Citation: R v Mohiadin, 2024 MBCA 34
Date: 20240418
Docket: AR22-30-09852

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Marc M. Monnin
Madam Justice Diana M. Cameron
Madam Justice Anne M. E. Turner

B E T W E E N:	)	***J. F. Rogala***
	)	*for the Appellant*
HIS MAJESTY THE KING	)	
	)	***M. E. Carlson***
Respondent	)	*for the Respondent*
	)	
- and -	)	*Appeal heard:*
	)	***December 15, 2023***
SAMATAR MOHIADIN	)	
	)	*Judgment delivered:*
(Accused) Appellant	)	***April 18, 2024***

TURNER JA

[1] After a trial in Provincial Court (the trial), the accused was convicted of failing to comply with the curfew condition of his release order (the curfew breach). He appeals his conviction, asserting that the trial judge committed an error pertaining to the *actus reus* of the offence. Further, he submits that the verdict was unreasonable because the trial judge did not consider reasonable inferences that supported a conclusion other than the accused's guilt.

[2] For the reasons that follow, I would dismiss the accused's conviction appeal.

[3] Prior to the trial, the accused pled guilty to failing to comply with a condition of his release order that he remain in Alberta. Further to an inquiry

made by this Court, the parties filed written submissions regarding whether the *Kienapple* principle (see *R v Kienapple*, 1974 CanLII 14 (SCC) [*Kienapple*], or the rule against multiple convictions, applied such that either the curfew breach or the breach for failing to remain in Alberta should have been judicially stayed. The accused asserts that it does apply.

[4] For the reasons that follow, I disagree that there is a sufficient nexus between the two offences such that the *Kienapple* principle applies.

Facts

[5] The accused was arrested following a traffic stop just before 8:00 p.m. in Winnipeg. At the time, he was subject to a release order that included conditions that he abide by a curfew of 10:00 p.m. to 6:00 a.m. at an address in Edmonton, Alberta, and that he remain in Alberta. The accused was charged with several offences, including failing to comply with those two conditions of his release order.

[6] After the trial, the accused was acquitted of several charges but convicted of the curfew breach. The learned trial judge stated:

> [The accused] was in Winnipeg at 7:55 PM. It is highly speculative to suggest he was on his way to the airport to fly home and be there in time for a 10 PM curfew. There is no evidentiary basis for that explanation. I am satisfied he was in breach of his release order condition on that count . . ..

The Conviction for the Curfew Breach

[7] The accused argues that he had *not yet* breached his curfew because, when he was stopped by police in Winnipeg, it was only 6:55 p.m. in Edmonton. The accused asserts that the trial judge's finding that he was not

on his way to the airport to get home for his 10:00 p.m. curfew was unsupported by the evidence and was speculative.

[8] The Crown replies that by putting himself in a situation where it was impossible to comply with the curfew condition, the accused had committed the *actus reus* of the offence. In addition, it submits that the trial judge properly considered the circumstantial evidence and drew a reasonable inference.

The Elements of the Offence

[9] An error regarding the interpretation or application of the elements of an offence constitutes an error of law, subject to appellate review on the standard of correctness (see *R v Le*, 2019 SCC 34 at para 23).

[10] In accordance with s 9 of the *Criminal Code*, RSC 1985, c C-46 [the *Code*], no one can be convicted of a criminal offence unless they do something that is prohibited by a valid statute. Interpreting the scope of a legislated offence is an exercise for judges. In *Winko v British Columbia (Forensic Psychiatric Institute)*, 1999 CanLII 694 (SCC), McLachlin J (as she then was) described the relationship as follows at para 67:

> [I]t is impossible to draft laws that precisely foresee each case that might arise. It is the task of judges, aided by precedent and considerations like the text and purpose of a statute, to interpret laws of general application and decide whether they apply to the facts before the court in a particular case.

[11] The elements of the offence of breaching a release order were outlined by this Court in *R v Custance*, 2005 MBCA 23 [*Custance*]. The Crown must prove (*ibid* at para 10):

> (1) . . . that the accused was bound by [a release order];
>
> (2) that the accused committed an act which was prohibited by that [release order] or that the accused failed to perform an act required to be performed by that [release order]; and
>
> (3) that the accused had the appropriate *mens rea*, which is to say that the accused knowingly and voluntarily performed or failed to perform the act or omission which constitutes the *actus reus* of the offence.

[12] The first and third elements are not at issue. There is no dispute that the accused was bound by a release order that required him to be at an address in Edmonton for a 10:00 p.m. curfew. There is also no dispute that the accused was knowingly and voluntarily in Winnipeg at the time of his arrest. The question is whether the trial judge correctly interpreted and applied the second element of the offence.

[13] Generally, the law penalizes prohibited acts, but does not penalize failures or omissions to act unless the person is under a specific duty. Here, given the conditions of his release order, the accused was under a duty to be at his address in Edmonton by 10:00 p.m.

[14] The definitions of the words "fails" and "comply" are helpful.

[15] The Supreme Court of Canada in *R v Zora*, 2020 SCC 14 at para 41, accepted the *Oxford English Dictionary* (11th ed) definition of "fails" as "acting contrary to the agreed legal duty or obligation and <u>being unable to meet set standards or expectations</u>" [emphasis added].

[16] "Comply" is defined as: "To do what is required or requested; to conform, submit, or adapt to (a command, demand, requirement, etc.)" (Bryan A Garner, ed, *Black's Law Dictionary*, 11th ed (Thomson Reuters:

2019) sub verbo “comply”); or to “act in accordance (with a wish, command, rule, etc.)” (Katherine Barber et al, eds, *Oxford Canadian Dictionary of Current English* (Don Mills, ON: Oxford University Press, 2005) sub verbo “comply”).

[17] These definitions support the interpretation that when someone is unable to meet the expectations of a condition, they are in conflict (and therefore in non-compliance) with the condition. The *actus reus* of a failure to comply with release conditions is a failure to act in a manner that leaves a person capable of complying with the condition. A court order, such as a release order, creates an affirmative legal duty that imposes obligations on an individual to act. As such, where a person under a condition puts themselves in a position where it is no longer possible to meet their obligations, they are not in compliance with the condition.

[18] The accused’s release order imposed the specific obligation that he be at an address in Edmonton by 10:00 p.m. every day. Section 145(5)(a) of the *Code* provides that failing to act in compliance with that obligation is an offence. Thus, the accused was not merely prohibited from an act (i.e., being outside a specified address after 10:00 p.m.), he was under a positive obligation to act so as to be able to be at the address by 10:00 p.m.

[19] The trial judge did not err in his assessment of the elements of the offence. The trial judge properly found that the accused had put himself in a position where it was not possible to comply with the 10:00 p.m. curfew and, therefore, the element of the offence had been made out.

Was the Verdict Unreasonable?

[20] The test for an unreasonable verdict is whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered (see *R v Biniaris*, 2000 SCC 15 at para 36).

[21] In *R v Villaroman*, 2016 SCC 33, the Supreme Court explained that when a verdict is based on circumstantial evidence "the question becomes whether the trier of fact, acting judicially, could reasonably be satisfied that the accused's guilt was the only reasonable conclusion available on the totality of the evidence" (at para 55).

[22] A trial judge's factual inferences are afforded significant deference and can only be set aside if unreasonable (see *R v Singh*, 2020 MBCA 61 at para 62).

[23] Based on the evidence at trial, it was reasonable for the trial judge to conclude that the only logical inference was that the accused was not able to get back to the address in Edmonton in time for his 10:00 p.m. curfew.

[24] While generally an accused is not required to present evidence, there are circumstances where the evidence cries out for an explanation. An accused "cannot at once remain silent and then ask [a] Court to transform speculative alternative explanations, on which he offered no evidence, into reasonable doubt" (*R v Roberts*, 2020 NSCA 20 at para 55).

[25] As he noted, the trial judge was not presented with any evidence that the accused was on his way to the airport to fly home and would have made it to his address by 10:00 p.m. Such a conclusion on the evidence at trial would have been nothing more than speculation.

[26] On appeal, I must consider whether the inferences drawn were reasonably open to the trial judge. In the present case they were and I am not persuaded that the trial judge erred.

The *Kienapple* Principle

[27] Although not raised before the trial judge, after hearing the appeal, this Court asked counsel to address whether the *Kienapple* principle should apply, such that a judicial stay of proceedings should be entered on either the curfew breach or the failure to remain in Alberta.

[28] The *Kienapple* principle, or the rule against multiple convictions, provides that an accused should not be convicted of multiple offences that contain the same, or substantially the same, elements—in other words, offences that constitute the same criminal wrong (*ibid* at 748).

[29] A single act by an accused can give rise to more than one criminal charge. If an accused is guilty of more than one wrong, it is not unjust that he or she be convicted of more than one offence (see *R v Prince*, 1986 CanLII 40 at para 24 (SCC) [*Prince*]).

[30] For the *Kienapple* principle to apply, both a factual nexus and a legal nexus must be established between the offences. A factual nexus is established when the same act grounds both charges (see *Prince* at paras 17-20). A legal nexus is established when the offences involve the same cause, matter or delict (*ibid* at paras 24-26).

[31] The accused asserts that sufficient factual and legal nexuses have been established in the present case. He says that factually, both offences occurred as part of a single incident—the accused being in Winnipeg at the

time he was arrested. A sufficient legal nexus exists because both offences arise from the same release order and the curfew breach was predicated on the accused's failure to remain in Alberta.

[32] The Crown replies that there is neither a sufficient factual nor a sufficient legal nexus between the two offences. It says that the evidence at trial regarding the curfew breach involved the accused's presence in a Winnipeg parking lot at 7:55 p.m. The failure to remain in Alberta occurred at an earlier point in time. It submits that the accused's position that there is a sufficient legal nexus because the two offences arose from the same release order is overly broad. The two conditions of the release order address separate concerns and contain separate elements and, therefore, are legally different.

[33] In my opinion, the same act does not ground both offences. The accused failed to comply with the condition that he remain in Alberta as soon as he left that province. Clearly, that occurred earlier in time from when he was arrested at close to 8:00 p.m. in Winnipeg. While the accused was arrested for both offences at the same time, the *actus* of the offences occurred at different times. A sufficient factual nexus between the two charges has not been established.

[34] I am also of the opinion that a sufficient legal nexus has not been established.

[35] A comparison of the elements of each offence is an essential part of the legal nexus inquiry. I must consider whether there are different elements in the offences that sufficiently distinguish them (see *R v Kinnear*, 2005 CanLII 21092 at para 34 (ONCA)).

[36] Applying the factors in *Custance* to the offence of failing to remain in Alberta, the Crown must prove (1) that the accused was bound by a release order, (2) that he left Alberta, and (3) that he left Alberta knowingly and voluntarily.

[37] The curfew breach offence requires the Crown to prove (1) that the accused was bound by a release order, (2) that he put himself in a position where it was impossible to be at his Edmonton residence by 10:00 p.m., and (3) that he put himself in that position knowingly and voluntarily.

[38] While similar, the elements of the two offences are different. The accused committed two acts: (1) leaving Alberta, and (2) failing to be in a position to be home for his 10:00 p.m. curfew. The accused could fail to remain in Alberta without breaching his curfew; and fail to abide by his curfew without leaving Alberta. In my opinion, given the different elements of the two offences, there is not a sufficient legal nexus to justify a judicial stay of proceedings on one of the two charges.

[39] I conclude that a judicial stay of proceedings pursuant to the *Kienapple* principle would not be appropriate in the present case.

Conclusion

[40] For the reasons set out above, I would dismiss the conviction appeal.

Turner JA

I agree: Monnin JA

I agree: Cameron JA