

CANADA / JUDGMENT

R. v. Charlie

2020 BCCA 39

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 39 R. v. Charlie COURT OF APPEAL FOR BRITISH COLUMBIA Citation: R. v. Charlie, 2020 BCCA 39 Date: 20200124 Docket: CA44887 Between: Regina Respondent And James David Junior Charlie Appellant Restriction on publication: A publication ban has been imposed under s. 486.5 of the Criminal Code restricting the publication, broadcasting or transmission in any way of evidence that could identify a victim/witness/undercover officer. This publication ban applies indefinitely unless otherwise ordered. SEALED IN PART Before: The Honourable Madam Justice Saunders The Honourable Mr. Justice Fitch The Honourable Mr. Justice Butler On appeal from: An order of the Supreme Court of British Columbia, dated October 12, 2017 (R. v. Charlie, Prince George Docket 36893-13). Oral Reasons for Judgment Counsel for the Appellant: M.P. Klein, Q.C. R. Thirkell Counsel for the Respondent: D.M. Layton, Q.C. Place and Date of Hearing: Vancouver, British Columbia January 24, 2020 Place and Date of Judgment: Vancouver, British Columbia January 24, 2020 Summary: The appellant was convicted of first degree murder. In the course of deliberations, the jury asked several questions. One question concerned the mens rea of party liability for murder. Held: Appeal allowed. The judge gave an answer that did not describe the mens rea correctly and omitted reference to knowledge the principal offender intended to commit the crime. The verdict cannot be saved and a new trial is required.

- [1] SAUNDERS J.A.: James David Junior Charlie was convicted by a jury on October 12, 2017 of one count of first degree murder of Fribjon Bjornson on or about January 12, 2012, at or near Fort St. James, British Columbia. On August 31, 2016, two other persons pleaded guilty to second degree murder of Mr. Bjornson and Mr. Charlie pleaded guilty to offering indignities to a dead body or human remains, between January 12, 2012, and February 1, 2012, at or near Fort St. James.
- [2] The circumstances of Mr. Bjornson's death are brutal. The theory of the Crown was that Mr. Charlie was one of four people who assaulted Mr. Bjornson over a prolonged period of time in the basement of a residence, that Mr. Charlie provided a wire or cord to one of the men who had beaten Mr. Bjornson, knowing the man would use it to strangle Mr. Bjornson, and that with others, Mr. Charlie took Mr. Bjornson's dead body to the shore of nearby Stuart Lake where it was covered with snow for about a week, before he and another person moved it to a location where the indignities occurred.

- [3] At trial, the question for the jury was whether Mr. Charlie was guilty of first degree murder or alternatively, second degree murder or manslaughter. Those questions engaged the law on party liability for murder, a mens rea issue. The judge instructed the jury on the elements of first degree murder, second degree murder and manslaughter, and on the law of party liability. The judge did not instruct the jury on the included offence of attempted murder, nor on the defence of intoxication.
- [4] The judge did not provide the jury or counsel with a copy of his instructions.
- [5] During their deliberations, the jury asked several questions of the trial judge. The first question had three parts:
- 1) Can we have a copy of the judge's statement regarding elements of 1st & 2nd degree murder and manslaughter? - We would prefer this is writing rather than the judge explaining it to us.
 - 2) We are unclear on the element of forcible confinement.
 - 3) For 2nd degree à the element of unlawful act w assault with weapon [sic]. Is the only consideration the cord?
- [6] In response, the judge provided the jury with a 31 page excerpt of his charge to the jury, provided an answer on the jury's second part of its question on forcible confinement, and asked for clarification of the third part of the question.
- [7] The jury then returned with a second question, restating the third part of its earlier question that the judge had not understood. That question focussed on the character of "the cord" as a weapon used in the assault. The judge answered that question. That evening, the judge received another question from the jury. It disclosed part of the jury's deliberations. The judge advised counsel the next morning that he had received this question the night before, would seal it, and would ask the jury to rephrase the question in a way that did not disclose their deliberations. The jury returned this question: Please re-explain the criteria for first degree murder, second degree murder, and manslaughter. Please re-explain forcible confinement for primary and secondary parties and what constitutes a continuous event and two or more separate events.
- [8] The judge's response to this request was lengthy. The answer fell into two portions. First, he addressed the potential that murder and unlawful confinement could be one, or two, transactions and provided examples. Second, he addressed the actus reus and the mens rea for party liability for murder including: To be a party to an offence or to - or to an offence you have to first find that the principal actually committed the offence. Then you have to find that the party did something and that act actually aided - that is assisted or abetted - that is encouraged the principal to commit the offence. You also have to find that the party intended that his actions would aid - again - assist or abet, encourage, the principal to do the act. So they have - the - the party has to do something that actually assists and they have to actually intend to actually insist - to assist the party, the principal, rather.

- [9] Mr. Charlie appeals from conviction. He says the judge erred in several ways in answering the jury's questions, in refusing to instruct the jury on the partial defence of intoxication, and in failing to instruct the jury on all available verdicts, specifically the included offence of attempted murder. On the questions, Mr. Charlie contends, in particular, that the judge erred in answering the jury's last question by giving a faulty instruction on the mens rea of party liability for murder.
- [10] In most appeals the Crown vigorously supports the trial results, but not always is it able to do so consistent with its most important duty, in the public interest, to uphold the administration of justice and ensure trial process is fair. This is one of those cases in which the Crown, acting in its highest tradition and I am sure after much reflection, does not contest all of the grounds of appeal raised by the appellant.
- [11] The Crown does dispute all of the grounds of appeal raised except the one concerning the answer on the mens rea of party liability for murder. On that ground, on the mens rea, the Crown concedes that the appeal should be allowed because the instruction suggests that a person can be convicted as a party to murder provided he or she intended to assist the principal in doing "the act", and does not instruct the jury that the party must have known that the principal intended to commit the crime: *R. v. Briscoe*, 2010 SCC 13 at para. 17; *R. v. Podolski*, 2018 BCCA 96 at paras. 194-195. The Crown further acknowledges that the verdict cannot be saved under the curative proviso of s. 686(1)(b)(iii) of the Criminal Code, R.S.C. 1985, c. C-46.
- [12] We have had the opportunity to review the troubled instruction, and I agree that the instruction I have quoted contains the error conceded by the Crown. The error is central to the instruction on the mens rea of party liability for murder. As such, it is not a harmless error. Nor can it be said that although serious, the evidence is so overwhelming that a reasonable and properly instructed jury would inevitably have convicted: *R. v. Van*, 2009 SCC 22.
- [13] While this conclusion is a burden to all those interested in pressing the case to a decisive conclusion, particularly the family and friends of Mr. Bjornson, and also those called on to take part in the trial, in my view, the verdict must be set aside and a new trial ordered.
- [14] Accordingly, I would set aside the conviction and order a new trial.
- [15] FITCH J.A.: I agree.
- [16] BUTLER J.A.: I agree.
- [17] SAUNDERS J.A.: The appeal is allowed, the conviction is set aside and a new trial is ordered. "The Honourable Madam Justice Saunders"

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