. 430(4) of the Criminal Code;
 - Count 5: October 26th, 2021 - Carried or had in his possession a weapon (axe) for a purpose dangerous to the public peace or for the purpose of committing an offence, contrary to s. 88(1) of the Criminal Code;
 - Count 6: October 26th, 2021 - Committed mischief by wilfully damaging a motor vehicle (property of Nathan Holley) contrary to s. 430 of the Criminal Code;
 - Count 7: October 28th, 2021 - Carried or had in his possession a weapon (axe) for a purpose dangerous to the public peace or for the purpose of committing an offence, contrary to s. 88(1) of the Criminal Code; and,
 - Count 8: October 28, 2021 - Committed mischief by wilfully damaging a motor vehicle (property of Alicia O'Quinn), contrary to s. 430 of the Criminal Code.
- [3] He pleaded guilty to all three mischief charges (Counts 4, 6, and 8) and was tried on the remaining counts.
- [4] During his closing submissions, defence counsel addressed the application of the rule against multiple convictions set out in *R. v. Kienapple*, [1975] 1 S.C.R. 729. The Crown deferred its submissions until after the judge made her findings of fact.
- [5] On April 13th, 2022, the Honourable Judge Crockett acquitted the appellant of the uttering threats count (Count 2), and convicted him of assault with a weapon (Count 3), and the three weapons offences (Counts 1, 5, and 7).
- [6] Unfortunately, neither counsel nor the judge returned to the Kienapple issue.
- [7] The appellant was sentenced on August 3, 2022.
- [8] On August 24, 2022, he filed a notice of appeal from his conviction and application for leave to appeal his sentence. A Division of this Court dismissed both appeals as abandoned on January 6, 2023.

- [9] Upon application brought by new counsel, a Division of this Court reinstated both the appellant's conviction appeal and his application for leave to appeal sentence on June 15, 2023: R. v. Morine, 2023 BCCA 250.
- [10] On appeal from his convictions, the appellant argued that the assault with the weapon conviction (Count 3) ought to have been conditionally stayed pursuant to Kienapple.
- [11] The Crown agrees that convictions on both Counts 1 and 3 violated the rule against multiple convictions, given the factual and legal nexus between them and the absence of Parliamentary intent that convictions for both be registered. The Crown says that in accordance with the jurisprudence the less serious offence, the weapons offence (Count 1), ought to be conditionally stayed. The appellant agrees that is correct.
- [12] The respondent Crown further says the rule against multiple convictions precludes the registration of convictions on both Counts 5 (the weapons charge) and 6 (the mischief charge) given the factual and legal nexus between them. In the respondent's view, the least serious of these two charges--the mischief charge (Count 6)--ought to have been conditionally stayed. The appellant adopts that submission.

Discussion

- [13] The trial judge made the following findings.
- [14] With respect to Count 3:
- [50] I find the Crown has proved beyond a reasonable doubt that Mr. Morine accosted or approached Mr. Mancuso while openly carrying the axe, a weapon, which he used or intended to use for the purpose of threatening or intimidating Mr. Mancuso. I therefore find him guilty on Count 3, assaulting Mr. Mancuso with a weapon.
- [15] With respect to Counts 5 and 6:
- [53] In the case of Mr. Holley, Mr. Morine approached Mr. Holley's truck and smashed the mirrors with the axe, causing them to fly in front of Mr. Holley and land in the vehicle. Mr. Morine also testified that he said words to the effect of, "How, do you like that, if you want to punch my window and curse me out, there you go". He also called Mr. Holley a motherfucker. He was retaliating for Mr. Holley swearing at him and punching his window. I conclude Mr. Morine used the axe for the purpose of threatening or intimidating Mr. Holley. So the axe was used as a weapon as defined in s. 2. He used that weapon for the purpose of committing the offence of mischief.
- [54] I have already concluded that Mr. Morine used the axe as a weapon as defined in s. 2 when he assaulted Mr. Mancuso. He used the weapon by the same definition for the purpose of committing the mischief to Mr. Mancuso's truck.

[Emphasis added.]

[16] With respect to Counts 7 and 8:

[55] Finally, in relation to Ms. O'Quinn's van, Mr. Morine testified that when the white haired men said he was going back to jail, he felt backed into a corner like an animal. He thought the only way to get back at them was through a show of force, which was why he looked for the men in Tim Horton's, and smashed the van which he thought was their vehicle. After he smashed that vehicle, he gestured towards the three men in Tim Horton's which he said meant something along the lines of, "suck it, how do you like that". I infer from his testimony and the video, that the gesture he is referring to is when he grabbed his crotch and shook it with his left hand in the direction of the Tim Horton's. Taken together, his stated intention, his actions, and his gesture after the fact, make it clear he used the axe for the purpose of threatening or intimidating the three men. He used the weapon for the purpose of committing the mischief to the vehicle.

[17] With respect to Counts 1, 5 and 7, she summarized her findings as follows:

[56] It follows that I conclude, on Counts 1, 5, and 7, pursuant to s. 88(1), that the Crown has proved beyond a reasonable doubt that Mr. Morine carried and had in his possession a weapon, the axe, for the purpose of committing the offences of mischief that being damage to the three vehicles. In the case of Mr. Mancuso, that offence is mischief and also assault.

[Emphasis added.]

[18] And finally:

[63] Even following the purely subjective analysis, it is clear that Mr. Morine intended to do harm to property by smashing the vehicles with an axe. It follows that his purpose was also objectively dangerous to the public peace, since he intended to, and did, in fact cause, damage to the vehicles. Accordingly, I conclude that Mr. Morine is guilty, on Counts 1, 5, and 7 of possessing a weapon, the axe, for a purpose dangerous to the public peace.

[Emphasis added.]

[19] The Crown says, despite the trial judge's reference in para. 53 to the use of the axe to threaten or intimidate, the trial judge found the appellant guilty of the s. 88(1) offence specific to Mr. Holley on the basis that Mr. Morine possessed the axe for the purpose of committing mischief, and that is clear from paras. 56 and 63 of her reasons.

[20] We agree that, given the factual and legal nexus between Count 1 (weapons) and Count 3 (assault with a weapon), registration of convictions for both offences offends the rule against multiple convictions. The possession of a weapon conviction ought to have been conditionally stayed.

[21] For the same reasons, we are of the view that registration of convictions for both Count 5 (weapons) and Count 6 (mischief) offends the rule against multiple convictions. The mischief conviction ought to have been conditionally stayed.

[22] On the other hand, the convictions on the possession of a weapon offence (Count 7) and mischief (Count 8) relating to Ms. O'Quinn's vehicle do not stem from the same delict. The Crown notes that the trial judge found that the appellant set out to use the axe for the purpose of vandalism on October 28, 2021. The distinction between the two wrongful acts committed on October 28, 2021 was drawn by the judge when she noted (at para. 55):

Taken together, his stated intention, his actions, and his gesture after the fact, make it clear he used the axe for the purpose of threatening or intimidating the three men. He used the weapon for the purpose of committing the mischief to the vehicle.

Conclusion

[23] We accept the Crown's interpretation of the trial judge's reasons read as a whole and, based on that interpretation, we agree with the position taken by the appellant and the respondent Crown. The appeal is allowed, the convictions on Count 1 and Count 6 are set aside and conditional stays of proceedings will be entered in place of those convictions.

"The Honourable Mr. Justice Willcock"

"The Honourable Madam Justice Fisher"

"The Honourable Madam Justice DeWitt-Van Oosten"

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