

CANADA / JUDGMENT

Lajoie v. R.

[1974] SCR 399**COURT**

Supreme Court of Canada

DECIDED

31 January 1973

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Lajoie v. R. Collection Supreme Court Judgments Date 1973-01-31 Report

[1974] SCR 399 Judges Fauteux, Joseph Honoré G  rald; Abbott, Douglas Charles; Martland, Ronald; Judson, Wilfred; Ritchie, Roland Almon; Hall, Emmett Matthew; Spence, Wishart Flett; Pigeon, Louis-Philippe; Laskin, Bora On appeal from British Columbia Subjects Criminal law Decision Content Supreme Court of Canada Lajoie v. R., [1974] S.C.R. 399 Date: 1973-01-31 Robert J. Lajoie Appellant; and Her Majesty The Queen Respondent. 1972: November 22; 1973: January 31. Present: Fauteux C.J. and Abbott, Martland, Judson, Ritchie, Hall, Spence, Pigeon and Laskin JJ. ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA Criminal law—Attempted murder—Intent—Charge to jury—Criminal Code, ss. 21, 24, 201, 202, 210. The appellant shot a taxi driver while attempting to rob him. The victim was wounded but not killed. The appellant was, inter alia, charged with attempted murder. The trial judge told the jury that they must be satisfied beyond a reasonable doubt that at the time the appellant did the shooting he had the intent to kill. The appellant was found guilty of the lesser offence of discharging a firearm with intent to endanger life. By a majority judgment, the Court of Appeal ordered a new trial on the charge of attempted murder. The accused appealed to this Court. Held: The appeal should be dismissed. The trial judge should have directed the jury that the intent, which must be established to support a charge of attempted murder, is proven if the jury is satisfied, beyond a reasonable doubt, that the appellant meant to cause bodily harm that he knew was likely to cause death and was reckless whether death ensued or not. If it can be established that the accused tried to cause bodily harm to another of a kind which he knew was likely to cause death, and that he was reckless as to whether or not death would ensue, then, under the wording of s. 210 of the Criminal Code, if death did not ensue an attempt to commit murder has been proved. In the light of the wording of s. 210, there may be an intent to do that which constitutes the commission of the offence of murder without that intent being to kill the victim. When s. 24(1) of the Code refers to “an intent to commit an offence”, in relation to murder it means an intention to commit that offence in any of the ways provided for in the Code, whether under s. 201 or under s. 202. APPEAL from a judgment of the Court of Appeal for British Columbia[1], ordering a new trial. Appeal dismissed. G.J. Lecovin, for the appellant. W.G. Burke-Robertson, Q.C., and F.A. Melvin, for

the respondent. The judgment of the Court was delivered by MARTLAND J.—This appeal is from a judgment of the Court of Appeal for British Columbia which, by a majority of two to one, allowed the appeal of the present respondent from the acquittal of the appellant on a charge of attempted murder, and ordered a new trial on that issue. The facts are summarized in the reasons for judgment of Nemetz J.A. as follows: Alexander Von Heyking was a student at the University of British Columbia. He had a part time job as a taxi driver in the City of Vancouver. On the night of April 28th, 1970 he was flagged down by Lajoie and a female companion and directed to drive to a West End address. On arrival, Lajoie locked the driver's door and before Von Heyking had turned around, Lajoie fired a shot which missed Von Heyking. When the driver turned he saw Lajoie holding a small black hand gun and while he was shaking it Lajoie said, "Give me your money". Lajoie and the female alighted from the car. The driver radioed for help and then got out and ran. Lajoie ran after him. When Lajoie was some 30 feet behind him, Von Heyking felt his arm suddenly go numb. Lajoie turned and ran and the driver hailed a passing car which took him to the hospital. There was blood on the back of the driver's shirt some six inches below the shoulder and he correctly concluded that Lajoie had shot him. The following morning a surgeon extracted the bullet. It had passed about an inch below the level of the artery, about an inch from one of the lungs and about three inches from the heart. It is apparent that the victim luckily escaped death. Lajoie was, inter alia, charged with attempted murder. In charging the jury, the learned trial judge said, in part, "in order that this person may be found guilty of the crime of the attempt to murder ... you must be satisfied beyond a reasonable doubt that at the time he did that shooting he had the intent to kill that taxi driver". The jury found the accused guilty, not of attempted murder, as charged, but of the lesser offence of discharging a firearm with intent to endanger life. The question of law, which is in issue in this appeal, as a result of the dissent of Taggart J.A. in the Court of Appeal, is as to whether the learned trial judge should have directed the jury that the intent, which must be established to support a charge of attempted murder, is proven if the jury is satisfied, beyond a reasonable doubt, that the appellant meant to cause bodily harm that he knew was likely to cause death and was reckless whether death ensued or not. Branca J.A. and Nemetz J.A. were of the opinion that the learned trial judge erred in failing to direct the jury in this way. Taggart J.A. took the opposite view. The charge of attempted murder is defined by s. 210 (now s. 222) of the Criminal Code, which reads as follows:

210. Every one who attempts by any means to commit murder is guilty of an indictable offence and is liable to imprisonment for life. An attempt is defined in and by s. 24 of the Criminal Code as follows:
24. (1) Every one who, having an intent to commit an offence, does or omits to do anything for the purpose of carrying out his intention is guilty of an attempt to commit the offence whether or not it was possible under the circumstances to commit the offence.

- (2) The question whether an act or omission by a person who has an intent to commit an offence is or is not mere preparation to commit the offence, and too remote to constitute an attempt to commit the offence, is a question of law. Section 201 (now s. 212) of the Criminal Code defines culpable homicide amounting to murder as follows:

201. Culpable homicide is murder

- (a) where the person who causes the death of a human being
- (i) means to cause his death, or (ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless. whether death ensues or not; There is judicial authority to support the submissions of both the appellant and the respondent in respect of the issue now in question. The appellant relies upon the judgment of the Appellate Division of the Supreme Court of Alberta in *R. v. Flannery*[2]; the judgment of the Court of Criminal Appeal in *R. v. Whybrow*[3]; and the judgments of the Quebec Court of Queen's Bench in *R. v. Menard*[4], and *Tousignant v. R.*[5] The respondent relies upon the later judgment of the Quebec Court of Queen's Bench in *R. v. Walker*[6], and the judgment of the Court of Appeal for Ontario in *R. v. Ritchie*[7]. These authorities were reviewed in the judgments in the Court of Appeal. The difference of view can be illustrated in the following passage from the reasons of Nemetz J.A.: In charging the jury as he did, the judge was following a line of authority enunciated in *Rex v. Flannery*; *R. v. Menard*; *Tousignant v. The Queen*; and *R. v. Whybrow*. In *Whybrow*, at p. 146, Lord Chief Justice Goddard said in part: "In Murder the Jury is told—and it has always been the law—that if a person wounds another or attacks another either intending to kill or intending to do grievous bodily harm, and the person attacked dies, that is murder, the reason being that the requisite malice aforethought, which is a term of art, is satisfied if the attacker intends to do grievous bodily harm. Therefore, if one person attacks another, inflicting a wound in such a way that an ordinary, reasonable person must know that at least grievous bodily harm will result, and death results, there is the malice aforethought sufficient to support the charge of murder. But, if the charge is one of attempted murder, the intent becomes the principal ingredient of the crime. It may be said that the law, which is not always logical, is somewhat illogical in saying that, if one attacks a person intending to do grievous bodily harm and death results, that is murder, but that if one attacks a person and only intends to do grievous bodily harm, and death does not result, it is not attempted murder, but wounding with intent to do grievous bodily harm. It is not really illogical because, in that particular case, the intent is the essence of the crime while, where the death of another is caused, the necessity is to prove malice aforethought, which is supplied in law by proving intent to do grievous bodily harm." With great respect, it is difficult for me to resolve the illogicality referred to by Lord Goddard with such facility. I prefer to follow the reasoning set out by Schroeder, J.A. in *R. v. Ritchie* (1970) 3 O.R. 417. At p. 423 he said, in part: "I feel great difficulty in concluding that the attempt is only proven when a direct intent rather than an indirect intent within the meaning of s. 201 (a)(ii) is established. The attempt to commit murder must surely be an attempt to commit the act with the intent as defined in s. 201 (a)(i) and (ii) of the Code. Section 24 and s. 201 must be

read together and due regard must be had to both sections in determining whether or not an attempt to murder has been established. “The bare intention does not constitute a crime and an innocent act acquires the quality of criminality only if it is coupled with an unlawful and malicious intent. There is nothing in the statement of this proposition to suggest that the mens rea for attempt should be restricted to direct intention. In *R. v. Cunningham*, [1957] 2 Q.B. 396 at pp. 399-400, the Court of Criminal Appeal adopted the following principle which had been propounded by the late Professor C.S. Kenny in the first edition of his *Outlines of Criminal Law* published in 1902 and repeated at p. 186 of the 16th edition published in 1952: “In any statutory definition of a crime, malice must be taken not in the old vague sense of wickedness in general but as requiring either (1) An actual intention to do the particular kind of harm that in fact was done; or (2) recklessness as to whether such harm should occur or not (i.e., the accused has foreseen that the particular kind of harm might be done and yet has gone on to take the risk of it). It is neither limited to nor does it indeed require any ill will towards the person injured.” (I note that this quotation from Kenny is substantially repeated in the 19th edition at p. 211.) In England (vide *Whybrow*, supra, *R. v. Grimwood* [1962] 2 Q.B. 621 and *R. v. Loughlin* [1959] C.L.R. 518) and in the United States (vide *Thacker v. Commonwealth* 114 SE 504) the curious result is that a greater blameworthy state of mind must be proven on a charge of attempting to commit murder than of actually committing murder. In essence, these cases hold that on a charge of attempted murder nothing less than an intention to kill must be proven to establish the guilt of the accused. I cannot agree that this is the law in Canada. I am in agreement with the reasons of the majority in the Court of Appeal. We are concerned in this case with the application of certain specific provisions of the Criminal Code. Section 201 (a) provides that culpable homicide is murder where the person who causes the death of a human being means either: (1) to cause his death, or (2) to cause him bodily harm that he knows is likely to cause death and is reckless whether death ensues or not. Section 210 of the Code provides that every one who attempts by any means to commit murder is guilty of an indictable offence and is liable to imprisonment for life. Murder may be committed if the accused means to cause death, but it may also be committed if he means to cause bodily harm knowing that it is likely to cause death and is reckless whether death ensues or not. If it can be established that the accused tried to cause bodily harm to another of a kind which he knew was likely to cause death, and that he was reckless as to whether or not death would ensue, then, under the wording of s. 210, if death did not ensue an attempt to commit murder has been proved. Section 210, which took effect when the new Criminal Code was proclaimed in 1954, is worded differently from its predecessor, s. 264 of the old Code. That section provided that: Every one is guilty of an indictable offence and liable to imprisonment for life who, with intent to commit murder, ... There then followed eight paragraphs defining various acts; e.g., the administration of poison, wounding and shooting. The last paragraph, (h), read: “by any other means attempts to commit murder”, which wording is similar to the wording of the later s. 210. It should be noted, however, that paragraph (h) was only operative subject to the preliminary governing words “with intent to commit murder”. When s. 210 was enacted those words were eliminated. It was those words which were considered in the *Flannery*

case, when they were construed, in their context, as meaning an actual intent to kill. It was this kind of intent which was in the mind of Lord Goddard in the Whybrow case when he referred to intent becoming the principal ingredient of the crime of attempted murder. The word “intent” does not appear in s. 210. It appears in the definition of an attempt in s. 24, but the reference there is to “having an intent to commit an offence”. For the reasons already given, it is my view that, in the light of the wording of s. 210, there may be an intent to do that which constitutes the commission of the offence of murder without that intent being to kill the victim. This Court dealt with a situation somewhat analogous to the present one in *R. v. Trinneer*[8]. That case was concerned with the conviction of the accused on a charge of non-capital murder. The charge was based on the application to the accused of s. 21(2) of the Code, which provides:

- (2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence. The accused and a companion, Frank, who was armed with a hunting knife, to the knowledge of the accused, forcibly drove a woman to a lonely point some distance out of Vancouver, with the intention of robbing her. Frank took her some distance from the car, in which the accused remained. Frank inflicted multiple stab wounds on the woman, which resulted in her death. The issue of law was as to whether, on these facts, the accused knew or ought to have known that the commission of the offence of murder would be a probable consequence of the carrying out of the common purpose of robbery. The Court of Appeal had held that this could only be established if the accused knew or should have known that the death of the deceased would be a probable consequence of carrying out the robbery. In allowing the appeal and restoring the conviction this Court held that the “commission of the offence”, referred to in s. 21(2), as applied to the offence of murder, contemplated and included commission of that offence in the manner defined in s. 202(a) and/or (d) (now s. 213, which provided:
 - 202. Culpable homicide is murder where a person causes the death of a human being while committing or attempting to commit ... robbery ... whether or not the person means to cause death to any human being and whether or not he knows that death is likely to be caused to any human being, if
 - (a) he meant to cause bodily harm for the purpose of
 - (i) facilitating the commission of the offence, or (ii) facilitating his flight after committing or attempting to commit the offence, and the death ensues from the bodily harm; * * *
 - (d) he uses a weapon or has it upon his person
 - (i) during or at the time he commits or attempts to commit the offence, or (ii) during or at the time of his flight after committing or attempting to commit the offence, and the death ensues as a consequence. As the offence of non-capital murder was complete when Frank

intentionally caused bodily harm to the victim resulting in her death, while committing robbery, whether or not he meant to cause her death or knew that death was likely to be caused, it was not necessary, in applying s. 21(2) to the accused, to show that he knew or ought to have known that death was a probable consequence of carrying out the robbery. In relation to the present case the important point is that, in applying s. 21(2) to the offence of murder, this Court held, in the *Trinneer* case, that “the commission of the offence” meant commission in any of the ways contemplated by the Code and not merely its commission in the form of an intentional killing. Similarly, in my opinion, when s. 24(1) refers to “an intent to commit an offence”, in relation to murder it means an intention to commit that offence in any of the ways provided for in the Code, whether under s. 201 (now 212) or under s. 202 (now 213). I would dismiss the appeal. Appeal dismissed. Solicitors for the appellant: Lecovin, Allan, Fahlman & Laugheed, Vancouver. Solicitor for the respondent: F.A. Melvin, Vancouver.

- [1] [1971] 5 W.W.R. 385, 4 C.C.C. (2d) 402, 16 C.R.N.S. 180.
- [2] [1923] 3 W.W.R. 97, 40 C.C.C. 263, [1923] 3 D.L.R. 689.
- [3] (1951), 35 Cr. App. R. 141.
- [4] [1960] Que. Q.B. 398, 130 C.C.C. 242, 33 C.R. 224.
- [5] [1960] Que. Q.B. 767, 130 C.C.C. 285, 33 C.R. 234.
- [6] [1963] Que. Q.B. 578, [1964] 2 C.C.C. 217, 42 C.R. 311
- [7] [1970] 3 O.R. 417, [1970] 5 C.C.C. 336.
- [8] [1970] S.C.R. 638, [1970] 3 C.C.C. 289, 10 D.L.R. (3d) 568.

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