Date: 2012 05 07
File: T1-CR-2011-002254

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

JAMA FARAH

REASONS FOR DECISION
of the
HONOURABLE JUDGE CHRISTINE GAGNON

Heard at:	Yellowknife, Northwest Territories April 26, 2012
Date of Decision:	May 7, 2012
Counsel for the Crown:	M. Lecorre
Counsel for the Accused:	N. Homberg

[s. 348(1)(b) of the *Criminal Code*]

Date: 2012 05 07
File: T1-CR-2011-0022544

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

JAMA FARAH

---

1. Preamble

[1] It is alleged that on November 12, 2011, Jama Farah broke and entered into a place, to wit a dwelling house, situated at Apartment 1 of 5102, 51st Street, in Yellowknife, in the Northwest Territories, and that he committed therein the offence of mischief, contrary to section 348(1)b) of the Criminal Code.

[2] The evidence heard at trial consisted of four witnesses for the Crown. The accused did not testify. The issues raised at this trial are whether a vacant apartment under renovation is a dwelling-house and whether the accused committed a mischief inside the apartment by either damaging property or by interfering with the lawful use or enjoyment of property.

2. Summary of findings of law and fact

[3] Under section 348(1)(b), the proof of a mere break and enter does not constitute an offence unless it is proven that the accused also committed an indictable offence therein, distinct from the acts of breaking and entering.

[4] Section 348(2) creates a rebuttable presumption that evidence that a person broke and entered or attempted to break and enter into a place is proof that he did so with intent to commit an indictable offence.

[5] Section 662(6) of the Criminal Code provides that where a count charges an offence under paragraph 348(1)(b) and the evidence does not prove that offence but does prove an offence under paragraph 348(1)(a), the accused may be convicted of an offence under the latter paragraph.

[6] A place may be characterized as a dwelling-house if it is occupied or kept as a permanent or temporary residence; a place is kept as a residence based on the intention of the builder, the nature of the building, the traditional, temporary, seasonal or actual use, depending on the circumstances, as well as the strength of the temporal connection between any of these factors and the time of assessment of the character of the building.

[7] The offence of mischief contemplated at section 430(1)(a) of the Criminal Code, namely to willfully destroy or damage property, is included in the offence of breaking and entering into a place when the evidence falls short of proving that the accused intended to commit an indictable offence therein, or that the accused committed therein an indictable offence, and when the *actus reus* of the break and enter involves the breaking of a part of a building or a thing in order to gain access inside the place.

[8] A mischief by willfully interfering with the lawful enjoyment of property requires the proof of acts of interference other than merely being present.

[9] A person may be found guilty of an offence if he or she did or omitted to do something to help another person to commit the offence or if he or she encouraged another person to commit this offence.

[10] For the reasons that follow, I find that Jama Farah participated in the act of willfully breaking a window of a dwelling-house, by suggesting to Darlene Cotchilly and Darren Lee Kenny this mode of entry into Apartment 1 of 5201, 51st Street, and by attempting to break this window using a laptop computer.

[11] Wilfully breaking a window is to willfully cause damage to property and it is a mischief, contrary to section 430(1)(a) of the Criminal Code.

[12] The purpose for entering the premises was to drink alcohol with Ms Cotchilly and Mr Kenny, rebutting the presumption that he entered the premises with intent to commit an indictable offence therein.

[13] There is no reliable and credible evidence of any mischief committed inside the unit.

[14] Jama Farah is not guilty of the offence of breaking and entering into a dwelling-house and committing the indictable offence of mischief therein contrary to section 348(1)(b) of the Criminal Code or of the lesser-included offence of breaking and entering into a dwelling-house with intent to commit an indictable offence therein contrary to section 348(1)(a) of the Criminal Code.

[15] Jama Farah is guilty of the lesser-included offence of mischief contrary to section 430(1)(a) of the Criminal Code.

3. Summary of the evidence

[16] On or about November 12, in Yellowknife, Northwest Territories, three persons entered into an apartment building located at 5201, 51st street, also known as Simpson House, in the early hours of the morning. They went into Unit 1 to drink alcohol in a warm place.

[17] Simpson House was under an eviction order and renovations and repairs were being done in some units that had been damaged by a recent fire. Apartment 1 was one of them.

[18] Don Andrusiak was hired by the owner of this property, Northern Properties, to patrol inside and outside the building and ensure that the doors and windows were secure and that no one has trespassed.

[19] On November 12, 2011, his patrols of 00:30 and 2:49 a.m. were normal: all doors locked, no damage noted.

[20] At 5:19 a.m., he noticed there was light coming from Apartment 1. He looked through one of this unit's windows and saw that there were people inside. He immediately called the police and stood by the front door until they arrived. He let constable Kyle Pharis inside upon his arrival at the location.

[21] Constable Pharis knocked on the door to Apartment 1. The door was opened from within by a woman who appeared intoxicated. She was later identified as Darlene Cotchilly. Constable Pharis entered and saw two men going into a bedroom. He followed them and observed that they were attempting to open a

window. He told them they were under arrest. One of the men (later identified as Darren Lee Kenny) obeyed his direction while the other backed into a closet.

4. Identification evidence

[22] This man had dark skin, was slender and had short curly hair. He started to speak a language that Cst Pharis did not understand. Constable Pharis stepped further into the room and took a better look at the man. He then recognized him as Jama Farah, as he had dealt with him on two unrelated prior occasions. He said: "I know who you are, you are Jama Farah." The man acknowledged that he was. During his testimony in court, Constable Pharis pointed at the accused, stating that this was the person he had recognized and identified inside Apartment 1 on November 12, 2011. Ms Cotchilly and Mr. Kenny also identified the accused during their testimony as the man they met on the street and with whom they entered inside Apartment 1 of Simpson House. I am satisfied that Jama Farah has been identified by the witnesses as the third person who went inside Apartment 1, 5201, 51st Street, in Yellowknife, Northwest Territories, on November 12, 2011.

5. The break and entry

[23] When Constable Pharis entered Unit 1 of Simpson House, he observed three people inside: a female (Darlene Cotchilly) and two males (Darren Kenny and Jama Farah).

[24] Darlene Cotchilly said that although Jama Farah tried to break a window, he was unsuccessful. She said she broke the window using her feet. She then said that the other man, Darren Lee Kenny entered through the broken window and went to open the door for her and Mr. Farah, whom she knew as "Norway". Ms Cotchilly said that she had a mickey of vodka and that they entered into the apartment to drink this alcohol and be warm. She was not challenged on this assertion and I accept it.

[25] Darren Kenny testified that the front door of the building was unlocked and that he and Darlene Cotchilly had been drinking together in the stairwell earlier on November 11, 2011. He said that later, they had met with Mr. Farah and they wanted to enter inside a unit; that Mr. Farah said that he knew how to break-in. Mr. Kenny said that he was holding a door open and that he heard a smash. He

claims he does not know who broke the window, but that Mr. Farah came from inside to open the door to him.

[26] Both Mr. Kenny and Ms Cotchilly admitted to having consumed a significant quantity of alcohol before they met Mr. Farah. This may have impacted their ability to observe, record, or remember the events. Their evidence is unreliable to some extent. When their evidence is contradictory on a material fact, I prefer the evidence of sober witnesses or I rely on material evidence.

[27] Don Andrusiak testified that he had the keys to the building's front door and that he opened the door for Constable Pharis. Constable Pharis confirms that. I accept the testimonies of Mr. Andrusiak and Constable Pharis on that aspect. I reject Mr Kenny's testimony with respect to the fact that the front door was not locked. I find that if he held a door open, it was from the moment that someone opened it from the inside after entering through the window.

[28] I cannot make a finding whether Mr. Farah is the one who went in first and opened the door for the others. However, I find that he did go inside as a result of Ms Cotchilly breaking the window.

[29] I also find that he tried to break the window using an object. Both Mr. Kenny and Ms Cotchilly said that Mr. Farah is the one who suggested that they break into the building. I find that he participated in the act of breaking the window even if he is not the person who ultimately broke it because through his actions, he encouraged the others to commit the offence. In and of itself, this act is a mischief contrary to section 430 of the Criminal Code, but it is also a component of the offence of breaking and entering. I also find that Jama Farah entered the building through a temporary opening as contemplated at section 350 of the Criminal Code, this opening being the broken window. By virtue of the presumption created at section 350(b)(ii), he is deemed to have broken and entered. Mr. Farah did not testify; the proof of a lawful justification or excuse lies on him, so this presumption has full effect. I find that Jama Farah broke and entered into a place.

6. Is Apartment 1 of Simpson House a dwelling-house for the purpose of section 348(1)(d) of the Criminal Code?

[30] Paragraphs 348(1) (a) through (c) all involve the commission of an offence in a place. The distinction between a dwelling-house and a place other than a dwelling-house was created for sentencing purposes and it is found at paragraphs (d) and (e) of section 348. The principle behind this distinction is that:

> "From a personal property standpoint it (the dwelling-house) sits at the top of the personal privacy paradigm as a place of special significance, not only in the context of the privacy rights accorded those in their dwellings under the Charter of Rights and Freedoms but also from a general societal perspective as well." (*R. v. Sappier*, [2005] N.B.J. No 483, at paragraph 15)

[31] The crime of breaking and entering is viewed as more serious when it is perpetrated into someone's home. However, not every house is a home. As Judge Ferguson pointed out in *R. v. Sappier*,

> "Rather than approach the issue solely from the standpoint of what the structure was intended for, the law obliges that an "in all of the circumstances" approach be taken in determining whether the structure is in fact a dwelling-house or kept as such."

[32] Section 2 of the Criminal Code defines *dwelling-house* 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…"

[33] Counsel for the defense argues that if no one was <u>living there</u> at the time of the offence, then the unit cannot be considered as a dwelling-house, although it is a place. Counsel emphasized the occupation aspect of the definition.

[34] A place may be legally characterized as a dwelling-house based on criteria such as: the intention of the builder, the nature of the building, the traditional, temporary, seasonal or actual use, depending on the circumstances, as well as the strength of the temporal connection between any of these factors and the time of the assessment of the character of the house.

[35] At the material time, this unit was vacant but not abandoned. Work was being done inside this unit to repair damages caused by a recent fire. The building was locked. Exhibit 3-7 shows the front of this building and it appears to be a multiple-unit apartment building. The property owner had hired a private security firm to patrol around and inside the building. Although the unit was vacant, I infer from this that the owner intended to limit the access to his property and to allow only certain people, such as Mr. Andrusiak and construction workers inside the premises.

[36] The building is designed to be occupied as a permanent residence. Unit 1 was occupied in the past. It was not currently being used as a home, but work was being done to restore the condition of the apartment so it could be used again for living… can it be said, then that the apartment was being "kept" as a permanent or temporary residence?

[37] The meaning of the word "kept" was discussed in *R. v. Sappier*, at paragraph 32:

> "The word "kept" is defined in the Collins English Dictionary Second Edition 1986, Collins London & Glasgow as: "the past tense or past participle of keep". Thus it would seem clear that in order for a dwelling-house to be "kept" as such it must have achieved that status at some point in the past."

[38] "To keep" has as its primary meaning "to retain possession of" in the Houghton Mifflin Canadian Dictionary of the English Language. It also means to maintain; synonyms include: retain, withhold, reserve, grasp, clutch. "these verbs mean to have something in one's possession or control. *Keep* is the most general and imprecise."(idem)

[39] There is evidence that the owner of the building intended to retain possession of the apartment and to restore it to its initial condition in order to continue to offer it for rental to tenants. I find that the apartment Unit number 1 of Simpson House, although vacated of its tenant and temporarily unoccupied, still retained its character of dwelling-house because of the close temporal connection with past occupancy and intended future occupancy.

7. Do the actions of the accused constitute the offence alleged on the information?

[40] The information alleges that Jama Farah "did break and enter a certain place, to wit a dwelling house situated at Apartment 1, 5201 51st Street, and did commit therein the indictable offence of mischief contrary to section 348(1)(b) of the Criminal Code."

[41] The offence of mischief is defined as follows:

> "430(1) Every one commits mischief who willfully
>
> 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, interferes with any person in the lawful use, enjoyment or operation of property.

[42] Don Andrusiak observed that one window facing the parking lot was smashed and that another one was ajar.

[43] Darlene Cotchilly said that Jama Farah tried to break a window using a laptop computer. As he was not getting any results, she said she kicked the window and smashed it.

[44] Constable Pharis said that he observed two broken windows in Unit 1; a window in a bedroom appeared to have been broken from the outside in and only one pane broken from the inside. The other window had both panes broken. He said that he observed steps in the snow leading to the window. Pictures were tendered on consent and marked collectively as exhibit 3; these pictures were taken by constable Dunphy, who did not testify. Exhibit 3-1 and 3-2 show the same windows from different distances. It is not clear from these pictures whether any of these windows are broken. The screen from one has been removed and it is lying on the snow-covered ground. The screen over the other window has been ripped and it is hanging from its frame. There are many steps and imprints in the snow in front of both windows. It is impossible to tell when they were made and by whom. This evidence has little probative value. It also contradicts the testimony of Constable Pharis about two windows being broken. I find that Constable Pharis's testimony with respect to a second broken window is unreliable.

[45] I conclude that the totality of the evidence proves that one window was broken and that it is shown on pictures 3-3 to 3-6.

[46] I find no evidence of any other damage caused by any of the intruders inside the unit or to its structure at the material time.

[47] I find that the mischief committed by Mr. Farah was an element of the act of breaking and entering; however, for him to be found guilty of the offence as alleged on the information, the Crown must prove that Mr. Farah committed a distinct offence of mischief <u>while inside</u> the apartment unit. There is one authority suggesting that the mischief may be committed by the very act of breaking and entering (*R. v. Elie Prime Elusme*, [2010] J.Q. No 5371), but this interpretation is

contrary to the wording of section 348(1)(b) which provides that the break and enter occurs inside a place and is followed by the commission of an offence *therein.* I don't consider this decision binding.

[48] There is no evidence that the accused destroyed or damaged property inside the apartment unit, either as a principal or as a party to the offence; there is no evidence that he rendered property dangerous, useless, inoperative or ineffective; the evidence shows that they had entered the apartment to drink alcohol, which was in the possession of Ms Cotchilly. When Constable Pharis knocked on the door to Unit 1, Ms Cotchilly opened the door and let the officer inside. Mr. Farah was arrested in a bedroom in circumstances suggesting that he may have tried to leave the apartment by a window.

[49] Does the presence of Mr. Farah inside the vacant unit in the early hours of the morning of November 12, 2011, constitute a wilfull obstruction, interruption or interference with the lawful use, enjoyment or operation of property, thus a mischief contrary to s. 430(1)c)?

[50] The Crown says it does and relies on the authority of *R. v. E. (S.)* reported at 1993 CanLII 3410 (NWT CA):

> "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."

[51] This case was decided with respect to a charge of being unlawfully in a dwelling-house with intent to commit an indictable offence, contrary to section 349 of the Criminal Code and ultimately the court had to decide whether the offence of mischief was included in this offence. But the biggest problem with relying on this case is that it was not followed over the years; in fact, it was distinguished in *R. v. Reinhardt* (2005) B.C.J. No 2454, in *R. v. Beyo* (2000) 47 O.R. (3d) 712, in *R. v. I.G.L.* [2008] N.J. No. 390, and it was decided around a purely theoretical argument of invasion of privacy. In *R. v. Beyo*, the Court said that:

> "If a person never becomes aware of the entry, I fail to see how there could be any interference with the enjoyment of the property…Wholly abstract notions or feelings of privacy and security and interference with theoretical rights to control access to property, even a dwelling-house, cannot be transformed into criminal intent."

[52] The fact situation in *R. v. Wendel* ([1966] B.C.J. No. 73) is similar to our fact pattern as it involves a group of youths who entered an apartment for the purpose of drinking beer in a place where it was warm. The trial judge found that this was trespassing at best and the Court of Appeal added that:

> "the mere entry of vacant premises and making use of them for a comparatively short period of time for an innocent purpose does not, in the absence of the element of *mens rea,* constitute the offence of committing mischief."

[53] The Court of Appeal further stated that "there must be present at the time of the breaking and entering an intent to wilfully obstruct or interfere." The Court decided not to interfere with the finding by the trial judge that there was "evidence which negative an intention to obstruct, interrupt or interfere with lawful use of the premises" and that this was a finding of fact that was not open for that Court to disturb on a Crown appeal which was restricted to questions of law alone. I agree with this interpretation.

[54] In *R. v. Schizgal*, [2001] B.C.J. 646, the accused was charged with breaking and entering into a dwelling house and committung therein the indictable offence of mischief. The issue addressed was whether "the mere breaking of the close can constitute the offence as charged." The accused had damaged the door to a house as he forced his way in and was seeking refuge as he claimed he was being pursued by individuals. The Court of Appeal stated:

> "it is clear that the appellant broke and entered the premises. However, breaking and entering, in itself, does not constitute an offence as contemplated by s. 348(1)(b) of the Criminal Code. The appellant did not break and enter the premises and commit an indictable offence therein, namely, mischief. His actions confirm that his intent was to break into the premises in question, but not for the purpose of committing an indictable offence. He was afraid and attempting to escape his pursuers. He is not guilty of the offence as charged. The appellant did cause damage to the doorframes of the premises. The indictment as worded incorporates mischief as a lesser-included offence."

[55] In *R. v. Waylon Storr* ([2008] N.W.T.J. No. 35), a decision from the Supreme Court of the Northwest Territories, Vertes, J. considered that the action by the accused to force his way into the complainant's house after she had refused to let him in, striking her in the face and engaging in a tug-of-war over their daughter constituted a mischief by interrupting with the complainant's lawful use of her residence. I agree with the conclusion reached by Vertes, J. and I find that this situation is quite different from the facts as they relate to Mr. Farah.

[56] In the decision of *R. v. Reinhardt*, the court asked

> "whether the occupation of the premises as was admittedly done by Mr. Reinhardt constituted an interference with the lawful use of the premises, a mischief, committed therein. (…) It is established law in BC that trespass alone is not sufficient to establish the offence of mischief by interference with the use of property: *R. v. Wendel* (…) Rosenberg J.A. specifically notes that the finding of the court (in *E.S.*) relates to the offence of entering a dwelling house, not the alternate offence of being in the premises with intent to commit mischief, which was not charged. However the reasoning of this and the *Wendel* case are in my view persuasive as to whether the offence of mischief by interference with the use of property may be committed simply by the entering and occupying of premises. It cannot. There must be an actual interference which is known to the lawful owner or person in possession. "Squatting" without some obstructive alteration, or irreversible usurpation of the premises is not sufficient."

8. Conclusions

[57] Applying the law to the facts of our case, I find that the occupation by Mr. Farah did not constitute a mischief as it did not willfully obstruct, interrupt or interfere with the lawful use, employment or operation of property.

[58] As a result, I conclude that the Crown has proven that the accused broke and entered into a dwelling-house but not that he committed <u>therein</u> the offence of mischief, thus the offence as charged is incomplete.

[59] However, I cannot simply dismiss the information, as I found that Mr. Farah had participated in the offence of breaking a window of apartment 1 at Simpson House and this act permitted him to enter the premises. Therefore I must now consider whether the offence of mischief (by willfully destroying or damaging property) is included in the offence of breaking and entering a place (to wit a dwelling-house) and to commit an indictable offence therein.

[60] I am guided on the issue of included offences by the findings made by the Supreme Court of Canada in the matter of *R. v. G.R.* [2005] 2 S.C.R. 371, which are that:

> "At common law, where an offence consisted of several ingredients ("divisible") the jury could convict of any offence "the elements of which were included in the offence charged, subject to the rule that on an indictment for felony the jury could not convict of a misdemeanor' (Simpson (No.2), at p. 132). The subject is now governed by statute, and s. 662 authorizes convictions for "included" offences in only three categories:
>
> a) offences included by statute, e.g., those offences specified in s. 662(2) to (6), and attempts provided for in s. 660;

b) offences included in the enactment creating the offence charged, e.g., common assault in a charge of sexual assault;

c) offences which become included by the addition of apt words of description to the principal charge."

[61] The offence of breaking and entering into a place with the intent to commit an indictable offence is included in the offence of breaking and entering into a place and committing an indictable offence, by virtue of section 662(6) of the Criminal Code. However, I cannot find Mr. Farah guilty of this lesser and included offence because the Crown has not proven beyond a reasonable doubt that Mr. Farah had the intent to commit a criminal offence therein, and I also find that there was evidence to the contrary to rebut the presumption that he broke and entered with intent to commit an indictable offence therein, namely the evidence that they had broken into that apartment to be able to drink alcohol with Ms Cotchilly and Mr. Kenny in a warm place.

[62] At section 321 of the Criminal Code, "break", for the purpose of section 348, 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."

[63] These are elements common to both section 348(1)b) and 430(1)(a) of the Criminal Code. The accused broke the window and therefore caused damage to it, which is a mischief. That form of mischief is incorporated in the wording of the information, as was the case in *R. v. Shizgal*; and as the judge found in that case, I find Mr. Farah guilty of the lesser and included offence of mischief.

Christine Gagnon
J.T.C.

Dated at Yellowknife, Northwest Territories, this 7th day of May, 2012.

Date: 2012 05 07
File: T1-CR-2011-002254

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

JAMA FARAH

REASONS FOR DECISION
of the
HONOURABLE JUDGE CHRISTINE GAGNON
