

CANADA / JUDGMENT

R. v. Cooper

2020 BCCA 206

COURT

British Columbia Court of Appeal

DECIDED

20 July 2020

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2020 BCCA 206 R. v. Cooper

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Cooper,

2020 BCCA 206

Date: 20200720

Docket: CA46080

Between:

Regina

Respondent

And

Malcolm Lyle Cooper

Appellant

Before:

The Honourable Madam Justice Bennett

The Honourable Mr. Justice Goepel

The Honourable Madam Justice Griffin

On appeal from: Orders of the Supreme Court of British Columbia, dated

August 10, 2018 (conviction) and May 1, 2019 (sentence) (R. v. Cardoso,

2018 BCSC 1786 (conviction), New Westminster Docket X080507).

Reasons for Judgment

Counsel for the Appellant

(via videoconference):

E. Purtzki

Counsel for the Respondent

(via teleconference):

C. Tomusiak

Place and Date of Hearing:

Vancouver, British Columbia

June 4, 2020

Place and Date of Judgment:

Vancouver, British Columbia

July 20, 2020

Written Reasons by:

The Honourable Madam Justice Bennett

Concurred in by:

The Honourable Mr. Justice Goepel

The Honourable Madam Justice Griffin

Summary:

Mr. Cooper and others participated in a home invasion. Following a trial by judge alone, he was found guilty of several offences, three of which involved the use or discharge of firearms. He appeals from the convictions for the firearms offences on the basis that the trial judge erred in his application of the test for party liability. Held: Appeal allowed, new trial ordered. The trial judge applied the incorrect legal test in finding Mr. Cooper guilty as a party to the firearms offences, and the convictions cannot be sustained by application of s. 686(1)(b)(iii) of the Criminal Code.

Reasons for Judgment of the Honourable Madam Justice Bennett:

- [1] Malcolm Cooper and three others committed crimes in the course of what is colloquially known as a "home invasion."

- [2] Several firearms were found at the scene, and shots had been fired from one of them. Although the trial judge concluded that a co-accused had fired those shots and that Mr. Cooper did not have possession of any of the guns, he convicted Mr. Cooper as a party to three firearms offences. Mr. Cooper appeals those convictions on the basis that the judge erred in his analysis of party liability. He does not appeal his other convictions stemming from the home invasion.
- [3] The three firearms offences were: committing robbery while using a restricted or prohibited firearm, contrary to s. 344(1)(a) of the Criminal Code (Count 2); using a firearm while committing, attempting to commit, or during flight after committing or attempting to commit the indictable offence of breaking and entering, contrary to s. 85(1) (Count 4); and intentionally discharging a firearm while being reckless as to the life or safety of another person, contrary to s. 244.2(1)(b) (Count 8). In relation to Count 2, Mr. Cooper does not dispute that he is guilty of robbery.
- [4] In my view the appeal should be allowed and a new trial ordered on the three firearms offences.

Background

- [5] On November 29, 2016, Robert Morrison Sr. was at his home with his partner, Misha Moayed, their four-year-old daughter, Alison, his son, Robert Morrison Jr., his son's girlfriend, Brittney Parker, and his brother, John Morrison. Four intruders broke into the house on the ground floor and proceeded upstairs.
- [6] Mr. Morrison Jr. and Ms. Parker were on the ground floor. They hid in a closet and called 9-1-1. Over the course of the home invasion, Mr. Morrison Jr. heard at least two gun shots, some banging, and requests for money.
- [7] Mr. Morrison Sr. was confronted by one intruder with a gun but was able to escape to a neighbour's house. He called 9-1-1 and remained there until police arrived.
- [8] John Morrison was beaten by the intruders and has no memory of the home invasion.
- [9] Ms. Moayed had been in her bedroom with her daughter. She heard noises and emerged to find three intruders beating John Morrison. A fourth intruder was standing off to the side.
- [10] At some point later, all four intruders, John Morrison, Ms. Moayed and her daughter were together in a bedroom. During that time, one of the intruders fired a gun. Ms. Moayed testified that this individual had a short, stocky build. She provided physical descriptions of the other intruders as well.

- [11] The police arrived shortly after the gun was fired. Three officers entered the front of the house and three went around the back. The police officers first encountered John Morrison, bloodied, near the front door. They subsequently found Ms. Moayed in her bedroom with her daughter and one of the intruders, John MacInnis. A second intruder, Tristan Wight, was located in another bedroom, where officers also discovered a second firearm. Mr. MacInnis and Mr. Wight were the only two intruders in the house.
- [12] One of the police officers who had gone around the back of the house saw someone jump over a fence. Officers searched the area and eventually found and arrested the appellant, Mr. Cooper. They also located a Smith & Wesson pistol on the ground in the backyard. Mr. Cooper's hands and face later tested positive for gunshot residue, but an expert testified that the residue could have been transferred.
- [13] A fourth intruder, Mr. Marcos Cardoso, was arrested at a 7-Eleven store in the early morning hours of the next day. Among the four intruders, he was the only one who matched the description given by Ms. Moayed as to who shot the gun in her bedroom.
- [14] Mr. Cardoso and Mr. Cooper were tried together. Mr. Wight and Mr. MacInnis both pleaded guilty and testified at Mr. Cooper's trial.

Trial judgment

- [15] The trial judge began his judgment by recounting the testimonies of the various witnesses at trial. His review of the testimony and evidence is extensive. He concluded that Mr. Cardoso had fired the gun in Ms. Moayed's bedroom based on her description of the four intruders.
- [16] Defence counsel conceded that Mr. Cooper was guilty of the first three counts of the indictment: breaking and entering; committing robbery (while using a firearm); and unlawfully confining John Morrison, Ms. Moayed, and her daughter. With respect to the second count, the concession of guilt was only to the offence of robbery--not to using a firearm during the commission of that robbery.
- [17] The judge found (at para. 150) that Mr. Cooper was "actively engaged" in the events in the bedroom, thus attracting liability for the firearms-related offences as a party. Citing s. 21(c) of the Criminal Code, (a provision that does not exist) he said this:
- [204] I conclude, given the nature and objective of the home invasion, the retrieval of three handguns from the scene, the fact there were no other forms of restraint available to the accused, and that it was known to all participants that guns were going to be used prior to the entry in the residence and that it was objectively foreseeable to all in those same circumstances, (going into a home for a perceived million-dollar robbery), that resistance was foreseeable and that guns might be discharged by one or more of the intruders carrying such.

- [18] The judge was not satisfied beyond a reasonable doubt that Mr. Cooper was in possession of the Smith & Wesson found in the backyard. He accordingly acquitted Mr. Cooper of Counts 9 and 10 relating to that weapon.

Issues

- [19] Mr. Cooper and the Crown agree that the judge erred in his reference to the Criminal Code section, and submit that since the Crown only relied on s. 21(2) at trial, this is the provision that the judge must have intended to rely on. I will proceed on the basis that the judge intended to refer to s. 21(2).
- [20] The issue on appeal is whether the trial judge applied the correct test when convicting Mr. Cooper of the firearms related offences as a party pursuant to s. 21(2).

Positions of the parties

- [21] Mr. Cooper submits that the trial judge applied the wrong legal test for finding him criminally liable as a party to the firearms offences.
- [22] He submits that in relation to Counts 2 and 4, the judge erred in finding actual knowledge that "all participants" knew that guns were going to be used prior to entry into the residence. He submits that the evidence does not support a finding of actual knowledge on the part of Mr. Cooper. He further submits that the judge did not consider whether Mr. Cooper "ought to have known" that the firearms were going to be used. Secondly, he says the judge erred by failing to go on and analyse whether the use of firearms was a likely or probable consequence of the originally intended criminal act. That element of the offence, he submits, was not considered.
- [23] In relation to Count 8, Mr. Cooper contends that the judge erred in his analysis (at para. 204) by finding that "resistance was foreseeable and that guns might be discharged by one or more of the intruders" (emphasis added), rather than determining whether Mr. Cooper foresaw that the other crime would likely or probably result from the commonly intended unlawful purpose.
- [24] He also submits that the judge did not distinguish among the three counts, and failed to assess the knowledge component with respect to those counts.
- [25] The Crown submits that when the reasons are read as a whole and in conjunction with the submissions made at trial, it is clear that the judge was aware of the correct legal test, and that he applied it to the facts. Alternatively, if the judge did err in law, the Crown says that the appeal should be dismissed because there is no substantial wrong or miscarriage of justice, invoking the curative proviso in s. 686(1)(b)(iii) of the Criminal Code.

Discussion

Legal framework

- [26] Section 21(2) of the Criminal Code permits a court to find someone culpable of a crime when it is the foreseeable and probable consequence of a common intention to carry out an unlawful purpose:
- (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.
- [27] Section 21(2) has three essential elements: (1) an agreement to participate in the unlawful purpose; (2) the commission of an incidental and different crime by another participant; and (3) knowledge, that is, foreseeability of the likelihood of the incidental crime being committed: see *R. v. Cadeddu*, 2013 ONCA 729 at para. 53; and *R. v. Simon*, 2010 ONCA 754 at para. 43.
- [28] The unlawful purpose is different from the crime charged. In *R. v. Simpson*, [1988] 1 S.C.R. 3 at p. 11, Justice McIntyre, for the Court, noted "a person may become a party to an offence [pursuant to s. 21(2)] committed by another which he knew or ought to have known was a probable consequence of carrying out an unlawful purpose in common with the actual perpetrator."

Analysis

- [29] The trial judge focussed on the main issues in the case of who did what and when. He canvassed the evidence thoroughly. He concluded that because Mr. Cooper was "actively engaged" in the events in the bedroom (when a gunshot was fired), he was guilty of Counts 2, 4 and 8. At no time did he review the elements that are necessary to attract party liability under s. 21(2). I am not suggesting that reasons for judgment must read like a jury instruction; however, by failing to turn his mind to the actual elements of the test, the judge fell into error.
- [30] There is no dispute that there was an agreement to commit an unlawful purpose, be it breaking and entering, unlawful confinement or robbery. There is also no dispute that Mr. Cardoso committed the incidental crime--the firearms-related offences. The issue is whether the Crown proved that Mr. Cooper had the necessary knowledge component of the incidental offence.
- [31] The judge concluded that by being actively engaged in the primary offence, liability flowed for the incidental offence. Active engagement in the primary offence does not necessarily mean the elements for party liability are met for an incidental offence. Here, the trial judge failed to consider whether it was foreseeable that the firearms would be used or discharged as an incidental crime to the primary offence.

- [32] In addition, when the judge later stated (at para. 204) that "all participants [knew] that guns were going to be used and that it was objectively foreseeable that resistance was foreseeable and that guns might be discharged" (emphasis added), he committed an error in law. The test, as noted above, is whether it was reasonably foreseeable that the incidental offences would occur, not whether they "might" occur.
- [33] With respect, the trial judge applied the wrong test when he reached his conclusion in relation to Mr. Cooper's guilt on the three offences via party liability.

Application of curative proviso

- [34] Where there is an error of law (unlike a miscarriage of justice or an unreasonable verdict), the Crown may rely on s. 686(1)(b)(iii) of the Criminal Code to sustain the conviction by showing that, notwithstanding the error, there is no substantial wrong or miscarriage of justice. In order to do this, the error must be either (1) so harmless or minor that it could not have had any impact on the verdict, or (2) not minor, but the evidence against the accused was so overwhelming that any other verdict would have been impossible: *R. v. Van*, 2009 SCC 22 at para. 34. If proceeding under the second category, any possible measure of doubt concerning the strength of the Crown's case is afforded to the accused: *Van* at para. 36.
- [35] In my view, the error committed was not a harmless one. The trial judge acquitted Mr. Cooper of actual possession of any of the guns and failed to properly apply the knowledge component of the legal test under s. 21(2).
- [36] The evidence supporting actual knowledge by Mr. Cooper that the others carried weapons is not overwhelming. Furthermore, the evidence pointing to reasonable foreseeability that Mr. Cardoso would fire his weapon is not so overwhelming that it can be said that no wrong or substantial miscarriage of justice would result if the convictions are sustained. Therefore, I would not apply the curative proviso in these circumstances.
- [37] Mr. Cooper says there must be a new trial, as there is evidence that may support a conviction if the proper test is applied. He does not seek an acquittal.

Conclusion

- [38] I would allow the appeal, set aside the convictions for the firearms offences found in Counts 2, 4 and 8, and order a new trial for those offences.

"The Honourable Madam Justice Bennett"

I AGREE:

"The Honourable Mr. Justice Goepel"

I AGREE:

"The Honourable Madam Justice Griffin"

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