

CA 00313

Appeal No. CA 00313

IN THE COURT OF APPEAL OF THE NORTHWEST TERRITORIES

THE COURT:

THE HONOURABLE MR. JUSTICE LIEBERMAN
THE HONOURABLE MADAM JUSTICE HETHERINGTON
THE HONOURABLE MR. JUSTICE STRATTON



BETWEEN:

HER MAJESTY THE QUEEN

RESPONDENT

- and -

SOUDLOO E.

APPELLANT

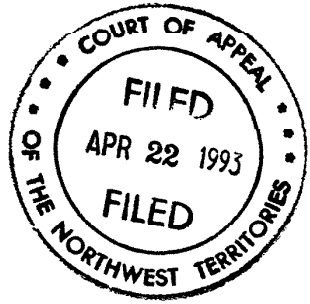
APPEAL FROM THE JUDGMENT OF
HER HONOUR JUDGE B. A. BROWNE
MADE THE 14TH DAY OF MAY, 1991

REASONS FOR JUDGMENT OF THE HONOURABLE MADAM JUSTICE HETHERINGTON
CONCURRED IN BY THE HONOURABLE MR. JUSTICE LIEBERMAN
AND CONCURRED IN BY THE HONOURABLE MR. JUSTICE STRATTON

COUNSEL:

Paul A. Bolo,
for the Appellant

Gregory S. Francis,
for the Respondent



**REASONS FOR JUDGMENT OF
THE HONOURABLE MADAM JUSTICE HETHERINGTON**

The appellant was charged with entering the dwelling house of Ooloosie Kolola without lawful excuse and with intent to commit an indictable offence. He pled not guilty and was tried by a Territorial Court judge. She found him not guilty of the offence with which he was charged, but guilty of the "included offence of interfering with the lawful use and enjoyment of the property of Ooloosie Kolola". In short she found him guilty of mischief. This appeal followed.

The appellant did not suggest that the Crown failed to prove beyond any reasonable doubt that he committed mischief as found by the trial judge. He did not say that during his trial he raised any defence which could have resulted in him being acquitted, had he been charged with this offence. He said only that the offence of mischief described by the trial judge is not included in the offence with which he was charged. He said that for this reason the trial judge could not convict him of mischief.

Therefore the only issue on this appeal is whether the offence of committing mischief by interfering with a person in the lawful use and enjoyment of property is included in the offence of entering a dwelling house without lawful excuse and with intent to commit an indictable offence.

S. 662(1) of the **Criminal Code** sets out the general rule as to when an accused may be convicted of an included offence. It reads as follows:

"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; or
- (b) of an attempt to commit an offence so included."

While the Code contains some specific rules in this regard, none is relevant in this case.

The offence with which the appellant was charged is created by s. 349 of the Criminal Code. The relevant parts of that section read as follows:

"349.(1) Every one who without lawful excuse . . . enters or is in a dwelling-house with intent to commit an indictable offence therein is guilty of an indictable offence"

S. 350 describes what is meant by the word "enters" in s. 349. It reads as follows:

"350. For the purposes of section . . . 349,
(a) a person enters as soon as any part of his body or any part of an instrument that he uses is within any thing that is being entered; . . ."

The expression "dwelling-house" is defined in s. 2 as follows:

"'dwelling-house' means the whole or any part of a building or structure that is kept or occupied as a permanent or temporary residence, and includes"

(Emphasis added)

It is important to keep in mind that s. 349 applies only to a dwelling-house as that expression is defined above. S. 348, on the other hand, speaks of breaking and entering a "place".

That word is defined in s. 348(3) as follows:

- "(3) For the purposes of this section . . . 'place' means
 - (a) a dwelling-house;
 - (b) a building or structure or any part thereof, other than a dwelling-house;

- (c) a railway vehicle, a vessel, an aircraft or a trailer; or
- (d) a pen or an enclosure in which fur-bearing animals are kept in captivity for breeding or commercial purposes."

When compared to s. 348, s. 349 has a very restricted application. It applies only to space in a building or structure, and only when that space is kept or occupied as a residence.

The offence of entering a dwelling house without lawful excuse and with intent to commit an indictable offence contrary to s. 349 requires two mental elements. The first is the general intent to enter the dwelling house without lawful excuse, and the second is the specific intent to commit an indictable offence.

In light of the discussion above does the commission of the offence described in s. 349(1) include the commission of the offence of committing mischief by interfering with the lawful use, enjoyment and operation of property by a person? The latter offence is described in s. 430(1)(d) of the Code, the relevant parts of which read as follows:

"430.(1) Every one commits mischief who wilfully

...

(d) . . . interferes with any person in the lawful use, enjoyment or operation of property."

What mental element is necessary for this offence? In R. v. Jacobson, [1987] N.W.T.R. 233, this court considered the mental element required under s. 387(1)(c), now s. 430(1)(c), which reads:

"430.(1) Every one commits mischief who wilfully

...

(c) obstructs, interrupts or interferes with the lawful use, enjoyment or operation of property;"

In the result the court decided (at 238) that this offence required a general intent to interfere with the lawful use, enjoyment or operation of property. Similarly, the offence under s. 430(1)(d) with which we are concerned requires a general intent to interfere with any person in the lawful use, enjoyment or operation of property.

R. v. Jacobson is not otherwise of assistance in this case because it does not appear that the trailer which Jacobson entered was a dwelling house.

The commission of one offence is included in the commission of another when all of the essential elements of the first are necessarily part of the second. Authority for this proposition is found in Lockett v. The Queen (1980), 50 C.C.C. (2d) 489 (S.C.C.). In that case (at 492) Mr. Justice Chouinard, writing for the court, quoted with approval the following passage from the judgment of Sheppard, J.A., writing for the British Columbia Court of Appeal in R. v. Manuel (1960), 128 C.C.C. 383, at 384:

"It follows that in order to be an included offence within sec. 569 [now s. 662] the essential constituent of the included offence must necessarily be "included or involved" in the offence as described in the enactment creating it or as charged in the count."

(Part in square brackets added)

The essential constituent of mischief under s. 430(1)(d) is intentional interference with any person's lawful use, enjoyment or operation of property. Counsel for the Crown contended that a violation of privacy is such an interference. And he contended that an entry into a dwelling house without lawful excuse is a violation of privacy, whether there is any one in the house or not. He therefore argued that any entry into a dwelling house without lawful excuse as

described in s. 349 constituted an interference with a person's use, enjoyment or operation of property.

It seems to me that any entry into a dwelling house without lawful excuse is at least an interference with the resident's use of the property. A person occupying or keeping space in a structure as a residence has the right to control that space subject only to any legal restrictions on that right. He has the right to exclude those who have no legal entitlement to enter. This is an important aspect of his use of the property. It is this aspect which results in his feeling of security and privacy in his residence. Any entry into it without lawful excuse, even if the resident is not aware of it, detracts from that right to control and therefore interferes with his use of the property.

I therefore agree with counsel for the Crown that interference with a person's use of property is necessarily involved in any entry into a dwelling house without lawful excuse as described in s. 349. The entry constitutes interference. If the entry is intentional, it follows that the interference is intentional.

Counsel for the appellant brought to our attention the case of R. v. Drake (1974), 16 C.C.C. (2d) 505. In that case the Appellate Division of the Supreme Court of Nova Scotia decided (at 508) that the offence of mischief as described in s. 387(1)(d), now s. 430(1)(d), was not included in the offence of breaking and entering a dwelling house with intent to commit an indictable offence, either as that offence was described in the indictment in question or as it was described in s. 306(1)(a), now s. 348(1)(a). Writing for the court, Macdonald, J.A. concluded that even if it were, there was no evidence of the commission of this offence "primarily because the evidence clearly indicated that the premises were unoccupied at all material times." It does not appear that

the argument made by the Crown before us was put to the Appellate Division of the Supreme Court of Nova Scotia, and I respectfully disagree with its conclusion.

An accused must, of course, know the charges which he faces. If an accused read s. 349 of the Code, the enactment which creates the offence of entering a dwelling house without lawful excuse and with intent to commit an indictable offence, would he know that the offence of mischief under s. 430(1)(d) was included in it?

In Lockett (at 492) Mr. Justice Chouinard quoted further from the judgment of Mr. Justice Sheppard in Manuel (at 385) as follows:

"Further, to be an included offence the inclusion must form such an apparent and essential constituent of the offence charged that the accused in reading the offence charged will be fairly informed in every instance that he will have to meet not only the offence charged but also the specific offences to be included. Such apparent inclusion must appear from "the enactment creating" the offence or "from the offence as charged in the count"; either of those two may be considered under s. 569 but not the opening by counsel or the evidence."

In my view it is so clear that entering a dwelling house without lawful excuse as that offence is described in s. 349 is an interference with a person's use, enjoyment or operation of property, that an accused would know that a charge alleging an offence contrary to that section included the latter offence.

It follows that mischief under s. 430(1)(d) is included in the offence of being in a dwelling house without lawful excuse and with intent to commit an indictable offence, as that offence is described in s. 349(1). It is not necessary to consider whether mischief under s.

430(1)(d) is included in the offence as charged. However, in my view it is. The charge alleged that the appellant


"on or about the twenty-eighth day of March 1990 at or near the Hamlet of Lake Harbour in the Northwest Territories did without lawful excuse enter the dwelling house of Ooloosie KOLOLA situated at Lake Harbour in the Northwest Territories with intent to commit an indictable offence therein contrary to Section 349 of the Criminal Code."

For the reasons given above, I think that the offence of mischief under s. 430(1)(d) is included in this charge.


The appeal is therefore dismissed.

Some of the judges on this court, but not on this panel, do not agree with this decision. I mention this because it might be relevant if the appellant applies for leave to appeal to the Supreme Court of Canada.

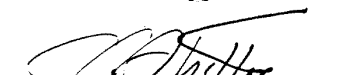
DATED at YELLOWKNIFE,
NORTHWEST TERRITORIES,
this 22nd day of April
A.D. 1993


HETHERINGTON, J.A.

I CONCUR:


LIEBERMAN, J.A.

I CONCUR:


STRATTON, J.A.

APPEAL #CA 00313

A.D. 1993

IN THE COURT OF APPEAL OF
THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

RESPONDENT

- and -

SOUDLOO E.

APPELLANT

REASONS FOR JUDGMENT OF THE COURT
