

CANADA / JUDGMENT

Imrich v. The Queen

[1978] 1 SCR 622

COURT

Supreme Court of Canada

DECIDED

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Imrich v. The Queen

Collection

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1977-04-29

Report

[1978] 1 SCR 622

Judges

Laskin, Bora; Martland, Ronald; Judson, Wilfred; Ritchie, Roland Almon; Spence, Wishart Flett; Pigeon, Louis-Philippe; Dickson, Robert George Brian; Beetz, Jean; de Grandpré, Louis-Philippe

On appeal from

Ontario

Subjects

Criminal law

Decision Content

Supreme Court of Canada

Imrich v. The Queen, [1978] 1 S.C.R. 622

Date: 1977-04-29

Gustav Imrich (Plaintiff) Appellant;

and

Her Majesty The Queen (Defendant) Respondent.

1977: February 9, 10; 1977: April 29.

Present: Laskin C.J. and Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz and de Grandpré JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Criminal law—Arson—Charge to the jury—Complaint of non-direction—Appellant alleging that matters vital to the defence were not put to the jury—Evidence as to lack of motive not included in charge—Criminal Code, ss. 389, 391, 618(1)(a).

Appellant was convicted of arson. The case for the Crown rested on the contention that the fire had been deliberately set and, as the evidence as to the identity of appellant as the man who set it was almost entirely circumstantial, on motive and opportunity. Appellant had a number of creditors and although none of them appeared to have been pressing him at the time of the fire there was evidence that he was in financial difficulties. After the fire appellant filed a claim of loss which did not appear to be excessive and indeed before the fire he had received an offer to purchase at a sum higher than the estimate on which his claim was based. To this he had made a counter offer which was not accepted. The Crown also alleged exclusive opportunity. The Court of Appeal dismissed the appeal but Dubin J.A. dissented on the grounds that there was non-direction amounting to misdirection in the trial judge's charge to the jury in that he failed to adequately place before the jury and refer the jury to evidence vital to their determination of the guilt or innocence of the accused and failed to instruct the jury adequately on the issue of opportunity. The accused brought an appeal as of right under s. 618(1)(a) of the Criminal Code.

Held (Laskin C.J. dissenting): The appeal should be dismissed.

Per Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz and de Grandpré JJ.: Appellant conceded that the fire had been set deliberately but the evidence as to the identity of the man who set it was almost entirely circumstantial. There was no complaint of the trial judge's direction in respect of circumstantial evidence. The only error in this regard was favourable to the appellant. In presenting a defence to a jury it is the trial judge's duty not only to outline the theories of the defence but to give the jury matters of evidence essential in arriving at a just conclusion in reference to that defence. However the evidence in this case justified a properly instructed jury in concluding that the appellant had the exclusive opportunity to set this fire and did set it and the dissenting judge, like the other members of the Court of Appeal, was of opinion that the trial judge had fairly set forth the respective theories of the Crown and the defence. The determination of the appeal therefore rested on deciding whether or not the reasons for dissent raised questions showing that the trial judge failed to give the jury "matters of evidence essential in arriving at a just conclusion in reference to that defence". While the trial judge failed to refer on the question of motive to appellant's refusal of the offer to purchase prior to the fire, in seeking to prove the identity of the culprit motive was immaterial if the opportunity to set the fire was shown to have been exclusive. The overriding consideration in assessing such errors as those

referred to in the dissent was that the events on the day of the fire were unfolded at the trial by witnesses who had played a part in them. If the trial judge omitted from his direction the matters complained of in dissent because he did not consider them essential to the jury reaching a just conclusion the Supreme Court should not substitute its view for that of the trial judge as to what were and what were not essential matters of evidence to be included in a direction which met with the approval of appellant's counsel at trial and with the majority in the Court of Appeal.

Per Laskin C.J., dissenting: For the reasons of Dubin J.A. dissenting in the Court of Appeal the judgments below should be set aside and a new trial ordered.

APPEAL from a judgment of the Court of Appeal for Ontario[1] dismissing an appeal from a conviction on a charge of arson before Dick Co. Ct. J. with a jury. Appeal dismissed, Laskin C.J. dissenting.

D.K. Laidlaw, Q.C., and G. Houlding, Q.C., for the appellant.

Edward Then, for the respondent.

THE CHIEF JUSTICE (dissenting)—For the reasons given by Dubin J.A., dissenting in the Ontario Court of Appeal, I would set aside the judgment of that Court and the conviction and order a new trial.

The judgment of Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz and de Grandpré JJ. was delivered by

RITCHIE J.—This is an appeal from a judgment of the Court of Appeal for Ontario dismissing the appellant's appeal from the conviction of arson entered against him at his trial before His Honour Judge Dick sitting with a jury.

Mr. Justice Dubin delivered separate and dissenting reasons for judgment in the Court of Appeal of Ontario, expressing the opinion that the appeal should be allowed, the conviction set aside and a new trial ordered. The appeal accordingly comes to this Court as of right in accordance with the provisions of s. 618(1)(a) of the Criminal Code and the question of law raised by the dissenting opinion is recorded in the order for judgment of the Court of Appeal as follows:

...Mr. Justice Dubin, dissenting therefrom and expressing the opinion that the appeal should be allowed, the conviction set aside and a new trial directed on the following grounds, in law, namely: there was non-direction amounting to misdirection in the learned trial judge's charge to the jury in that he failed to adequately place the defence before the jury and refer the jury to evidence vital to their determination of the guilt or innocence of the accused and failed to instruct the jury adequately on the issue of opportunity.

The reasons for judgment of the Court of Appeal have now been conveniently reported in (1974), 6 O.R. (2d) 496, (hereinafter referred to as the "report"), and I therefore feel relieved of the obligation of reciting the facts giving rise to this prosecution in any more than skeleton form. The evidence showed that the appellant was the sole owner of the property destroyed by fire and that he was in the course of effecting repairs on the house situate thereon at the time of the fire. On

the afternoon of February 21, 1972, the appellant, together with his common-law wife and another woman had been in the house during the afternoon and the women had left for about an hour in order to go shopping during which period the appellant was left alone. There is no doubt that there were flammable materials available on the premises which the appellant accounted for as materials which were necessary in the work he was doing. The two women returned at approximately 5 p.m. and assisted in cleaning up while the appellant was doing some painting work. Later in the afternoon they worked together with the appellant in replacing railing on the staircase.

The two women and the appellant left the house at 7 p.m. at which time neither of the women observed or detected any evidence as to fire on the premises. They also stated that when they left the lights had been turned out and the doors locked.

The evidence as to when the fire was first observed is somewhat conflicting, ranging in time from 8 to 10 p.m., at which latter time the fire department was in fact called in, and when the firemen arrived they found the doors locked as well as the windows, and although a bolt to one of the cellar windows was missing, it, as well as all the other windows in the cellar, had been covered over with cloth which was nailed down and which did not appear to have been displaced.

The house in question had been purchased by the appellant in October 1971 for \$16,600 and he stated that it was purchased for the purpose of resale and he had made considerable improvement on it since his purchase. The property was insured for \$20,000 in November, 1971, which was the amount recommended by the insurance agent as replacement cost. After the fire the appellant filed a proof of loss based on an estimate of \$15,500 which does not appear to have been exorbitant. It is also noteworthy that before the fire the appellant received an offer to purchase in the sum of \$19,000 and made a counter offer of \$20,500 which was not accepted.

The appellant had a number of creditors and although none of them appeared to have been pressing him at the time of the fire, there is evidence upon which the jury would have been justified in concluding that he was in financial difficulties.

It was conceded on behalf of the appellant that the fire had been set deliberately but the evidence as to the identity of the appellant as the man who set it was almost entirely circumstantial. There is, however, no complaint by the appellant as to the trial judge's instructions to the jury in respect of circumstantial evidence and he was in fact more than favourable to the defence in this regard as he included in his charge the caution that it was "dangerous to convict" on such evidence. This was an error but one of such a character as to colour the jury's approach to the evidence and to materially weaken the Crown's case.

I am familiar with the cases in this Court concerning the duty of a trial judge in instructing a jury which are referred to by Mr. Justice Dubin in his dissenting opinion at pp. 509 and 510 of the report, and I agree with Mr. Justice Spence when he said, in *Colpitts v. The Queen*[2], at p. 752, that it is part of the trial judge's duty in addressing the jury "to not only outline the theories of the defence but to give the jury matters of evidence essential in arriving at a just conclusion in reference to that defence." (The italics are my own.)

The indictment charged that the appellant

...on or about the 21st of February, 1972...did unlawfully and wilfully, without legal justification or excuse, and without colour of right, and with intent to defraud, set fire to a certain building, to wit: a dwelling, the property of the said Gustave Imrich... In the course of his dissenting reasons for judgment, Mr. Justice Dubin included the following passage:

The learned trial judge in his charge to the jury very fairly set forth the respective theories of the Crown and of the defence and did so with a very even hand. However, with respect to the learned trial judge, he did not draw to the attention of the jury evidence which was vital to the defence and which bore directly on the issue of guilt or innocence in this case, nor did he relate such evidence to the legal propositions which he very fully placed before the jury.

In my opinion the evidence as a whole was such as to justify a properly instructed jury in concluding that the accused did in fact have the exclusive opportunity to set this fire and that he did set it. This was also the opinion of all judges in the Court of Appeal, including Mr. Justice Dubin who stated, at p. 511 of the report:

On the evidence, it was open to the jury properly instructed to have concluded that the accused did in fact have the exclusive opportunity to set this fire. It was open to them to reject the evidence of the witness who testified as to the open window and the presence of lights at a material time. On all the other evidence, including evidence to which I have not specifically referred, a jury could conclude that the accused was the only person who had the opportunity to set the fire, even though it was open to them to find to the contrary.

Having regard to the fact that Mr. Justice Dubin, like other members of the Court, was also of opinion that the trial judge fairly set forth the respective theories of the Crown and of the defence, it appears to me to follow that the determination of this appeal resolves itself into deciding whether or not the dissenting reasons for judgment raise questions showing that the trial judge failed to give the jury "matters of evidence essential in arriving at a just conclusion in reference to that defence".

The first error complained of by Dubin J.A., related entirely to the question of motive in that he considered that the trial judge should have referred the jury to the evidence that the accused, shortly before the fire, had refused an offer to purchase the premises for \$19,000. In seeking to prove the identity of the culprit in such a case as this, motive is immaterial if the opportunity to set the fire is shown to have been exclusive. In my view the whole theory of the Crown was that Imrich had the exclusive opportunity to set this fire and on this issue instructions relating to

motive cannot be characterized as “matters of evidence essential in arriving at a just conclusion”. It seems to me that such an instruction could only have had the effect of leaving the jury with the impression that lack of motive was of importance even where exclusive opportunity was proven.

Dubin J.A. further took exception to the fact that the trial judge had failed to instruct the jury with regard to the evidence of one witness who testified to seeing a window open and lights in the window after the accused and his two friends had left the house. He referred to this as “vital” evidence and put the matter thus:

If the jury accepted the testimony of this one witness then the Crown’s theory that the accused had the exclusive opportunity to set this fire would have had to fail.

The evidence as to there being a light in the house after Imrich had left is conflicting and confusing and it is to be remembered that the witnesses were testifying in June, 1973, to the events of the evening of February 21, 1972. After the lapse of this period of time, it is not surprising that there were differences between witnesses. Everything turned on the exact time when the lights were allegedly seen and the witness to whom Mr. Justice Dubin referred was basing his testimony on his recollection of the time when a certain television program was being viewed by his children. Acceptance of this evidence leads to the conclusion that some unknown arsonist had broken into the locked premises for the purpose of setting the fire and had elected to turn on the lights although there were no curtains to shield the window. In my view this is a highly speculative conclusion and is inconsistent with the statement of the appellant and his two friends that they had locked all doors and windows on leaving, which must be viewed in conjunction with the evidence of the firemen who testified that the doors and windows were locked when they arrived except one on which the locking mechanism had rotted, and who further testified that the snow piled outside the cellar windows was not disturbed and there were no indications of forcible entry. The trial judge did not consider the evidence as to the light to be essential and as a majority of the Court of Appeal appeared to have agreed with him, I would not interfere on this ground.

Dubin J.A. took the further ground that the trial judge had erred in failing to mention to the jury the fact that Mr. Imrich’s two women friends were on the premises for a considerable time after the fire was alleged to have been set and detected no evidence of fire. With the greatest respect I do not share the view that this was in any sense an essential matter for the defence.

Further objection was taken to the charge of the trial judge in that he failed to instruct the jury that there was no direct evidence that the premises were set fire to at the time alleged by the Crown as the scientific evidence was consistent with it having been set either before the accused arrived or after he left the premises. The appellant was in the premises for an hour alone in the afternoon of February 21 at a time when flammable material was available for setting the fire; there is no suggestion that anyone was in the house in the morning, and I have dealt with the evidence suggesting that someone broke into the premises after the departure of Imrich and his friends. There is in my view no evidence to support the suggestion that the fire was set before the appellant arrived or after he left and, in my view, it is not necessary, where a strong case of

circumstantial evidence has been presented, for the Crown to exclude every speculative possibility which is consistent with innocence.

Finally, Mr. Justice Dubin objected that the trial judge in addressing the jury should have referred to threats received by the appellant from time to time, but there is nothing in the evidence to connect these threats with the fire and I do not consider that reference to them was “essential in arriving at a just conclusion”.

As is noted in the reasons for judgment of both Mr. Justice Schroeder and Mr. Justice Dubin, the learned trial judge failed to instruct the jury with respect to s. 391 of the Criminal Code which reads as follows:

391. Where a person is charged with an offence under section 389 or 390, evidence that he is the holder of or is named as the beneficiary under a policy of fire insurance relating to the property in respect of which the offence is alleged to have been committed is, in the absence of any evidence to the contrary and where intent to defraud is material, proof of intent to defraud.

The result of this omission was that the jury was not made aware of the statutory presumption of “proof of intent to defraud” arising out of the fact that the premises were insured. I agree with Mr. Justice Schroeder that this lapse on the part of the judge was favourable to the appellant, but in any event the jury had before it the fact of the existence of the insurance policy and that the appellant filed a proof of loss based on an estimate of \$15,500. If the members of the jury believed that Imrich set the fire, they could also conclude, without the aid of s. 391 that he was claiming a substantial sum of money from the insurers in respect of a fire which he himself had set and that that was only consistent with an intention to defraud the insurance company. The jury’s verdict must be read in light of the fact that they obviously disbelieved the appellant’s denial under oath of having set the fire or having had anything to do with its ignition.

There is no complaint as to the judge’s charge in regard to this evidence, and in my view the overriding consideration in assessing the errors alleged by Dubin J.A., must be that the events of the afternoon and evening of February 21, 1972 were unfolded before the judge and jury from the mouths of the witnesses who had played a part in them. The trial lasted for eight days and the testimony of the witnesses was succeeded by lengthy addresses from counsel for the defence and the Crown in which all phases of the evidence were made the subject of comment. At the end of this long trial the judge was required to charge the jury and there is no doubt that he omitted to mention the matters complained of by the dissenting judge in appeal; but it can only be concluded that in the context of all the evidence which he had heard, he did not consider these matters essential to the jury reaching a just decision, and at the conclusion of his remarks counsel for the appellant stated “The defence has no objection to Your Honour’s charge”.

I am conscious of the fact that counsel’s failure to object to the charge does not preclude the allegation of errors on appeal, but it is a circumstance which, taken together with the opinion of the majority of the Court of Appeal, means that this Court is being invited to substitute its view for that of the trial judge as to what were and what were not essential matters to be included in a

charge which had met with the approval of the appellant's counsel at trial and which was endorsed by the majority of the Court of Appeal for Ontario. Notwithstanding the persuasive opinion of Mr. Justice Dubin and the forceful argument presented by counsel for the appellant, I am not prepared to adopt this course.

For these reasons I would dismiss this appeal.

Appeal dismissed, LASKIN C.J. dissenting.

Solicitors for the appellant: McCarthy & McCarthy, Toronto.

Solicitor for the respondent: The Attorney General for Ontario, Toronto.

[1] (1974), 6 O.R. (2d) 496.

[2] [1965] S.C.R. 739.

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