

CANADA / JUDGMENT

Poitras v. R.

[1974] SCR 649

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Supreme Court of Canada

DECIDED

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Poitras v. R.

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Date

1973-06-29

Report

[1974] SCR 649

Judges

Martland, Ronald; Judson, Wilfred; Ritchie, Roland Almon; Laskin, Bora; Dickson, Robert George Brian

On appeal from

Manitoba

Subjects

Criminal law

Decision Content

Supreme Court of Canada

Poitras v. R., [1974] S.C.R. 649

Date: 1973-06-29

Leonard Joseph Poitras Appellant;

and

Her Majesty The Queen Respondent.

1973: April 24; 1973: June 29.

Present: Martland, Judson, Ritchie, Laskin and Dickson JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Criminal law—Narcotics—Trafficking—Drug sold to undercover agent—Accused taking money—Delivery by another person—Criminal Code, 21—Narcotic Control Act, R.S.C. 1970, c. N-1, s. 4(1).

Criminal law—Appeal—Question of law alone.

A, an undercover agent, told L that he would love to have some hashish. L introduced A to the accused who said that he was on his way to get some and that the price was \$8 a gram. A gave the accused the money for two grams and L said that he would go with the accused and return with the drug. Some twenty minutes later L met A in the washroom of a beverage room and delivered the hashish. The accused was charged with trafficking contrary to s. 4 (1) of the Narcotic Control Act. The trial judge acquitted the accused on the ground that the evidence was as consistent with the fact that the accused was acting for A alone as it was consistent with the fact he was delivering or selling or trading in drugs or offering to do so. By a majority judgment, the Court of Appeal set aside the verdict of acquittal and registered a conviction. The accused appealed to this Court.

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

Per Martland, Judson, Ritchie and Dickson JJ.: The civil law of “agency” cannot be applied in this context. “Agency” does not serve to make non-criminal an act which would otherwise be attended by criminal consequences. Even if the appellant could be said to be the agent of A for the purposes of civil responsibility, his acts may, none the less, amount to trafficking in narcotics or aiding in such trafficking. If the evidence was consistent with the accused delivering or selling or trading in drugs or offering to do so, the fact that he may have been acting as an agent for A would not exculpate him. An alternative view is that the appellant aided and abetted an unidentified vendor in selling, and L in delivering the narcotic to A.

Per Laskin J., dissenting: One who buys a narcotic does not by that act engage in trafficking, and, similarly, one who assists in a purchase is not guilty of trafficking through the effect of s. 21 of the Code. The evidence supports no other purpose than that of aiding in a purchase. It was L and the unknown seller who were the traffickers.

APPEAL from a judgment of the Court of Appeal of Manitoba[1], setting aside the acquittal of the appellant and registering a conviction. Appeal dismissed, Laskin J. dissenting.

G. Brodsky, for the appellant.

S.F. Sommerfeld, Q.C., and J.E. Hodges, for the respondent.

The judgment of Martland, Judson, Ritchie and Dickson JJ. was delivered by

DICKSON J.—In May 1970 an undercover agent with the R.C.M.P. Drug Squad, Constable Arsenault, assumed the role of singer with a rock band known as the Prodigal Son. The band played in the beverage room of the Westminster Hotel in Winnipeg. One afternoon in the beverage room Arsenault said to one Little, “I would really love to get my hands on some good hash. I feel like really getting stoned”. Shortly after, Little, followed by Arsenault, left the hotel in search of the accused, known as the Beast, whom they located on the street not far from the hotel. Arsenault was introduced to the accused and the following dialogue ensued:

Little (to the accused): We were wondering if you had any hash?

The accused: No, I was just on my way to the Diggers (the name of a house in the vicinity) to get some.

The accused (to Arsenault): How much do you want?

Arsenault: Two grams will be plenty. The accused: They are going for \$8.00 a gram.

Arsenault: Do you have change for twenty?

Arsenault’s twenty dollar bill was changed at a drug store located in the Westminster Hotel and \$16.00 handed by him to the accused. Arsenault had to return to the beverage room to sing and asked the accused when he might expect the accused to arrive with the hashish. Little interrupted and said he was going to accompany the accused to the Diggers and would be returning with the hashish. Arsenault went back to the beverage room. Some twenty minutes later Little met Arsenault in the wash room area of the beverage room, and delivered the hashish.

The accused was charged with unlawfully trafficking in hashish (Cannabis Resin) contrary to the provisions of the Narcotic Control Act and amendments thereto. Hashish is a narcotic. The definition of “trafficking” is found in s. 2 of the Act:

- (a) to manufacture, sell, give, administer, transport, send, deliver or distribute, or
- (b) to offer to do anything mentioned in paragraph (a);

otherwise than under the authority of the Act or the regulations.

Section 21(1) of the Criminal Code provides that anyone who does or omits to do anything for the purpose of aiding any person to commit an offence or abets any person in committing it is a party to the offence. It follows that anyone who sells or delivers hashish or offers to do so, or does anything for the purpose of aiding another person to do so, is guilty of an offence.

At the conclusion of the trial of the accused in County Court Judges’ Criminal Court, Thompson C.C.J. said:

I find that the facts in evidence which have been placed before the Court have not established trafficking as defined in the Narcotics Control Act, beyond a reasonable doubt. The evidence indicates it is as consistent with the fact that this accused was acting for Arsenault alone as it is consistent with the fact he was delivering or selling or trading in drugs or offering to do so. It seems to me that there is not a clear case here of proof of trafficking, and I am finding the accused not guilty.

It seems manifest that Thompson C.C.J. relied on what was said by Jessup J.A. in *Regina v. Madigan*[2]:

It is not an offence under the statute to purchase controlled drugs. Accordingly, no criminal liability would attach to the acts of the accused if he had been the purchaser. It follows that similarly no criminal liability attaches to such acts if they were on behalf of the purchaser as his agent. In my opinion, on the peculiar facts of this case, it cannot be said they are consistent only with the accused acting as an agent either for the vendor or for both the vendor and the purchaser; they are equally consistent with him acting as an agent for the purchaser alone.

An appeal from the judgment of Thompson C.C.J. was taken to the Court of Appeal of Manitoba[3] and that Court by a majority, Freedman C.J.M. dissenting, allowed the appeal, set aside the verdict of acquittal and registered a conviction against the accused. Freedman C.J.M. held that the judgment did not involve a question of law alone and, therefore, the appeal failed for lack of jurisdiction.

As I read the judgment of Thompson C.C.J., he found the evidence placed before him to be consistent with the fact that the accused was acting as an agent for Arsenault in the purchase, and consistent with the fact that the accused was delivering or selling drugs or offering to do so. Then, seemingly applying the rule in *Hodge's case*, and finding the evidence equally consistent with two alternative theories, the one pointing to innocence and the other to guilt, he acquitted the appellant. The fallacy, if I may say so, in this reasoning lies in the fact that even if the appellant can be considered to have been “acting for” Constable Arsenault, it does not follow that he could not also have done one or more of the acts which constitute “trafficking” under the Narcotic Control Act. It was argued on behalf of the appellant that the words “to buy” do not appear in the definition of “trafficking” under the Narcotic Control Act; therefore a mere purchaser does not traffic and an agent for the purchaser comes under the same protective umbrella. I do not agree. One cannot apply the civil law of “agency” in this context. “Agency” does not serve to make non-criminal an act which would otherwise be attended by criminal consequences. Even if the appellant could be said to be the “agent” of Constable Arsenault for the purposes of civil responsibility, his acts may, none the less, amount to trafficking in narcotics or aiding in such trafficking. If, as the trial judge would seem to have found, the evidence was consistent with the accused delivering or selling or trading in drugs or offering to do so, the fact that he may have been acting as an agent for Arsenault would not exculpate him.

I am further of the opinion that the question before the Court of Appeal of Manitoba, and before this Court is a question of law, and law alone. It can be identified readily in the judgment of Thompson C.C.J., namely, does the fact that an accused is acting as an agent for a purchaser of narcotics afford a good defence. This question can be asked, and answered, without reference to the detail of the particular case.

In *The Queen v. Lemire*[4], Martland J., for the majority of the Court, said:

In my opinion, the guilt of the respondent in the present appeal depends upon the legal effect of facts found, or inferred, in the Court below. This raises questions of law in respect of which, for the reasons already stated, I think there was error. There is no ground not involving such questions upon which Lemire's appeal could have been allowed. There was, therefore, a right of appeal to this Court and the appeal should succeed.

I would only add this. On the evidence, it was undoubtedly open to the judge to find that there were present the three essential elements of any sale: the agreement or bargain, the payment of the price and, through the aid of Little, the delivery or conveyance of the property. An alternative view is that the accused aided and abetted an unidentified vendor in selling, and Little in delivering the narcotic to Constable Arsenault. Whichever view one takes, the appellant did unlawfully traffic in a narcotic contrary to the provisions of the Narcotic Control Act.

I would dismiss the appeal.

LASKIN J. (dissenting)—I have had the advantage of reading the reasons of Dickson J. before preparing my own. He has accurately recited the facts upon which the accused was acquitted at trial but convicted on appeal, Freedman C.J.M. dissenting, on a charge of unlawful trafficking in hashish contrary to s. 4(1) of the Narcotic Control Act, R.S.C. 1970, c.N-1. In my opinion, the trial judge came to the correct result which I support for different reasons.

Trafficking under s. 4(1) and possession for the purpose of trafficking under s. 4(2) are serious offences, life imprisonment being the ultimate penalty in each case. By contrast, mere possession of a narcotic, an offence under s. 3, is punishable on summary conviction (by fine or imprisonment or both, the term of imprisonment being six months for a first offence and one year for a subsequent offence) or on indictment by imprisonment up to seven years. Trafficking is defined in s. 2 of the Act as follows:

- (a) to manufacture, sell, give, administer, transport, send, deliver or distribute, or (b) to offer to do anything mentioned in paragraph (a);

otherwise than under the authority of the Act or the regulations.

It is to be noted that one who buys a narcotic does not by that act engage in trafficking, and, similarly, one who assists in a purchase is not guilty of trafficking through the effect of s. 21 of the Criminal Code. Section 21 makes a person a party to an offence if he does or omits to do anything for the purpose of aiding any person to commit it. In a broad sense, every purchaser by reason of the purchase may be said to be aiding in a sale of a narcotic, and if this is enough to make him

guilty of trafficking then on this reasoning every person who aids a purchaser would likewise be guilty unless excused by the Regulations. This broad sense of the matter fails to take account of the words in s. 21 “for the purpose of aiding”. Moreover, since possession of a narcotic is an offence, and there is an onus on an accused who pleads not guilty to a charge under s. 4(2) to establish that his possession was not for the purpose of trafficking (see s. 8 of the Act), it would, in my opinion, be incongruous to turn a mere purchaser into a trafficker by using s. 21 of the Criminal Code to supply the want of definition. I did not understand that there was any dispute with this view in the present case.

The question becomes therefore whether what the accused did should be viewed as done for the purpose of aiding an unknown seller to make a sale. There is no evidence that the accused himself sold the hashish or that he transported it, sent it or delivered it or distributed it. The evidence shows that the accused went away with Little, that it was Little who said he would be returning with the hashish and that it was Little who delivered it to Arsenault. There is no evidence that the accused returned to the place of delivery with Little, and it is clear he was not with Little when the latter made the delivery. All there is to connect the accused with the hashish is the fact that Arsenault gave him \$16 which the accused said was the price of two grams and that he went off with Little.

If, on the facts of this case, one had to decide if the accused was party to a contract for the sale and purchase of hashish it would be an extravagant conclusion so to find. It would, however, be open to find, as a matter of the civil law, that he had agreed to obtain or assist in obtaining hashish for Arsenault. Such a finding would be equally open as a matter of the criminal law if it was an offence to purchase a narcotic substance. Since it is not, this Court is being asked to conclude that the accused was acting for the purpose of aiding an undisclosed seller to supply hashish for Arsenault. Having regard to the burden of proof on the Crown, it would, in my opinion, be conjecture to come to that conclusion just as it would be conjecture to conclude that the accused was himself the seller.

I agree with my brother Dickson that doctrines of agency are apt to mislead if one should seek to apply them in the criminal law in their full civil law significance. As he says, the accused could be agent for Arsenault and still be guilty of trafficking if he delivered the hashish to his principal. That does not mean, however, that an agent for a purchaser who does not engage in any of the acts enumerated in s. 2 may none the less be guilty of trafficking. We come full circle here if, apart from involvement in any such acts, s. 21 of the Criminal Code is invoked to implicate such an agent.

What is left then to implicate the accused is that he may have directed Little to a seller, having received \$16 from Arsenault. There is no evidence to show that the accused kept the money or whether he did not give it to Little or who paid it to the seller or even if it was so paid. Little gave no evidence, although he was associated with Arsenault and was the person who had agreed to bring the hashish to Arsenault. In my opinion, the accused was not, in what he did, acting for the purpose of aiding in the sale or delivery or distribution of a narcotic unless it can be said, as a matter of law, that by taking Little to a source of supply, if that is what happened, he did so for the

purpose of aiding in the sale or delivery of the hashish to Arsenault.

In my opinion, the evidence supports no other purpose than that of aiding in a purchase. It was Little and the unknown seller who were the traffickers. The incidental effect of what the accused did was to aid indirectly in a sale or transportation or delivery of a narcotic drug, but, again, thus cannot be brought within s. 21 of the Criminal Code when the definition of “trafficking” in s. 2 excludes purchase.

I would accordingly allow the appeal, set aside the conviction and restore the acquittal of the accused. I would add that I also agree with Freedman C.J.M. that the appeal to the Manitoba Court of Appeal from the decision of the trial judge was not upon a question of law alone. Whether the Crown has proved guilt beyond a reasonable doubt does not raise a question of law alone; and, in finding as he did that the burden of proof had not been met, the trial judge weighed the evidence and found it wanting. What he said on the aspect of consistency of the evidence with guilt or no guilt does not afford any basis upon which to charge him with having erred in law alone; it was again simply an assessment of the evidence.

Appeal dismissed, LASKIN J. dissenting.

Solicitors for the appellant: Walsh, Micay & Company, Winnipeg.

Solicitor for the respondent: A.A. Sarchuk, Winnipeg.

[1] (1972), 6 C.C.C. (2d) 559.

[2] [1970] 1 O.R. 80, [1970] 1 C.C.C. 354, 6 C.R.N.S. 180.

[3] (1972), 6 C.C.C. (2d) 559.

[4] [1965] S.C.R. 174 at 194, 51 D.L.R. (2d) 312.

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