



**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

Citation: *R. v. Rich*, 2016 NLCA 19

Date: May 9, 2016

Docket: 201501H0050

BETWEEN:

GREGORY ALEXANDER TOM RICH

APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

Coram: Welsh, Harrington and Hoegg JJ.A.

Court Appealed From: Provincial Court of Newfoundland and Labrador
Happy Valley-Goose Bay

Appeal Heard: May 9, 2016

Judgment Rendered: May 9, 2016 (Orally)

Memorandum of Disposition Filed: May 9, 2016

Counsel for the Appellant: Derek Hogan and Steve Lichti

Counsel for the Respondent: Vikas Khaladkar

MEMORANDUM OF DISPOSITION

Welsh J.A.:

[1] At the hearing, the Court allowed the appeal, set aside the conviction and entered an acquittal on the charge of unlawfully entering or being in a dwelling (section 349(1) of the *Criminal Code*).

[2] In summary, Gregory Rich was charged with break and enter under section 348(1) of the *Criminal Code*, which provides that a person who “breaks and enters a place with intent to commit an indictable offence therein” is guilty of an indictable offence where the “place” is a dwelling house (underlining added). The trial judge found Mr. Rich not guilty on that charge, but guilty of the included offence under section 349(1), which provides that it is an offence to enter or be in a dwelling house, without lawful excuse, “with intent to commit an indictable offence” in that place.

[3] Mr. Rich was with a friend in a taxi in the early morning hours of May 5, 2013. He testified that he believed they were being driven home. However, his friend asked the driver to stop at the victim’s house. Mr. Rich testified that he did not know what his friend intended to do. The friend went alone into the house, without being invited, and assaulted an occupant who was in bed. When the friend did not return to the vehicle, the driver testified that he asked Mr. Rich to go and see what was happening. Mr. Rich entered the house through the open front door, without being invited. He heard a commotion and saw his friend assaulting the victim. The evidence was that Mr. Rich stood at the doorway to the bedroom. The victim’s mother, who was in a bedroom nearby, arrived when she heard the commotion. The taxi driver also approached the house. The mother told Mr. Rich and his friend to leave. The evidence was that Mr. Rich assisted in removing his friend from the house and apologized to the occupants.

[4] An element of the offence under both sections 348(1) and 349(1) requires a finding that the person entered or was in the dwelling house “with intent to commit an indictable offence”. In her oral reasons, the trial judge referred to the testimony of Mr. Rich and the taxi driver who both testified that:

... they did not know what [the friend] was going to do at the house or what the purpose of being in the house was. Their evidence is that they waited in the vehicle for [the friend] and when he didn’t appear, [the taxi driver] sent Mr. Rich into the house to see what was happening.

[5] The judge found that the witness' versions of events were "largely consistent except as to the reason for Mr. Rich being in the house for the amount of time that he was in the house." The judge concluded:

So, while I strongly suspect, Mr. Rich, that you knew exactly what Mr. Butler went to the house to do and that you perhaps went along with that, I am not convinced beyond a reasonable doubt that you committed the break and enter, however, I am convinced that you were unlawfully in a dwelling which is a lesser and included offence and I think that has been made out both by your own evidence and the evidence of the other parties who testified, in that you went into the house uninvited ... I am not satisfied you had any valid reason to be in the home, that you knew you should not have been in the home and that therefore the offence of unlawfully being in a dwelling is made out, so I am going to convict you on that count.

[6] It is clear from her decision that the judge was not satisfied beyond a reasonable doubt that Mr. Rich entered the house "with intent to commit an indictable offence" for purposes of section 348(1). There is no basis on which to interfere with that determination. An element of the offence not having been proven, an acquittal was properly entered.

[7] The same result applies in respect of section 349(1) of the *Criminal Code*. On the facts of this case, if the judge was not satisfied beyond a reasonable doubt that Mr. Rich entered the house "with intent to commit an indictable offence" for purposes of section 348(1), the same conclusion must apply with respect to section 349(1). Further, the judge did not advert to, and the facts do not support a finding that, having entered the house, Mr. Rich was in that place with intent to commit an indictable offence.

[8] Accordingly, at the hearing, the Court concluded that the trial judge erred in convicting Mr. Rich under section 349(1) when a required element of the offence, that he entered or was in the house "with intent to commit an indictable offence", had not been proven.

[9] In the result, the appeal was allowed, the conviction was set aside and an acquittal was entered on the charge under section 349(1).