

CANADA / JUDGMENT

Poupart v. Lafortune

[1974] SCR 175

COURT

Supreme Court of Canada

DECIDED

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Poupart v. Lafortune Collection Supreme Court Judgments Date 1973-05-07 Report

[1974] SCR 175 Judges Fauteux, Joseph Honoré G  rald; Abbott, Douglas Charles; Martland, Ronald; Judson, Wilfred; Ritchie, Roland Almon; Spence, Wishart Flett; Pigeon, Louis-Philippe On appeal from Quebec Subjects Criminal law Decision Content Supreme Court of Canada Poupart v. Lafortune, [1974] S.C.R. 175 Date: 1973-05-07 Roger Poupart (Plaintiff) Appellant; and Claude Lafortune (Defendant) Respondent. 1972: May 25; 1973: May 7. Present: Fauteux C.J. and Abbott, Martland, Judson, Ritchie, Spence and Pigeon JJ. ON APPEAL FROM THE COURT OF QUEEN’S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC Criminal law—Armed robbery—Person accidentally injured by police officer—Officer not liable for damages—Criminal Code, 1970 (Can.), c. C-34, s. 25(4). Appellant, who is a chartered accountant, was accidentally injured by a shot fired by respondent, a police officer, during the perpetration of an armed robbery on certain business premises where he was engaged in auditing the company’s books. The accident occurred in a corridor where boxes were stacked along one wall, thus leaving a narrow passage. Respondent, having got to the entrance of the corridor, saw two of the three gunmen at the other end turning to the left in order to escape into another corridor. He then fired three times in their direction hitting the appellant whom he had not seen and who was immobilized in the corridor after being forced by one of the gunmen to remain there while he was making his escape. The decision of the Superior Court ordering respondent to pay damages was reversed by the Court of Appeal. Hence the appeal to this Court. Held: The appeal should be dismissed. The justification created by the provisions of s. 25(4) of the Criminal Code relieves the police officer of any civil or criminal liability, not only in respect of the fugitive but also in respect of any person who accidentally becomes an innocent victim of the force used by such an officer in the circumstances described in those provisions and established by the evidence. With regards to negligence attributed to respondent in the Superior Court, it might be inferred without doing violence to the evidence that appellant was partially or totally out of the view of respondent while he was in the clear space between boxes allowing access to an office and before he turned around in the direction of the shots fired. Even if appellant was temporarily within respondent’s range of view, in law this could not be grounds for holding the latter liable and requiring in such circumstances a

standard of care greater than that required of a reasonable man. Respondent was not engaged merely in performing an act permitted by law, but he was engaged in the hazardous performance of a grave duty imposed on him by law. And he incurs no liability for damage caused to another when without negligence he does precisely what the legislature requires him to do. APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec, reversing a decision of the Superior Court. Appeal dismissed. Jules O. Duchesneau, for the plaintiff, appellant. Hervé Bélanger, for the defendant, respondent. The judgment of the Court was delivered by THE CHIEF JUSTICE—Appellant is appealing against a decision of the Court of Appeal reversing a judgment of the Superior Court which ordered respondent, an officer of the Montreal City Police, to pay him the sum of \$39,049.25 in damages. These damages resulted from an injury accidentally inflicted on appellant by a short fired by respondent in the course of a police action, during the perpetration of an armed robbery on the business premises of the Slater Shoe (Canada) Company. The two lower courts were in substantial agreement on the facts relevant to a consideration of the questions of law raised in this appeal. I need only summarize these facts with reference to the following diagram, produced at the hearing as Exhibit P-6: The offices of the Slater Shoe (Canada) Company are on the second floor of a building situated at the corner of de Normanville Street and Rosemont Boulevard. The entrance on Rosemont Boulevard leads by a stairway to a waiting room, adjoining which are an information desk and the office of the Secretary-Treasurer of the company, André Giguère. In the centre of the premises are the main office and the sample room, which may be reached either by corridor "A" on one side or corridor "C" on the other. These two corridors are connected at the rear by corridor "B", which has three offices opening onto it, one of which, that in the centre, is the office of Mr. Gibault, the company president. The accident in question occurred in corridor "A", which had on its entire length, against the wall adjacent to the main office and the sample room, boxes stacked six to seven feet high and two feet wide, thus leaving a passage of only three feet six inches. On the day in question, December 21, 1962, at about three-thirty or three forty-five in the afternoon, there were at least ten persons on the premises, including appellant Poupart, Jean-Guy Héту and Richard Brunet, all three being chartered accountants, who were engaged in auditing the company's books. Poupart was talking to Giguère in the latter's office, when three gunmen, subsequently identified as Bernier, Bonnin and Périneau, and armed respectively with a machine gun, a .45 calibre revolver and a .22 calibre revolver, suddenly burst in and spread out through the premises. They assembled all those present, if not everybody, into the main office at gunpoint, physical violence being used if required, and made them line up against the wall adjacent to corridor "A". They immediately demanded to know where the "payroll money" was. The auditors Poupart, Héту and Brunet, to whom their question was mainly directed, replied that they did not work for the firm and so knew nothing about it. While Bernier kept the group covered the other two gunmen searched the premises, gun in hand, but without finding any money. In front of the group gathered in the main office Bernier singled out Héту and, pointing the machine gun towards the latter's legs, told him he would count to five, by which time someone had better provide

the information required; he counted to five; drew the trigger of his weapon; a click was heard; but no shot was fired. At this point officers Lafortune and Picard, alerted by radio to the fact that an armed robbery was in progress at this location, arrived and rushed into the office. Someone shouted "Police". The officers were greeted by shots and subsequently exchanged shots with the gunmen. The following, according to the part of Lafortune's testimony cited in the judgment at trial, is a summary of what happened between the arrival of the police officers and the time the accident took place. As he entered the firm's offices Lafortune, looking through the glass partition adjoining the information desk, he saw a group of people in the main office with their hands up. He crouched down as he went round the counter of the reception desk, intending to surprise the thieves from behind. When he got to the end of the counter he saw Bernier and Bonnin, who were rather standing midway between the second and third columns in corridor "C". He aimed his gun at them to hold them at bay, and as he did so Périneau came out of Giguère's office and fired in his direction. Lafortune returned the fire and shouted "Everybody down". Then, as he turned back towards Bonnin and Bernier, he saw the latter raise his machine gun and try to fire at him. Lafortune fired again and Bernier and Bonnin ran through the main office towards corridor "A". Lafortune was acquainted with the premises, having been there in response to an earlier call, and knew that corridor "A" could be reached through the waiting room at the front, without going through the main office. He ran that way to cut off the retreat of the two gunmen. When he got to the entrance of the corridor, he saw them at the other end turning to the left in order to escape into corridor "B". Lafortune fired three times in their direction. Immediately after his third shot, he saw in corridor "A" for the first time an individual clutching his left shoulder: this was appellant, who, as we shall see from his testimony, had just been hit, and who took refuge in the entrance to the room where the stationery is kept, at point X on the diagram. As the two gunmen had disappeared, Bonnin jumping outside through a window and Bernier continuing along corridor "B", Lafortune immediately went to lend assistance to his associate Picard in disarming and capturing Périneau, who was in Giguère's office. Lafortune summarized what occurred on the premises after the accident as follows. As Périneau had been captured, Lafortune went into the main office and ordered the employees to stay down, telling them that a third gunman was still on the premises. Waiting for developments, he concealed himself behind the third column in corridor "C". A few moments later, he at first saw the barrel of Bernier's machine gun protruding past the corner of corridors "B" and "C", then the head of Bernier himself, who immediately disappeared as Lafortune fired at him. Lafortune remained where he was while Picard left the premises to take steps for the arrest of Bonnin, who had escaped. When Picard returned with police reinforcements he proceeded to join Lafortune in corridor "B". Picard broke down the door of Gibault's office, and the two men found Bernier inside, holding Gibault hostage. Bernier was then apprehended. On his part appellant Poupart testified, in short, concerning the circumstances immediately preceding the accident, that as Bernier was backing out of the main office while facing him, Bernier forced Poupart, using his machine gun, to follow him into corridor "A" and remain there while he was making his

escape towards the rear of the corridor; that while being then immobilized in the corridor opposite the entrance to the main office, Poupart heard shots coming from the front end of the corridor behind him; and as he turned around in this direction he was hit in the left shoulder. He indicated at point Y on the diagram where he was hit, and point X, the entrance to the stationery room where he took refuge. It is hardly necessary, but very relevant nonetheless, to add to this brief account of the circumstances essential for consideration of the questions of law that the foregoing events, especially those which took place between the time the police officers arrived and the moment the accident occurred, developed swiftly in an atmosphere of collective tension, which, be it noted, was quite properly regarded by several witnesses as responsible for the few discrepancies or conflicts of minor importance contained in the evidence; In his defence to the damage suit brought against him respondent pleaded the following provisions of s. 25 of the Criminal Code:

25. (1) ...

(2) ...

(3) ...

(4) A peace officer who is proceeding lawfully to arrest, with or without warrant, any person for an offence for which that person may be arrested without warrant, and every one lawfully assisting the peace officer, is justified, if the person to be arrested takes flight to avoid arrest, in using as much force as is necessary to prevent the escape by flight, unless the escape can be prevented by reasonable means in a less violent manner. The Superior Court justified as follows its judgment ordering officer Lafortune to pay compensation for the damage resulting from this unfortunate accident: (i) Relying on the rule followed by the courts in automobile accident cases, and stated in *Swartz v. Wills*[1] as follows: Where there is nothing to obstruct the vision and there is a duty to look, it is negligence not to see what is clearly visible and also being of the opinion that, even in circumstances where the atmosphere is heightened by tension, a police officer should, by reason of the training he has received, show more “sang-froid” and control than another person would, it held that the fact that officer Lafortune did not see appellant in the corridor constituted an act of negligence; (ii) it then attributed a second element of negligence to the officer, on account of his so-called lack of skill with shooting firearms, inferred from the fact that each of the three bullets fired by him in corridor “A” hit a target other than the gunmen; (iii) finally, after examining the question of whether the gunmen were in fact fleeing at the time Lafortune fired in their direction, and whether the officer was in law protected by the aforementioned provisions of s. 25 against a damage suit by an innocent victim, as he is against an action by the fugitive whose escape he seeks to prevent, the learned judge stated his adoption of the position most favourable to respondent, referred to the decisions of this Court in *Prietsman v. Colangelo et al.*[2] and *Beim v. Goyer*[3], and held that in view of the two elements of negligence previously mentioned, Lafortune could not avail himself of the protection of these provisions of the Code. In the Court of Appeal Rivard J.A., in reasons concurred in by

Choquette J.A., after summarizing the facts clarified the meaning and scope of the decisions of this Court in the Priestman and Beim cases, as well as the distinctions attaching to the particular circumstances of each of these cases and the present one, declared that this was an emergency situation compelling resort to severe measures, that the firearm was the means Lafortune had to adopt to protect those present, and himself, as well as to prevent the gunmen from escaping and ensure their arrest, and that having regard to the circumstances he was dealing with, the reproach made against Lafortune by the Superior Court, of having negligently performed his duty, could not be justified. Owen J.A., dissenting, only stated that in his opinion no error in the Superior Court judgment had been shown on behalf of Lafortune. Hence the appeal by Poupart against that judgment dismissing his action. Two observations must be made at once, with the greatest respect, regarding certain doubts expressed in the reasons for judgment of the learned trial judge. First, I should say that if only because of the decision of this Court in the Priestman case *supra*, there is no reason to doubt, in my view, that the justification created by the aforementioned provisions of s. 25 relieves the police officer of any civil or criminal liability, not only in respect of the fugitive but also in respect of any person who accidentally becomes an innocent victim of the force used by such an officer in the circumstances described in those provisions. And I would add that, if only because of the evidence that Bonnin leapt from a second-storey window when Lafortune fired at him and Bernier, there seems little doubt that the two gunmen were really taking flight. In short, subject to consideration of the allegation of negligence, I feel that all the circumstances necessary for Lafortune to be entitled to the justification provided in the aforementioned provisions of s. 25 are present and fully established by the evidence. The allegation of negligence: Poupart's testimony indicates that he was hit in his left shoulder by a bullet when, after standing still in the corridor opposite the entrance to the main office, he turned around in the direction of the first two shots fired at the gunmen. Before making this movement, was he in the clear space left almost at the centre of the row of boxes to allow access to the main office, and was he therefore, for a moment or so, out of the view of Lafortune, partially or totally, so that he could not be said to have been "clearly visible" to the latter, who, running, was arriving at the end of the corridor to cut off any possible retreat by the gunmen? This might certainly be inferred without doing violence to the evidence. Lafortune asserted that he did not see appellant while trying to prevent the escape of the gunmen by firing in their direction. Indeed, even if Poupart was at that moment temporarily within Lafortune's range of vision, I am respectfully of the opinion that in law this could not be grounds for holding the police officer liable by relying, moreover, on an analogy which cannot be regarded as valid, and by requiring in addition, in such circumstances, a standard of care greater than that required of a reasonable man. With regard to the analogy drawn by the trial judge between the case of the driver of an automobile, and the case of a police officer placed in the circumstances under consideration, I would say that in contrast with the driver of an automobile, Lafortune was not engaged merely in performing an act permitted by law, but, which is quite a different matter, as was pointed out at p. 618 in the Priestman case *supra*, he was engaged in the hazardous performance of a grave duty imposed on him by law. In carrying out such a duty a peace officer must undoubtedly refrain

from making any unjustifiable use of the powers relating to it. This principle was recognized in *Regina v. Waterfield and Another*[4], at p. 170 et seq., and recently recalled in this Court in the as yet unpublished decision of *Knowlton v. The Queen*. However, while a police officer is not relieved of a duty to take reasonable care, that is care the degree of which must be determined in relation to the particular circumstances of the case to be decided, the actions of Lafortune cannot, in a case like that before the Court, be evaluated as they would be if it were a case in which the precautions to be taken in accordance with the duty not to injure others were not conditioned by the requirements of a public duty. In short, the police officer incurs no liability for damage caused to another when without negligence he does precisely what the legislature requires him to do; see *Priestman* case *supra*. Interpreted otherwise the justification provided by s. 25(4) would be reduced to a nullity. In all defence, therefore, I would say with regard to the legal grounds given in support of the judgment of first instance that the Court of Appeal properly intervened to reverse that judgment, and, for the reasons given above and in the judgment *a quo*, I would dismiss the appeal with costs. Appeal dismissed with costs. Solicitors for the plaintiff, Appellant: Smith, Anglin, Laing, Weldon & Courtois, Montreal. Solicitors for the defendant, respondent: Côté, Péloquin, Mercier, Normandin, Ducharme & Bouchard, Montreal.

[1] [1935] S.C.R. 628.

[2] [1959] S.C.R. 615.

[3] [1965] S.C.R. 638.

[4] L.R. [1964] 1 K.B. 164.

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