
CANADA / JUDGMENT

R. v. F.M.

2008 BCCA 111

COURT

British Columbia Court of Appeal

DECIDED

18 March 2008

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2008 BCCA 111 R. v. F.M.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. F.M.,

2008 BCCA 111

Date: 20080318

Docket: CA034635; CA034636

CA034635

Between:

Regina

Appellant

And

F.M.

Respondent

CA034636

Between:

Regina

Appellant

And

T.J.S.

Respondent

BAN ON DISCLOSURE

pursuant to s. 111 of the Y.C.J.A.

Before:

The Honourable Mr. Justice Donald

The Honourable Mr. Justice Smith

The Honourable Mr. Justice Tysoe

S. Bell

Counsel for the Appellant

D. Redekopp

Counsel for the Respondent, F.M.

J.J. Blazina

Counsel for the Respondent, T.J.S.

Place and Date of Hearing:

Vancouver, British Columbia

6 November 2007

Place and Date of Judgment:

Vancouver, British Columbia

18 March 2008

Written Reasons by:

The Honourable Mr. Justice Smith

Concurred in by:

The Honourable Mr. Justice Donald

The Honourable Mr. Justice Tysoe

Reasons for Judgment of the Honourable Mr. Justice Smith:

I

- [1] The appellants stood trial in the Supreme Court of British Columbia before the Honourable Mr. Justice Grist sitting as a youth court judge pursuant to s. 13 of the Youth Criminal Justice Act, S.C. 2002, c. 1, on an indictment charging them jointly that on or about July 18, 2005 (count 1) they robbed and (count 2) they committed aggravated assault of Mewa Bain, and that on or about July 19, 2005 (count 3) they committed second degree murder of Shingara Thandi. On November 10, 2006, the trial judge convicted them on counts 1 and 2 and acquitted them of second degree murder on count 3 but convicted them of the included offence of manslaughter.
- [2] The appellant F.M. was fifteen years old and the appellant T.J.S. was thirteen years old at the time of the offences. Being "twelve years old or older but less than eighteen years old", they were "young persons" as defined in s. 2(1) of the Youth Criminal Justice Act. F.M. was sentenced, as an adult, to forty-nine months' imprisonment, after receiving credit of twenty-three months for pre-sentencing custody. T.J.S. was sentenced to twenty-six and one-half months after credit of nine and one-half months.
- [3] The trial judge acquitted of second degree murder because he was not satisfied beyond a reasonable doubt that the appellants knew the bodily harm they inflicted on Mr. Thandi was likely to cause his death, a necessary element of murder under in s. 229(a)(ii) of the Criminal Code, R.S.C. 1985, c. C-46:
229. Culpable homicide is murder
- (a) where the person who causes the death of a human being
- []
- (ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not [].
- [4] The Crown appeals from these acquittals and seeks a new trial on count 3. A Crown appeal lies from an acquittal on a question of law alone: Criminal Code, s. 676(1)(a). The Crown contends that the trial judge made the following errors of law:
1. The learned trial judge erred in law in holding that youths are incapable of foreseeing the natural consequences of their acts.
 2. The learned trial judge erred in law by basing the acquittal on an assumption about the capacity of youth to foresee serious consequences of their actions, inconsistent with Parliament's decision to extend the reach of criminal liability for all offences to "young persons" as defined in the Youth Criminal Justice Act.

3. The learned trial judge erred in law by concluding that he would not apply the common sense inference regarding intent in this case, absent any evidence specific to the accused to suggest they were unable to foresee that the bodily harm inflicted by them was likely to cause death.

[5] For the reasons that follow, I have concluded that the trial judge did not err in law as contended by the Crown and I would dismiss the appeal.

II

[6] The trial judge set out the facts succinctly in his reasons for judgment:

[1] [.] Mr. Mewa Bains was attacked and robbed on July 18th, 2005. Mr. Shingara Thandi was subjected to a similar but more severe attack the next day, July 19th, 2005. Mr. Thandi subsequently died on August 6th, 2005 as a result of heart failure following surgery performed to treat the head injuries received in the beating. Mr. Thandi's age was not entered into evidence; Mr. Bains was 83 years of age.

[2] The evidence is clear that the two accused, T.S., who was then 13 years of age, and F.M., then 15 years of age, were responsible for the attacks on both of these men. They, and several others, set out on July 18th to find other young people they could confront and fight, intending to take any money they might have. They carried a souvenir wooden baseball bat with them. When they were unsuccessful in finding anyone to set upon, T.S. and F.M. and another, T.R., went to the washroom in the Bear Creek Pavilion. The pavilion was a place where elderly Indo-Canadian men would often gather. T.R. was told to stay outside while T.S. and F.M. went into the washroom. They found Mr. Bains inside and struck him with the bat, or the bat and their fists. He fell to the floor and the two accused took his wallet which contained \$150.

[3] Mr. Bains suffered significant bruising over the back of his head, his right eye and to his upper chest. Over the next month he developed a subdural haematoma from the blow or blows to the head, which needed neurosurgery. Not long after this surgery, Mr. Bains suffered a stroke and died. There is no evidence the stroke was necessarily connected to the assault, but it is clear the injuries he received were sufficient to found the charge of aggravated assault.

[4] On the next day, the 19th of July, 2006, the two accused again came to the park. On this day, they brought the souvenir bat and a short aluminium bat taken from Mr. T.S.'s aunt's home. Shortly after 2:00 p.m. in the afternoon, they returned to the washroom, on this occasion attacking Mr. Thandi. He was struck at least three times to the head, causing fractures to the side of his head and to the back of his skull. He also suffered facial fractures and his dentures were broken. The blow or blows to the side and front of his head resulted in lacerations that bled profusely. He fell to the ground and was not able to get up.

- [5] Mr. Thandi was found in the washroom shortly after the attack. He was taken to hospital. His injuries resulted in an acute subdural haematoma. He was taken to the Royal Columbian Hospital for neurosurgery. The surgery was successful in relieving what otherwise would have been a condition that would have led to his death through the bleeding in his skull, but two days later, on July 21st, Mr. Thandi suffered a heart attack while in the intensive care ward. Mr. Thandi had coronary artery disease. His coronary arteries were subject to a 60 to 75 percent blockage. On July 28th, he had a second heart attack which caused his heart to stop and he died.
- [6] The two accused left the washroom after the attack on Mr. Thandi, but did not leave the park. They went back to a grassy area by the swimming pool area where other young people gathered. The two accused were known to three of the girls present there. They each testified they saw a bat concealed in T.S.'s clothing and that he told them that he and F.M. had just beaten a man in the men's washroom. The accused then left to an adjacent treed area and changed clothes and concealed the bats.
- [7] Two of the girls went to the washroom to see if what they had been told was true. Mr. Thandi was still on the floor of the washroom. After the ambulance and police arrived, they pointed out T.S. as likely responsible for the assault. T.S. had returned to the washroom area and was arrested by the attending police officer. F.M. stayed at the grassy area near the pool. The two girls who had gone to the washroom returned after T.S. was arrested and confronted F.M.
- [8] Ms. M. asked him why he had done it. He said that they needed money. Ms. B. said that when asked why they did it, F.M. said he did not know and that he did not want to talk at that location where others could overhear. The three moved to a bench where the two girls told him that it was best to turn himself in. F.M. then telephoned his father on his cell phone and told him that he had done a bad thing, that he and his friend had jumped a man and that he was badly hurt, and that he wanted to turn himself in. F.M. was arrested after this call and subsequently pointed out the area where the bats and clothing had been left.

III

- [7] There is no disagreement, and there was none before the trial judge, that to obtain murder convictions the Crown was obliged to prove the appellants each had a subjective foresight of death. In *R. v. Martineau*, [1990] 2 S.C.R. 633, Lamer C.J.C., writing for the court, concluded (at 646) that "it is a principle of fundamental justice that a conviction for murder cannot rest on anything less than proof beyond a reasonable doubt of subjective foresight of death". In *R. v. Creighton*, [1993] 3 S.C.R. 3, McLachlin J. (now C.J.C.) said (at 58), "Subjective mens rea requires that the accused have intended the consequences of his or her acts, or that knowing of the probable consequences of those acts, the accused has proceeded recklessly in the face of the risk".

[8] Similarly, there is no disagreement, and there was none before the trial judge, that this mens rea requirement was applicable to the appellants despite their young age. Parliament has fixed the age of criminal responsibility at twelve years by s. 13 of the Criminal Code:

13. No person shall be convicted of an offence in respect of an act or omission on his part while that person was under the age of twelve years.

By virtue of Young Offenders Act, R.S.C. 1980-81-82, c. 110, s. 72, this provision replaced ss. 12 and 13 of the Criminal Code, R.S.C. 1970, c. C-34, which set out the historic common law categories by which children under the age of seven were deemed to be incapable of committing a crime; children seven years old and less than fourteen were presumed to be incapable in the absence of proof of guilty knowledge of wrongdoing, which could not be presumed from the mere commission of the act; and children aged fourteen years and older were to be held responsible for their actions as if they were adults: see *Reg. v. Smith (Sidney)* (1845), 1 Cox C.C. 260, cited in *C. (A Minor) v. D.P.P.*, [1996] 1 A.C. 1 at 6 (Q.B.D.-D.C.).

[9] Nothing in the Youth Criminal Justice Act has modified the requirements of criminal liability as they apply to young persons. That statute is concerned primarily with the consequences for young persons of their crimes: see *R. v. M. (J.J.)*, [1993] 2 S.C.R. 421 at 428, 430, and *R. v. B.W.P.*, [2006] 1 S.C.R. 941, 2006 SCC 27, where Charron J. stated, for the court,

[4] The YCJA introduced a new sentencing regime. As I will explain, it sets out a detailed and complete code for sentencing young persons [.] Parliament has sought to promote the long-term protection of the public by addressing the circumstances underlying the offending behaviour, by rehabilitating and reintegrating young persons into society and by holding young persons accountable through the imposition of meaningful sanctions related to the harm done.

[10] Accordingly, by virtue of s. 13 of the Criminal Code, "young persons" are treated as adults for purposes of criminal liability and, in order to obtain a conviction of second degree murder in the case now before us, the Crown was required to prove beyond a reasonable doubt that each of the appellants subjectively foresaw that the bodily harm they intentionally inflicted on Mr. Thandi was likely to cause his death and that, knowing that probable consequence, they proceeded recklessly in the face of the risk.

IV

[11] After concluding that the attack on Mr. Thandi was so sustained and of such force that the appellants must have meant to cause him bodily harm, the trial judge addressed the "more difficult question [.] whether the accused knew that death was a likely result of the assault". He did not reach the question whether, if they knew that death was a probable consequence of their actions, they proceeded recklessly in the face of the risk of Mr. Thandi's death.

[12] The trial judge summarized the Crown's submission:

- [16] The Crown says this element of knowledge or foresight can be drawn as a reasonable inference from the degree of force used in the attack and the fact the accused, on July 19th, were apparently prepared for a more forceful and bloody attack than had been inflicted on Mr. Bains the day before. The Crown noted that the accused brought extra clothing to the park and the second aluminium baseball bat. In the Crown's submission, they were gearing up for a more vicious attack and one they would know was likely to have caused death.
- [13] After observing that there is often little direct evidence of an accused's mental state, the trial judge noted that there was evidence here that one of the appellants had made statements in the presence of the other that were probative of this issue. However, he discounted this evidence as unreliable and gave it "little weight".
- [14] He turned to the circumstantial evidence of mens rea, stating,
- [18] The evidence of foresight of death therefore rests substantially on proposed inferences drawn from the fact that extra clothes and a second bat were brought to the park that day and the commonsense inference to be drawn from the severity of the attack. The evidence relating to the clothing and the bat is consistent with the intention to use more violence, but it is also consistent with other explanations short of causing bodily harm the accused would have realized would likely cause death. The commonsense inference urged as a result of the severity of the attack is an inference the trier of fact is, in general, entitled to apply except in cases raising a reasonable doubt as to sanity or sobriety. However, the court is not required to draw this conclusion if inappropriate to the facts of the case.
- [15] Next, he recognized the requirement of subjective mens rea, stating,
- [19] In *R. v. Creighton* [[1993] 3 S.C.R. 3], the Supreme Court of Canada discussed the need to establish actual foresight of risk in founding criminal responsibility. It was held there that actual foresight does not apply to offences that may be prosecuted on an objective standard, what a reasonable person would have foreseen. It does apply to an offence such as second-degree murder.
- [16] Then, he concluded,
- [20] Here, it cannot be forgotten that the accused were 13 and 15 years of age at the time of the offence. The lack of life experience and the relative inability to foresee serious consequences accompanying an act are hallmarks of youth. These considerations convince me that it is inappropriate to apply the inference the Crown urges to conclude these two actually knew they were likely to cause Mr. Thandi's death. On balance, I have a reasonable doubt that the two accused meant to cause Mr. Thandi bodily harm knowing it was likely to cause his death. Accordingly, the accused will not be convicted of second-degree murder, but rather the included offence of manslaughter.

[Emphasis added]

- [17] In the Crown's submission, the passage I have emphasized demonstrates that the trial judge concluded that because of their age and concomitant lack of life experience the appellants were incapable of foreseeing the probable consequences of their actions. This is an error of law, the Crown says, since their capacity is deemed by operation of s. 13 of the Criminal Code. As a result of the error, the Crown submits, the trial judge erred further in failing to apply the common sense inference that a person intends the natural consequences of his acts. In the Crown's submission, the evidence was such that the trial judge should have drawn an inference beyond a reasonable doubt that each of the appellants subjectively foresaw that the bodily harm they intentionally inflicted on Mr. Thandi was likely to cause his death. The Crown submits further that, in referring only to the extra clothing and the second bat taken to the park that day by the appellants, the trial judge violated the rules that the standard of reasonable doubt does not apply to the individual items of evidence and that whether guilt has been established beyond a reasonable doubt must be determined on a consideration of the evidence as a whole.
- [18] I would not give effect to these submissions.
- [19] The trial judge's reasons for judgment must be read as a whole in order to determine and to understand the view he took of the case. As was said by Bastarache and Abella JJ., writing for the majority in *R. v. Gagnon*, [2006] 1 S.C.R. 621, 2006 SCC 17,
- [19] [.] A trial judge's language must be reviewed not only with care, but also in context. Most language is amenable to multiple interpretations and characterizations. But appellate review does not call for a word-by-word analysis; rather, it calls for an examination to determine whether the reasons, taken as a whole, reflect reversible error. The task is to assess the overall, common sense meaning, not to parse the individual linguistic components. [...]
- [20] When read as a whole, the reasons in the case at hand do not suggest that the trial judge made a sweeping generalization about the capacity of youth to form intent.
- [21] I grant that, read literally and in isolation, the passage in which the Crown asserts error could be taken to be an expression of the trial judge's view that all youths of the age of the appellants lack the ability to foresee the consequences of their actions and consequently that the appellants were incapable of foreseeing the consequences of their actions in this case. The next sentence, however, suggests a different interpretation: if the trial judge was treating it as a rule that young persons do not have the capacity to foresee the consequences of their actions, one would not expect him to say, as he did in paragraph 20 of his reasons, "On balance, I have a reasonable doubt" (emphasis mine). His choice of the phrase "on balance" demonstrates that he was weighing and balancing the evidence, not applying an inflexible rule or generalization. Moreover, in paragraph 19 of his reasons, the trial judge made it clear that he was aware of the required standard, namely, that he had to consider whether the appellants subjectively had the necessary foresight.

- [22] The judge's references to "lack of life experience" and "relative inability to foresee serious consequences" were made in the context of his considering whether he should apply the common sense inference, a subject he began to address at paragraph 18 of his reasons. After referring to some of the evidence, he correctly noted that the inference is permissive and that it will not apply "if inappropriate to the facts of the case" (emphasis mine). Clearly, he was considering the evidence and weighing what inferences he should draw from the evidence.
- [23] As well, he noted in paragraph 18 that the inference will not necessarily be applied "in cases raising a reasonable doubt as to sanity or sobriety", that is, in cases of diminished capacity. In *R. v. Seymour*, [1996] 2 S.C.R. 252, a case involving intoxication, Mr. Justice Cory, writing for the court, explained the role of the common sense inference in cases of diminished capacity:
- [21] [.] The common sense inference as to intention, which may be drawn from actions of the accused, is simply a method used to determine the accused's actual intent. That same common sense makes it readily apparent that evidence of intoxication will be a relevant factor in any consideration of that inference. It follows that the jury must be instructed to take into account the evidence of the accused's consumption of alcohol or drugs, along with all the other evidence which is relevant to the accused's intent, in determining whether, in all the circumstances, it would be appropriate to draw the permissible inference that the accused intended the natural consequences of his actions.
- [....]
- [23] It is common knowledge that a significant degree of intoxication may affect a person's state of mind and thus the ability to foresee the consequences of actions. It is, therefore, essential for a trial judge to link the instructions given pertaining to intoxication to those relating to the common sense inference so that the jury is specifically instructed that evidence of intoxication may rebut that inference. See *Robinson*, at para. 65 [*R. v. Robinson*, [1996] 1 S.C.R. 683]. A trial judge is obliged to ensure that the jury understands two important conditions: (1) the reasonable common sense inference may be drawn only after an assessment of all of the evidence, including the evidence of intoxication; and (2) the inference cannot be applied if the jury is left with a reasonable doubt about the accused's intention.
- [Emphasis in original.]
- [24] Just as it is common knowledge that intoxication can affect the ability of persons to foresee the consequences of their actions, it is common knowledge that lack of life experience affects the level of maturity and can affect the ability of youths to foresee the consequences of their actions. This is not to say, however, that youths by virtue of their age alone have diminished capacity. Rather, their age and level of maturity are relevant considerations for the trial judge in determining whether or not it is appropriate to draw the common sense inference that they actually intended the natural consequences of their actions in the

circumstances of a given case. Whether or not the inference is ultimately drawn will depend on the evidence before the trial judge.

- [25] Crown counsel identifies evidence from which the trial judge could have inferred that the appellants had the necessary criminal intent. However, there was also evidence before the trial judge of statements and actions of the appellants before, during, and after the offence from which he could have concluded that they lacked mature judgment. Without attempting to be exhaustive, I will mention some of it.
- [26] There was evidence that the appellants were part of a group of youths who spent their time idly, "hanging out" at the park and playing with their cell phones and, in the case of some of them, including the appellant T.J.S., drinking alcoholic beverages. There was evidence that the attack on Mr. Bains had its genesis in the suggestion of an older boy, a seventeen-year-old friend of the appellant T.J.S., that he would show T.J.S. how to fight and how to "jump" people and steal their money. There was evidence that a group of youths, including the appellants and the seventeen-year-old, spent some time looking for someone to "jump" before they went to the washroom where Mr. Bains was attacked. The seventeen-year-old, who remained outside during the attack, testified that when the appellants emerged from the washroom the appellant T.J.S. told him that "his idea worked". There was evidence that, after the attack on Mr. Bains, the group, including the appellants, took the Skytrain to a mall and spent all night walking around Vancouver and back to the park. There was evidence that within minutes after the attack on Mr. Thandi the appellant F.M. began to cry and called his father on his cell phone.
- [27] The trial judge was entitled to view this and similar evidence as demonstrating a level of immaturity that could cause him to reasonably doubt whether the appellants subjectively foresaw the consequences of their actions. Given the horrific nature of this offence and the community outrage surrounding it, it might have been better had the trial judge referred to some of this evidence in his reasons. However, he was not required to demonstrate that he had considered all aspects of the evidence so long as there was support in the evidence for his conclusion: see *R. v. Burns*, [1994] 1 S.C.R. 656 at 664-65.
- [28] In my view, the trial judge considered the effect of the lack of life experience of the two appellants on their subjective ability to foresee the consequences of their actions as one factor in his assessment of their actual intent. His conclusion that the Crown had not established *mens rea* beyond a reasonable doubt was a finding of fact: *The Queen v. Lampard*, [1969] S.C.R. 373 at 380. If his finding was in error, a matter on which it is not necessary to express an opinion, it was an error of fact, not an error of law.
- [29] Accordingly, I would not accede to the Crown's submission that the trial judge erred in law by holding that youths are incapable of foreseeing the natural consequences of their acts, by basing the acquittals on an assumption about the capacity of youths to foresee serious consequences of their actions, and by failing to apply the common sense inference. When read as a whole, the reasons do not demonstrate such errors.

V

[30] Since the Crown has failed to persuade me that the trial judge erred on a question of law, I would dismiss the appeal.

"The Honourable Mr. Justice Smith"

I agree:

"The Honourable Mr. Justice Donald"

I agree:

"The Honourable Mr. Justice Tysoe"

Corrigendum to the reasons of

The Honourable Mr. Justice Smith - 18 March 2008

[1] My reasons for judgment are corrected as follows. The emphasis referred to in the quote at paragraph 16 should read as:

[20] Here, it cannot be forgotten that the accused were 13 and 15 years of age at the time of the offence. The lack of life experience and the relative inability to foresee serious consequences accompanying an act are hallmarks of youth. These considerations convince me that it is inappropriate to apply the inference the Crown urges to conclude these two actually knew they were likely to cause Mr. Thandi's death. On balance, I have a reasonable doubt that the two accused meant to cause Mr. Thandi bodily harm knowing it was likely to cause his death. Accordingly, the accused will not be convicted of second-degree murder, but rather the included offence of manslaughter.

[Emphasis added]

[2] Paragraphs 21 and 22 should be blended into one paragraph and all subsequent paragraphs renumbered consecutively.

"The Honourable Mr Justice Smith"

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