

CANADA / JUDGMENT

MacDonald v. R.

[1977] 2 SCR 832

COURT

Supreme Court of Canada

DECIDED

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MacDonald v. R.

Collection

Supreme Court Judgments

Date

1977-04-04

Report

[1977] 2 SCR 832

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

MacDonald v. R., [1977] 2 S.C.R. 832

Date: 1977-04-04

Robert Wayne MacDonald (Plaintiff) Appellant;

and

Her Majesty The Queen (Defendant) Respondent.

1977: February 14; 1977: April 4.

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—Murder—Fatal shootings not actually carried out by appellant—Responsibility as a party to the offences—Possible inadequacy in direction to jury—Verdict of guilt inevitable—No reduction to manslaughter—Criminal Code, ss. 21, 307, 613(1)(b)(iii) and 623(1).

Appellant and one Pentiluk were jointly indicted for the non-capital murder of Derek Hannan and Gregory Plytas. Appellant had driven Pentiluk, on Pentiluk's directions, to the address at which the murders were committed, according to appellant's own statement, to beat up Hannan, who had earlier been thrown by Pentiluk from an apartment balcony. According to his statement appellant remained in the car while Pentiluk entered the house with a shot gun in order to bring Hannan out to the street so that appellant could fight him: While in the house Pentiluk shot and killed Hannan and Plytas. There was however other evidence to the effect that appellant had entered the; house with Pentiluk and that it was appellant who provided the murder weapon and ammunition. Both the accused were convicted of non-capital murder. In his charge the trial judge read s. 21 of the Criminal Code and then stated the theory of the Crown that appellant had aided and abetted Pentiluk by supplying the gun and ammunition and by driving Pentiluk to the scene ami had been engaged with Pentiluk in a common unlawful purpose. The judge thereafter drew the attention of the jury to s. 307 of the Code, entering a dwelling-house with intent and stated that the theory of the defence was, in part, that appellant did not know that a killing might result. The Court of Appeal affirmed the conviction of Pentiluk and, while finding defects in the direction to the jury on the responsibility of the appellant as a party to the offences under s. 21, nonetheless upheld the conviction of the appellant, on the ground that a reasonable jury properly instructed would on the evidence have inevitably convicted, invoking the curative provision of s. 613(1)(b)(iii) to dismiss the appeal. Appellant further appealed, with leave.

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

Per Martland, Judson, Ritchie, Spence, Pigeon, Beetz and de Grandpré JJ.: While the judge's charge was not as complete or as clear as might be desired, the jury was made fully aware of the issues. On the issue of aiding and abetting, under s. 21(1)(b) and (c), there was evidence that appellant supplied the gun and ammunition, that he drove Pentiluk to the scene of the crime, and that he was in the house with Pentiluk when and where the offences occurred. On the issue of s. 21(2), common unlawful purpose, the only unlawful common purpose mentioned in the direction to the jury was that appellant and Pentiluk entered a dwelling house, with the intent to commit an indictable offence. The trial judge could have gone further on the evidence and pointed out that appellant and Pentiluk went to the house armed with a shotgun, in a common unlawful purpose to inflict violence on Hannan.

Per Laskin C.J. and Dickson J. dissenting: Nowhere in the direction did the trial judge explain to the jury what must be found before they could decide whether appellant was a party to the murders under s. 21(1)(b) or (c). Where it is sought to inculcate a person by association of a particular kind, as provided by s. 21(1)(b)(c), it is necessary that the basis for such inculcation be clearly put to the jury. With reference to s. 21(2), there was no direction to impress upon the jury that if they found a common intention to carry out an unlawful purpose and to assist each other therein and an offence was committed in carrying it out, it was necessary that the Crown pursue beyond a reasonable doubt that appellant knew or ought to have known that its commission would be a probable consequence of carrying out the unlawful common purpose. Fatal misdirection and non-direction, considered in relation to conflict of evidence, made it impossible to apply the curative provisions of s. 613(1)(b)(iii).

On a new trial, appellant would not likely escape any conviction, but there is evidence on which a jury properly instructed, would more likely find appellant guilty of manslaughter than of murder. The Court should substitute a verdict of manslaughter. There is no incongruity in finding appellant guilty of manslaughter, although the principal offender has been found guilty of murder in the same transaction.

An appellate Court may substitute a conviction of an included offence of manslaughter, where it is satisfied that an element of support for a conviction of murder is missing, but, without it, there is still a basis for a conviction of manslaughter.

[R. v. Dick, [1947] O.R. 105; R. v. Reid (1975), 62 Cr. App. R. 109; R. v. Nantais, [1966] 2 O.R. 246, referred to.]

APPEAL from a judgment of the Court of Appeal for Ontario[1] dismissing an appeal from convictions by Keith J. with a jury on charges of non-capital murder. Appeal dismissed, Laskin C.J. and Dickson J. dissenting.

Alan Gold, for the appellant.

David Watt, for the respondent.

The judgment of Laskin C.J. and Dickson J. was delivered by

THE CHIEF JUSTICE (dissenting)—The appellant was convicted on two counts of murder of two named persons who were shot and killed by his co-accused, one Pentiluk. Both accused appealed to the Ontario Court of Appeal which affirmed their convictions in a unanimous judgment delivered by Martin J.A. The appellant MacDonald obtained leave to come to this Court. Although the relief claimed on his behalf in the factum of counsel was a new trial, the submissions by his counsel and by counsel for the Crown at the hearing made it evident that either the conviction should be affirmed or this Court should substitute a verdict of manslaughter. Its power to do so under ss. 613 and 623(1) of the Criminal Code was not challenged. There is no doubt that the Crown's case against MacDonald was a formidable one. There is also no doubt that the trial judge erred in very important respect in his charge to the jury to the prejudice of the accused. This was

not seriously challenged by Crown counsel who, however, supported the view taken by Martin J.A. that the case was an appropriate one for the application of the curative provisions of s. 613(1)(b)(iii) of the Criminal Code.

The appellant did not do the fatal shooting. However, he accompanied his co-accused to the place where the shooting occurred and, indeed, took the co-accused to that place in his car, and was aware before the shooting that the co-accused had a shotgun with him. Hence, the liability of the appellant to conviction depends on the application of s. 21 of the Criminal Code. This section reads as follows:

21. (1) Every one is a party to an offence who
- (a) actually commits it,
 - (b) does or omits to do anything for the purpose of aiding any person to commit it,
- or
- (c) abets any person in committing it.
- (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.

Pentiluk had been involved in a fight at the residence of one Helen Platt in Toronto. He and three others were uninvited guests at a party being held at that residence. Pentiluk had an altercation with Mrs. Piatt's brother, Derek Hannan, hitting him over the head with a board and then pushing him through the railing of a second floor balcony on to the ground below. Mrs. Platt in retaliation struck Pentiluk twice on the back and then one Plytas, who had come with Pentiluk, stepped between them. Pentiluk left with the two others who had come with him, Plytas remaining behind. They drove to the appellant's residence and were admitted by the latter's common law wife. The appellant was not home at the time but arrived soon after. In a voluntary statement made after his arrest, the appellant said that Pentiluk asked him to beat up Hannan and he agreed to do so, and drove with Pentiluk, at the latter's direction, to the Platt residence.

On arrival (according to the appellant's statement) Pentiluk took a shotgun from the trunk of the car, saying that he wanted it to force Hannan to come out and fight with the appellant. Pentiluk entered the house and the appellant said he heard two shots in rapid succession, followed by a third whereupon he ran into the house and up the stairs and said to Pentiluk "Let's get out of here". They ran out and the appellant drove away with Pentiluk. Other evidence disclosed that Hannan had been shot and killed while speaking on the telephone, that Plytas had been shot in the living room, receiving wounds from which he later died and that Mrs. Platt had been badly wounded by a third shot fired by Pentiluk.

There was evidence from which a jury could find that the gun used by Pentiluk came from the appellant's apartment and was even supplied by the appellant, and there was also evidence from which the jury could find that Pentiluk was accompanied by the appellant when he entered the Platt residence with the gun and began shooting. However, since the appellant's complicity in the murders depends on whether s. 21(1)(b) or (c) or s. 21(2) applied to engage his culpability, I think an appellate Court should be very hesitant to apply the curative provisions of s. 613(1)(b)(iii) if there has been misdirection on those implicating provisions when the misdirection (as I think it does here) relates directly to factual assessments which could take on a different complexion if the jury had been properly charged.

In charging the jury with respect to the appellant MacDonald, the trial judge read to them the whole of s. 21 but nowhere in the charge did he explain to them what must be found before they could decide whether the appellant was a party to the murders under s. 21(1) (b) or (c). It is my opinion that where it is sought to inculcate a person by association of a particular kind, as provided by s. 21(1)(b)(c), it is necessary that the basis for such inculcation be clearly put to the jury: see *R. v. Dick*[2]. The way in which the trial judge left aiding or abetting to the jury could have led them to believe that the appellant, merely by driving Pentiluk to the Platt residence where the killings were done, was a party to the offence of murder. Counsel for the Crown conceded the deficiency of the charge in this respect.

The trial judge also erred in respect of his instruction to the jury on s. 21(2). I regard this error as in itself fatal to the conviction, especially when it is regarded in the light of the fact that the trial judge failed originally to leave manslaughter as a possible verdict against MacDonald, although leaving it in relation to Pentiluk, and then, in recharging them that manslaughter was an alternative verdict did so in terms that did not meet the proper requirements of proof to make the appellant guilty of manslaughter under s. 21(2).

Indeed, except for an initial paraphrase of s. 21(2), the trial judge throughout his charge failed to make it clear that not only must the jury find a common intention of Pentiluk and MacDonald to carry out an unlawful purpose (here the infliction of violence) and to assist each other therein but that the appellant knew or ought to have known that a killing, amounting to either murder or manslaughter (which would have to be defined in the charge) would be a probable cause of carrying out the unlawful purpose.

The only references in the charge to the law on s. 21(2) consist of two separated passages followed by a lengthy recital of the evidence relating in the main to Pentiluk. The first passage is this: ...there is evidence, and I will draw it to your attention, and it has already been drawn to your attention, that these two men together must have entered that house, where they had no right to be, carrying a gun, which would bring them within Section 307 of the Criminal Code. This is not their house.

- (1) Every one who without lawful excuse, the proof of which lies upon him, enters or is in a dwelling-house with intent to commit an indictable offence therein is guilty of an indictable offence...

You see how I point out to you that Section 307 makes Subsection 2 of Section 21 one that you must take into consideration.

Then, after a short statement of the theory of Pentiluk's defence, came this passage:

As to MacDonald, the theory of his defence is that not only did he not supply the shotgun to Pentiluk but that he was unaware that Pentiluk had a gun until they got to 14 Seymour Avenue, and that his only reason for being at that address at the time of the shooting, which he admits in his statement, was to fight Derek Hannan; that he did nothing, in the language of Section 21 of the Criminal Code, to aid or abet Pentiluk in the fatal shooting and that he was not engaged in a common unlawful purpose, knowing that a killing might result.

[The emphasis is mine.]

Following the recital of the evidence there was no further reference to the law but only a direction as to possible verdicts; as to Pentiluk, guilty of murder or not guilty of murder but guilty of manslaughter, and as to the appellant, guilty as charged or not guilty.

When the charge ended, Crown counsel raised the question of failure to charge on manslaughter in respect of the appellant. That, however, was far from the only deficiency, even though at that stage the appellant's counsel, who was not his counsel on this appeal, did not say otherwise. The trial judge recalled the jury and corrected his failure to charge on manslaughter. I have already referred to the recharge, and now set out the passage in which manslaughter was left as an alternative verdict:

The circumstance that was drawn to my attention that might make that possible would be for you to find that no one had the intent of going there to shoot anybody at all and yet the gun did go off while they were engaged in some unlawful purpose, MacDonald having provided the gun to Pentiluk, and I suppose if that is your finding, well then that verdict of not guilty of non-capital murder but guilty of manslaughter is open to you and it will have to be given consideration.

Its unsatisfactory character is self-evident.

The jury itself felt uncomfortable about the trial judge's scant reference to the law and especially s. 21. They directed the following written question to the trial judge:

We would appreciate a clarification of section 21 and, we think, section 307.

The trial judge said to the jury that "this relates specifically to the accused MacDonald...and it must be subsection 2 in the context that you have put your question not the aiding or abetting". He then read them s. 21(2) and s. 307(1) and continued as follows:

Now, I want to relate those sections or that section to the evidence that is before you and on which you must make up your minds whether or not Section 21 is applicable in order to make the accused MacDonald a party to whatever offence you find was committed in that dwelling-house.

This being said, the trial judge recited certain evidence, including a quotation from the appellant's statement, and ended on this passage:

Now, I do not know what impression that is going to make on your minds. To my mind the only possible inference, if you believe Davis—and it is supported by the evidence of Millie Dubien and Helen Plaitt, that there were no footsteps after the third shot, and Derek Hannan saying “They have got a gun”—the only inference you can have is that when Pentiluk went into that house—this is based on Davis', an independent witness evidence—MacDonald was right with him and that the man with him had, to his knowledge, a gun in his hand, entering a dwelling-house which he had no right to be in. What the trial judge said was in no way responsive to the jury's question about s. 21 nor, as the trial judge saw it, on s. 21(2). In my opinion, the jury was asked to consider the culpability of MacDonald with so inadequate a direction on the law as to amount to no direction and, indeed, to serious misdirection on issues that required considerable care in exposition.

Having set out or referred to everything that the trial judge said on the law as it related to the appellant, I do not share the extenuating appraisal of the charge by Martin J.A. in saying that in respect of s. 21 “[it] was neither as complete nor as clear as one would have wished”. The trial judge never indicated that there was any requirement of intent in respect of aiding or abetting, let alone the nature of the intent; he had not give any direction to fix the jury with the necessity of appreciating that even if they found a common intention to carry out an unlawful purpose and to assist each other therein (I pass over as unimportant in the total picture that he mentioned only s. 307 in this connection) and an offence was committed in carrying it out, it was necessary that the Crown prove beyond a reasonable doubt that the appellant knew or ought to have known that its commission would be a probable consequence of carrying out the common unlawful purpose. The jury was left simply rudderless on crucial aspects of the case. The fatal non-direction and misdirection, when considered in relation to conflicts in the evidence, make it impossible, in my view, to apply in this case the curative provisions of s. 613(1)(b)(iii).

Quite plainly the conviction of murder cannot stand, and if the case was sent back for a new trial there is every likelihood that MacDonald would do what Pentiluk did and that is plead guilty to manslaughter as an included offence. The plea was not accepted in Pentiluk's case, but the submissions of counsel for the Crown in the present case as well as the alternative submission for relief of counsel for the accused persuade me that this Court should not send the case back for retrial, either on murder or on manslaughter. Since it is clear that there is evidence upon which a jury properly instructed would more likely find the appellant guilty of manslaughter than of murder (certainly the appellant would not likely escape any conviction), the desirable disposition is for this Court to substitute a verdict of manslaughter.

There is no incongruity in finding the appellant guilty of manslaughter although the principal offender has been found guilty of murder in respect of the same transaction: see *R. v. Reid*[3]. Moreover, an appellate Court may substitute a conviction of an included offence of manslaughter where it is satisfied that an element of support for a conviction of murder is missing but that without it there is still a basis for a conviction of manslaughter: see *R. v. Nantais*[4]. In this case, it may reasonably be said that the common intention was by the use of the gun to compel Hannan

to come out of the Platt residence to fight with the appellant; and although a killing might result because of Pentiluk's possession of the gun the appellant did not know nor ought he to have known that a killing would be a probable consequence of carrying out the common intention.

I would accordingly substitute a verdict of manslaughter and remit the case to the Ontario Court of Appeal for imposition of a sentence. The judgment of Martland, Judson, Ritchie, Spence, Pigeon, Beetz and de Grandpré JJ. was delivered by

MARTLAND J.—The appellant and one Pentiluk were jointly indicted and tried upon two counts for the non-capital murder of Derek Hannan and Gregory Plytas. Both were convicted and their appeals to the Court of Appeal for Ontario were dismissed. The appellant only, with leave, appealed to this Court.

The facts are recited in the reasons of Martin, J.A., who delivered the judgment of the Court of Appeal, as follows:

Both killings occurred in one transaction, and both counts were tried together. The jury was entitled to find that the following facts were established by the evidence: The deceased Derek Hannan lived at 14 Seymour Avenue in the City of Toronto on the first floor of a three storey house. On the evening of September 1st, 1972, his sister Mrs. Helen Platt who lived on the second and third floors of the house gave a party, which was attended by a number of people including her brother the deceased Derek Hannan, and a young woman Mildred Dubien, who lived on the third floor. At approximately 2:00 a.m. on September 2nd, the appellant Pentiluk, accompanied by Gus Williams, the deceased Gregory Plytas and John Pearson, arrived at the party. Some three quarters of an hour later, there was a fight between the appellant Pentiluk and the deceased Hannan on the veranda off the living room of the second floor apartment, apparently over Mildred Dubien. During the fight the appellant Pentiluk struck the deceased Hannan on the side of the head with a board from the railing on the veranda. He then pushed Hannan over the balcony and he landed on the ground below. When Mrs. Platt started downstairs to see how her brother was, she struck the appellant Pentiluk on the back as he was going toward the kitchen. Gregory Plytas interceded and the appellant Pentiluk told her: "You are going to get yours too." Pentiluk, Williams and Pearson then left; Plytas remained. Those three persons then went to 10 Boulton Avenue where the appellant MacDonald lived with Janice Taylor. MacDonald was not then at home but arrived soon afterwards. The appellants discussed the fight with Hannan. Shortly afterwards both the appellants left with a green gun case, that Janice Taylor got at the appellant MacDonald's request. About an hour after the appellant Pentiluk had left 14 Seymour Avenue, following the fight with Derek Hannan, Mrs. Platt saw Pentiluk and another man whom she did not recognize drive up in a car and park in front of the house. The appellant Pentiluk got out of the driver's door and both men went to the trunk and began to open it. Mrs. Platt then went to the kitchen. She heard the door open and her brother Derek Hannan say: "He's got a gun".

Derek Hannan was shot while talking to his brother on the telephone in front of the kitchen doorway. She then heard another shot coming from the living room. The appellant Pentiluk armed with a shotgun which he held in both hands went to the kitchen, stared at Mrs. Platt for 10-15 seconds and shot her in the thigh from a distance of about six feet. Mrs. Platt eventually recovered from the injury she received. Both Hannan and Plytas died from the effect of gunshot wounds in the abdomen caused by pellets from a shotgun.

The appellant MacDonald made a statement to the police, which the trial judge ruled was made voluntarily. In his statement he said he had left his apartment with the appellant Pentiluk to go to the place where Pentiluk had allegedly been assaulted. The appellant MacDonald said he drove to an address on Seymour to which he was directed by Pentiluk. The appellant Pentiluk removed a shotgun from the trunk and entered the house, according to the appellant MacDonald, to bring his assailant out onto the street so MacDonald could fight him. After hearing first two shots and then a third, the appellant MacDonald ran upstairs into the house and said: "Let's get out of here". The latter part of MacDonald's statement is in conflict with the evidence of Ernest Davis who lived at 18 Seymour Avenue, and who was awakened at 3:20 a.m. on September 2, 1972, by two shots. He shut off his air conditioner and then heard another shot at which point he looked out the window and saw two men running towards a car parked in front of 14 Seymour Avenue. One of the men got in the driver's side and the other, who appeared to be carrying a stick, got in the passenger's side.

The only defence advanced on behalf of the appellant Pentiluk was that he was intoxicated as a result of the consumption of alcohol and drugs to an extent that rendered him incapable of forming the intent requisite for murder. The case for the appellant MacDonald was that he was not a party to either of the offences, under the provisions of section 21 of the Code. Dealing with the appeal of the present appellant Martin, J.A., had this to say:

The most substantial ground of appeal urged on behalf of the appellant MacDonald is that the trial Judge did not sufficiently direct the jury with respect to the application of section 21 to the facts of the case, as the jury might find them from the evidence. We are bound to say that the charge in this respect was neither as complete, nor as clear as one would have wished. The only unlawful common purpose referred to by the trial Judge as the basis for the application of section 21 to the activities of the appellant MacDonald, in relation to the killings, was unlawfully entering a dwelling house, with intent to commit an indictable offence therein contrary to section 307 of the Code.

On the basis of the appellant's statement to the police, which was admitted in evidence, it is clear that both the appellants joined in a common purpose—to inflict unlawful violence on one or more of the persons in the house, and in furtherance of that purpose Pentiluk had with him, to the knowledge of the appellant MacDonald, a shotgun which was in fact loaded. Although there is no admission by the appellant that he knew the gun was loaded, the jury would be justified in inferring that he had such knowledge. Indeed, if the evidence of Pearson was accepted, the appellant MacDonald provided the shotgun.

Despite the defects in the charge, we think that the essential issues were placed before the jury and they were sufficiently instructed that the defence of the appellant MacDonald was that he had merely agreed to fight Pentiluk's assailant, and did not foresee that somebody might be killed. Indeed, we think that the failure of the trial Judge to more fully charge the jury with respect to the application of section 21 to the facts, as the jury was entitled to find them on the evidence, may have inured to the benefit of the accused, rather than to his disadvantage. We are unanimously of the view that a reasonable jury, properly instructed would, on the evidence, have inevitably found a verdict of guilty.

The only substantial ground of appeal raised before us is that which is dealt with by Martin, J.A., in the passage from his reasons quoted above.

In considering whether the defects alleged in the charge to the jury were such that the Court of Appeal should not properly have invoked the provisions of s. 613(1)(b)(iii) of the Criminal Code it is necessary to consider the factual back-ground in respect of which the charge was delivered.

The appellant did not give evidence at the trial, but he had made a statement to the police which was admitted in evidence. In it, he referred to a conversation with Pentiluk at the place where the appellant lived, which occurred after the incident between Pentiluk and Hannan. He said that Pentiluk told him that: "...he had been thrown over the balcony by one of the guys at the party. He said that he wanted to get even. He asked me if I would go with him and give the guy a beating. I said I'd go and look after the guy for him". He said that he had driven Pentiluk to a house pointed out by Pentiluk, where he stopped the car, that Pentiluk got out and went to the trunk of the car, and that he saw that Pentiluk had a shotgun or rifle. When the appellant asked him what he wanted that for, Pentiluk said he "...would make the guy come out of the house and I could Tight him on the street". He said that Pentiluk then entered the house.

The appellant therefore admitted to driving Pentiluk to the house, for the purpose of inflicting unlawful violence upon Hannan, and that Pentiluk was armed with a shotgun or rifle. The jury could properly infer that the appellant knew that the shotgun was loaded. There was other evidence led by the Crown to show that the appellant provided the weapon.

While the appellant, in his statement, said that he did not enter the house until three shots had been fired, an independent witness, Davis, was looking out of his bedroom window on to the street when the third shot was fired. Following that he saw two men running out of the house where the shooting had occurred and saw them enter a parked car. He noticed that the one who entered on the passenger's side was carrying something which looked like a stick, which he put between his legs when he entered the car. This evidence contradicts the latter part of the appellant's statement and places the appellant in the house when the third shot was fired. The trial judge dealt with the law applicable in respect of the charges against the appellant in the following passages from his charge to the jury:

As to MacDonald, conceding that MacDonald did not do the actual shooting, the Crown alleges that he is nevertheless guilty as charged by reason of the provisions of Section 21 of the Criminal Code, the relevant portions of which read as follows:

(1) Every one is a party to an offence who

(a) actually commits it.

that is, in the case, on the theory of the Crown, Pentiluk.

(b) does or omits to do anything for the purpose of aiding any person to commit it...

that is, any other person,

or (c) abets any person in committing it.

That would be MacDonald.

The second subsection:

(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.

On the evidence that I will discuss with you it is open to you to find that MacDonald was a party under both of those subsections.

The theory of the Crown is that MacDonald did become a party to the offence by aiding and abetting Pentiluk who, by his plea, has admitted the killing, in that MacDonald supplied the gun and ammunition, drove Pentiluk to 14 Seymour Avenue and, in addition, was engaged, in the language of Subsection 2, in “a common purpose“, assisting each other therein, and one of them in carrying out the common purpose, common unlawful purpose, committed an offence and that each of them knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose.

...There is evidence, and I will draw it to your attention, and it has already been drawn to your attention, that these two men together must have entered that house, where they had no right to be, carrying a gun, which would bring them within Section 307 of the Criminal Code. This is not their house.

(1) Every one who without lawful excuse, the proof of which lies upon him, enters or is in a dwelling house with intent to commit an indictable offence therein is guilty of an indictable offence...

You see how I point out to you that Section 307 makes Subsection 2 of Section 21 one that you must take into consideration.

Having dealt with the theory of the Crown in the passage above quoted, he discussed the theory of the defence:

As to MacDonald, the theory of his defence is that not only did he not supply the shotgun to Pentiluk but that he was unaware that Pentiluk had a gun until they got to 14 Seymour Avenue, and that his only reason for being at that address at the time of the shooting, which he admits in his statement, was to fight Derek Hannan; that he did nothing, in the language of Section 21 of the Criminal Code, to aid or abet Pentiluk in the fatal shooting and that he was not engaged in a common unlawful purpose, knowing that a killing might result.

Counsel for the appellant stresses that in this passage the trial judge uses the phrase “knowing that a killing might result” whereas s. 21(2) of the Criminal Code refers to “a probable consequence of carrying out the common purpose”. However, the jury had been charged in the terms of the subsection, and in this passage he is summarizing the position of the defence, i.e. that the appellant did not know that a killing might result from the common unlawful purpose. If he did not know that a killing might result from the common unlawful purpose then clearly he did not know that a killing was a probable consequence of the common unlawful purpose.

The trial judge thereafter reviewed in detail the evidence of the various witnesses.

While conceding that, as Martin, J.A. points out, the charge was not as complete or as clear as might be desired, it is my opinion that, in relation to the facts of this case, the jury was made fully aware of the issues to be decided. On the issue of s. 21(1)(b) and (c), aiding and abetting, the trial judge pointed out that, on the Crown evidence, the appellant supplied the gun and the ammunition and drove Pentiluk to the scene of the crime. He also reviewed the evidence which showed that the appellant was in the house with Pentiluk when the offences occurred.

On the issue of s. 21(2), dealing with carrying out a common unlawful purpose, he referred to s. 307(1) of the Criminal Code. He could have gone further and pointed out that the appellant and Pentiluk went to the house armed with a shotgun in a common purpose to inflict unlawful violence upon Hannan. He could have gone on to say that if the appellant ought to have known that the killing was a probable consequence of the common purpose the appellant would be a party to the offences. He did not do this, but, as Martin, J.A. points out, his failure to charge the jury more fully on the application of s. 21 to the facts may have inured to the benefit of the appellant.

The charge, as delivered, left it to the jury to decide whether the Crown evidence should be accepted, or whether the appellant’s statement that he had merely agreed to fight Hannan and did not foresee a killing should be accepted. On the Crown evidence a reasonable jury would have to reach a verdict of guilty. If the appellant’s explanation was accepted, the appellant would be acquitted. The jury brought in a verdict of guilty.

I agree with Martin, J.A. that a reasonable jury, properly instructed would, on the evidence in this case, have inevitably found a verdict of guilty. I would dismiss the appeal.

Appeal dismissed, LASKIN C.J. and DICKSON J. dissenting.

Solicitors for the appellant: Pomerant, Pomerant & Greenspan, Toronto.

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

[1] (1974), 21 C.C.C. (2d) 87, sub nom. R. v. Pentiluk and MacDonald.

[2] [1947] O.R. 105.

[3] (1975), 62 Cr. App. R. 109.

[4] [1966] 2 O.R. 246.

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