

CANADA / JUDGMENT

R. v. Hemphill

2003 BCSC 1666

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Supreme Court of British Columbia

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2003BCSC1666

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Hemphill,

2003 BCSC 1666

Date: 20031103

Docket: XO63778

Registry: New Westminster

Between:

HER MAJESTY THE QUEEN

RESPONDENT

And

KEVIN GRANT HEMPHILL

APPELLANT

Before: The Honourable Mr. Justice McKinnon

Reasons for Judgment

Counsel for the appellant:

G. Barriere

Counsel for the Crown:

V. Toselli

Date and Place of Hearing:

October 17, 2003

New Westminster, B.C.

[1] On June 21, 2002, Kevin Grant Hemphill (the "appellant") was convicted of committing an indecent act in public under s. 173(1)(a) of the Criminal Code. That section reads as follows:

173. (1) Every one who wilfully does an indecent act

(a) in a public place in the presence of one or more persons,

is guilty of an offence punishable on summary conviction.

[2] Mr. Hemphill appeals to this court from that conviction.

Facts

[3] The events leading to the arrest and conviction of the appellant occurred on February 15, 2002. On that date, the appellant was discovered by Wal-Mart Security Officers in the parking lot of Guildford Town Centre shopping mall masturbating in view of the parking lot and the Silver City movie theatres. Security officers had been conducting surveillance of the appellant for some time before observing him to masturbate. After observing this conduct, the Security Officers arrested the appellant.

Issues

[4] Counsel for the appellant has raised three issues on appeal. Specifically, counsel submits that the trial judge made the following errors in his judgment:

The trial judge erred in law in interpreting the mens rea to include recklessness.

The trial judge erred in law when, having interpreted the mens rea to include recklessness, the trial judge failed to nevertheless consider mistake of fact.

The verdict was unreasonable.

[5] In his written submissions, counsel for the appellant also contested the trial judge's finding that the accused was actually masturbating as being unreasonable, but this ground of appeal was abandoned at the hearing of this matter.

[6] The trial judge convicted the appellant on the basis of his finding that the appellant had been reckless in his conduct and that this satisfied the mens rea of the offence. This finding is apparent in the words of the trial judge when he said:

In my view, the definition of this offence in Section 173 includes recklessness with respect to whether or not the act is being done in the presence of one or more persons. If I am wrong in that regard, then my verdict is going to be wrong.

It is clear to me that the Crown has not proven that the accused knew that there was one or more persons in his presence as he did what he did. However, he was in a place that the public did not just have access to but an easy view of, and that there were people within the area that only had to look over and see him do what he was doing. The Crown has proven to me beyond a reasonable doubt that he [the accused] would have known that and that he did it anyway. That is the classic definition of recklessness and I suppose that is as much as needs to be said. The fact that he might not have known there was one or more persons in his presence does not result in a conclusion that the Crown has not proven the mens rea of the offence beyond a reasonable doubt. [emphasis added]

[7] In view of the findings of the learned trial judge, I would formulate the issues in this matter as follows:

Did the trial judge err in law by extending the "wilful" mens rea in s. 173(1)(a) of the Criminal Code to include recklessness?

If so, did he err in failing to consider mistake of fact?

If either of the above issues can be answered in the affirmative, was the decision of the trial judge unreasonable?

[8] In my view, the trial judge did err in law when he imported the concept of recklessness into the mens rea for an offence under s. 173(1)(a) of the Code. There is clear authority from our Court of Appeal in *R. v. Clark*, *infra*, that more is required to satisfy the guilty mind element of the offence than mere knowledge of the possibility of the potential presence of others and the decision to act anyway. Furthermore, it appears some evidence of the subjective state of mind of the accused is required to make out the mens rea of the offence.

[9] As recklessness was improperly imported into s. 173(1)(a), there is no need to consider the mistake of fact arguments. In any case, there was no evidence to suggest the Appellant misapprehended the relevant circumstances of the alleged offence.

[10] By improperly interpreting the required mens rea of the offence, the trial judge erred in law and, as such, his decision was unreasonable.

[11] I would allow the appeal and enter an acquittal. The following represents my analysis of the issues leading to this determination.

Issue: Did the trial judge err in law in interpreting the mens rea to include recklessness?

[12] Section 173 of the Code requires that the accused commit the offence "wilfully." The wilful requirement has been interpreted by the courts to apply to all elements of the offence. That is, the Crown must prove beyond a reasonable doubt that an accused (1) wilfully committed an indecent act and (2) wilfully committed this act in a public place and in the presence of one or more persons (*R. v. Mailhot* (1996), 108 C.C.C. (3d) 376 at 379 (Que. C.A.); *R. v. Sloan* (1994), 89 C.C.C. (3d) 97 at 101-102 (Ont. C.A.)).

[13] The question raised by the appellant is whether the trial judge erred in interpreting "wilful" in the circumstances to include "recklessness." In support of the appellant's contention that a wilful mens rea does not include recklessness, counsel makes two arguments.

[14] First, the Supreme Court of Canada's decision in *R. v. Docherty*, [1989] 2 S.C.R. 941, 51 C.C.C. (3d) 1, suggests that wilful is a mens rea distinct from recklessness. At ¶13, Wilson J. for the Court wrote the following:

13 Section 666(1) is clearly framed so as to require guilty knowledge in order to constitute a breach. The section prohibits an accused from wilfully failing or refusing to comply with a probation order. The word "wilfully" is perhaps the archetypal word to denote a mens rea requirement. It stresses intention in relation to the achievement of a purpose. It can be contrasted with lesser forms of guilty knowledge such as "negligently" or even "recklessly". In short, the use of the word "wilfully" denotes a legislative concern for a relatively high level of mens rea requiring those subject to the probation order to have formed the intent to breach its terms and to have had that purpose in mind while doing so.

[15] While the words of Wilson J. in *Docherty* seem to suggest that a trial judge may not read recklessness into a mens rea of "wilfully", treatment of the *Docherty* case, however, has not borne out this assertion.

[16] In *Canadian Criminal Law: A Treatise*, Professor D. Stuart addresses the *Docherty* case and its implications. At p. 223, Professor Stuart writes:

Where a specific mens rea word such as "intentionally" or "wilfully" is used it is now possible, on the authority of Wilson J.'s judgment for the Supreme Court of Canada in *Docherty* (1989), to argue that there should be no extension to recklessness or wilful blindness. The Supreme Court there decided that the offence of wilful failure to comply with a probation order required the "relatively high level of mens rea" in the form of intent. The justification is highly contextual. The alleged breach was based on the offence of having care and control of a vehicle while impaired, and the Court suggested it would be strange if the accused could be convicted, if the accused did not know of the violation of the probation order. Thus far the decision has not been applied to other offences.

[17] Professor Stuart's contention that the *Docherty* decision has not been applied to other offences, is supported authoritatively by the case law.

[18] In *R. v. Tan* (1992), 15 B.C.A.C. 231, our Court of Appeal distinguished the decision in *Docherty* by confining it to the circumstances of s. 666 and Part XI of the Code. Legg J.A., writing for a unanimous panel, found that the Supreme Court of Canada's finding with regard to a breach of a probation order was of no assistance in a situation of mischief as was the case in *Tan*. At ¶25, Mr. Justice Legg wrote:

The decisions relied upon by the appellants are of no assistance to them. Docherty was concerned with whether the appellant had wilfully failed to refuse to comply with a probation order contrary to s. 666(1) of the Criminal Code. That section is not contained in Part XI to which s. 429(1) applied.

[19] In *R. v. Gunn* (1997), 113 C.C.C. (3d) 174, leave to appeal to S.C.C. refused, [1997] 2 S.C.R. x, the Alberta Court of Appeal upheld the trial judge's decision to distinguish Docherty in a very similar manner as was done by the B.C. Court of Appeal in *Tan*. *Gunn* involved a situation of an accused charged with obstruction of a police officer. At ¶ 48, Picard J.A. wrote the following:

A case important to the Queen's Bench Justice in this case was *R. v. Docherty*, [1989] 2 S.C.R. 941, which he said described wilfully "rather well". In that case Justice Wilson found at 949-50 that "a relatively high level of mens rea" was required for the offence of "wilfully" failing to comply with a probation order. The trial judge in this case distinguished Docherty holding that the reasoning and conclusion in it applied only to the section of the Code being construed, s. 666(1), and had no application to s. 129(a). A careful reading of Docherty supports the trial judge's conclusion, as do the comments of Justice Sopinka in *R. v. DeSousa*, [1992] 2 S.C.R. 944, which restricted the propositions set down in Docherty. Thus, Docherty, as a case interpreting s. 666(1), does not assist in the search for the intent requirement of s. 129(a).

[20] Justice Picard references *R. v. DeSousa*, [1992] 2 S.C.R. 944, which as he states, "restricted the propositions set down in Docherty". At ¶32 of *DeSousa*, Sopinka J. wrote that:

In the circumstances of Docherty, the offence definition itself required intention in regard to all aspects of the actus reus and thus this proposition was not meant to be set down as an overriding principle of criminal law.

[21] The statement of Sopinka J. offers some assistance to the appellant as s. 173 offences require wilfulness in all aspects of the actus reus (i.e., the doing of the act, in a public place and in the presence of one or more persons).

[22] In the final analysis, however, Docherty is of no assistance to the appellant at bar. The bulk of judicial treatment of Docherty has confined its findings to s. 666 of the Code, or at least Part XI in which it is found. Furthermore, the Supreme Court of Canada arguably had the opportunity to reconsider whether Docherty has been properly confined to its facts, but declined to do so by refusing leave to appeal in the *Gunn* case.

[23] The second argument of appellant's counsel that "wilful" in the circumstances of s. 173 does not include recklessness, is that authority suggests that it is the exhibitionist nature of offences under the section that makes out the wilful mens rea and, more specifically, excludes notions of recklessness.

[24] Counsel points to various cases to support the contention that there needs to be an exhibitionist quality to the offence to support a finding of wilfulness. In *R. v. Mailhot*, supra, the Quebec Court of Appeal dealt with an appeal of a conviction under s. 173(1)(a). In this

case, which is more about mistake of fact, the court considered the mental element of the offence. In particular, it dealt with whether the accused must wilfully do the indecent act and do so in the presence of one or more unwilling persons. At p. 379, Chamberland J.A. for the court wrote the following:

In my view, the Crown is therefore required to prove that the accused (1) wilfully committed an indecent act and (2) wilfully committed this act in a public place in the presence of one or more persons.

With respect to the second element of the offence, it is understood that the person, or the persons, participating in the act cannot be the person or persons mentioned in s. 173(1). In summary, in order to constitute a crime within the meaning of this paragraph, the indecent act must have been committed in the presence of an audience, composed of one or more persons, excluding those who participated in the activity [emphasis added].

[25] Counsel for the appellant points to the requirement of an "audience" in the above passage to support the true intent of the inclusion of the word "wilfully" in s. 173. Other cases are also helpful in this regard, in particular the case of *R. v. Clark*, 2003 BCCA 408.

[26] In *Clark*, our Court of Appeal also dealt with an appeal of a conviction under s. 173(1)(a). In that case, the accused had been masturbating in the front window of his home in full, well-illuminated view of his neighbours. While the case is perhaps most significant in its treatment of what constitutes a "public place" for the purposes of s. 173(1)(a), the discussion of the mens rea is instructive. Hall J.A., for the Court, addressed the nature of the offence and the requisite intention as demonstrated in the relevant jurisprudence. At ¶5-6, he wrote:

5 I see no error in the judgment appealed from and I would uphold the conviction. I would say it is an inescapable inference from the facts that what the appellant was doing here was acting in an exhibitionist manner and seeking to draw attention to himself in a residential neighbourhood while he was in view of other residents. This is a very different case from *R. v. Sloan* (1994), 89 C.C.C. (3d) 97 (Ont. C.A.), where a prostitute was found in a vehicle in a parking lot performing an act of fellatio upon the driver. In that case, the driver testified as a Crown witness and testified it was their intention not to be seen by anyone else. Galligan J.A., for the majority, found that no offence was made out because there was no intention on the part of the accused to perform a sexual act in the presence of any person other than the driver and surreptitious police surveillance did not turn a private act into a public exhibition.

6 In *R. v. Follett* (1995), 98 C.C.C. (3d) 493, the Newfoundland Court of Appeal held that a sexual act performed between two persons in a public washroom at a mall, and recorded on a hidden camera, did not have a sufficient public quality to run afoul of this section of the Code. The court noted the presence of a surveillance camera did not suffice to convert this activity into an event that occurred "in the presence of one or more persons". This case appears to me to be near the line because I should think that an act performed in a public washroom would be one that could be anticipated to be observed by anyone who happened to enter the washroom at the time of the event. There, however, the evidence was that the sexual activity abruptly ceased when the

participants heard someone opening the washroom door. Such conduct by the participants could presumably found an inference that they had no intention to perform such an act if others might see it. That is much different from the instant case where the action of this appellant appeared to be designed to draw attention to himself and his activities. Similar reasoning to that found in *Follett* appears to underpin the reasoning of the Quebec Court of Appeal in the case of *R. v. Mailhot* (1996), 108 C.C.C. (3d) 376. There, an accused had approached a plain clothes police officer and apparently concluded, mistakenly, that the officer wished to engage in sexual conduct. The incident occurred in a park setting where the only persons present were the accused and the officer. The accused, believing the officer was assenting, undressed and performed an act of masturbation in the presence of the officer. The court concluded that the accused did not have the necessary mens rea to be found guilty of the offence of indecent behaviour in public. I venture to suggest that a very different result would have obtained if, for instance, the accused had performed the act in the presence of a person passing by in the area.

[27] With regard to evidence of the mens rea of the offence, Hall J.A. wrote the following (at ¶9):

While the vulgar comment affords very clear evidence of intent in that case [*R. v. Buhay* (1980), 30 C.C.C. (3d) 30 (Man. C.A.) - man exposed himself in his doorway and made vulgar comments to passing children], the remarkable performance of the appellant here, in getting up on a stool and weaving about, also affords powerful evidence of an intention to do an indecent act and call attention to himself. The exhibitionist features of conduct in such cases will usually afford the clearest evidence of the necessary intent.

[28] The implication from *Clark* is that potential for public view is not enough to substantiate a finding that an accused possessed the requisite intent to commit an indecent act in the presence of one or more persons. Specifically, the Court of Appeal suggests that only an act "designed to draw attention" will constitute a "public exhibition" and where the intent to create such a display is lacking in the evidence, the offence is not made out.

[29] It appears to me that the Court of Appeal considered cases where there was clear recklessness on the part of the accused and rejected such recklessness as determinative of the mens rea issue. In particular, in *R. v. Follett* (1995), 98 C.C.C. (3d) 493, the Newfoundland Court of Appeal considered the case of two persons engaged in sexual activity in a mall washroom. Despite the fact that the act occurred in a place where the public could enter at anytime, the Crown failed to demonstrate that the accused persons intended to commit the indecent act in the presence of others. The B.C. Court of Appeal in *Clark* noted that this case was "near the line" but accepted the finding that the persons charged did not intend to be seen by others. Evidence of their intention was made out by the fact that their activity ceased upon their realization that a member of the public was approaching.

[30] The Crown asserts that the mens rea of the offence is "wilful potential for view by a non-consenting member of the public." In support of this argument, Crown refers to three authorities: *R. v. Navratil*, [1995] B.C.J. No. 1952 (S.C.); *R. v. Srei*, [1998] A.Q. no. 1259 (Que. C.A.), and; *R. v. Bugar*, unreported, September 14, 2001, New Westminster Supreme Court Registry, Docket No. X056498.

[31] The authorities referred to by Crown Counsel are indeed useful in cases involving s. 173 of the Code. Their utility, however, is limited to the actus reus of the offence. All of these cases deal with what constitutes a "public place" or whether a police officer constitutes a member of the "public." By way of example, I refer to the following passage from *Navratil*, supra, referred to by the Crown in its submissions:

8 In the case at bar, clearly, investigating constables concluded that an indecent act was going to take place at some point. The fact that no member of the public other than a police officer observed this conduct may not be determinative. It is the potential for indecent conduct exposed to the public that is the key. Police officers are not members of the public when it is their intention to surreptitiously observe objectionable conduct.

[]

11 The act must also be committed in "the presence of one or more persons". Again, this requires the application of another objective test: did the appellant commit the indecent act in a public place where he would have been or was seen by a member of the public? If both questions are answered in the affirmative, then the actus reus of the offence is made out.

[32] Whether the appellant committed the alleged act in a public place or if the Wal-Mart Security Officers constituted members of the public is not the matter in issue as neither point is disputed. The Crown concedes that the officers were not members of the public for the purposes of the section and the appellant concedes that the parking lot was a public place.

[33] In short, the authorities referred to by the Crown do not support the argument that the mens rea for offences under s. 173(1)(a) is "wilful potential for view by a non-consenting member of the public." There is, in fact, no basis in law for this assertion. If anything, the Court of Appeal in *Clark* rejected such a notion.

[34] The Crown refers to *Clark* in its submissions, but in a manner that does not speak to the mens rea of the offence. Specifically, the Crown argues that *Clark* stands for the proposition that "in the presence of one or more persons" need not be physically proximate as in *Clark* those that observed the offence were some 60 feet away. Though *Clark* may indeed be support for such an argument regarding what constitutes a public place, such a consideration is only relevant to the actus reus, not the mens rea.

[35] The Crown's only other argument as to whether or not recklessness is properly included in the mens rea for the offence in question, is that the trial judge's use of the word "reckless" was only meant to refer to the "correct test" of "wilful potential for view by a non-consenting

member of the public." This argument must fail as the wilful potential test as it pertains to the mens rea is not "correct" as posited by the Crown. Nor can it be accepted that the learned trial judge did not mean "reckless" when he said "reckless." It is clear from the proceedings at trial that the judge meant and understood the doctrine of recklessness.

Issue: In view of the trial judge's erroneous finding that the mens rea for an offence under s. 173(1)(a) could be expanded to include recklessness, was the decision unreasonable?

[36] In *R. v. Biniaris*, [2000] 1 S.C.R. 381, the Supreme Court of Canada considered the subject of appellate standard of review. At ¶37, Arbour J. for the court wrote:

¶ 37 The court of appeal will therefore be justified to intervene and set aside a verdict as unreasonable when the reasons of the trial judge reveal that he or she was not alive to an applicable legal principle, or entered a verdict inconsistent with the factual conclusions reached. These discernable defects are themselves sometimes akin to a separate error of law, and therefore easily sustain the conclusion that the unreasonable verdict which rests upon them also raises a question of law.

[37] In view of the statements of Arbour J. in *Biniaris*, I find two grounds upon which to base a decision that the verdict of the trial judge was unreasonable and should be set aside.

[38] First, I think it is clear that by erroneously interpreting the mens rea in s. 173(1)(a) to include recklessness, the trial judge misapprehended the applicable law and thus was, "not alive to an applicable legal principle." Such an error was in the mind of the trial judge as is evidenced by his comments in judgment:

In my view, the definition of this offence in Section 173 includes recklessness with respect to whether or not the act is being done in the presence of one or more persons. If I am wrong in that regard, then my verdict is going to be wrong.

[39] I agree with the trial judge that his verdict is wrong as his conceptualization of the mens rea to include the doctrine of recklessness is wrong.

[40] Second, the evidence at trial was that the accused was "surprised" to discover he was in the presence of the security guards and he made efforts to cover himself and cease his conduct when he realized they were present. Furthermore, the trial judge found that the Crown had not proved beyond a reasonable doubt that the accused knew he was in the presence of others.

[41] As noted above, the B.C. Court of Appeal in *Clark* discussed the necessary intent and evidence thereof for an offence under s. 173(1)(a). In its discussion of the *Follet* case from the Newfoundland Court of Appeal, the B.C. Court of Appeal accepted the efforts of those engaged in indecent acts to conceal their behaviour from the public constituted evidence of lack of intent. That is, by putting an end to the indecent activities upon realizing the approach of a member of the public, the conduct of accused persons suggests no intent to commit the indecent act in the presence of others. In addition, no evidence was presented

to the trial judge that the accused attempted to draw attention to his activities or conduct himself in an exhibitionist manner.

[42] In view of these factors related to the evidence presented at trial, I find that the trial judge, "entered a verdict inconsistent with the factual findings at trial." Again, in view of the decision of the Supreme Court of Canada in Biniaris, this further confirms the finding that the trial judge's verdict was unreasonable.

Conclusion

[43] For these reasons, the verdict of the trial judge was unreasonable. The appeal is allowed and an acquittal directed.

"R.A. McKinnon, J."

The Honourable Mr. Justice R.A. McKinnon

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