

CANADA / JUDGMENT

R. v. Johnson

2023 SCC 24

COURT

Supreme Court of Canada

DECIDED

13 October 2023

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R. v. Johnson Collection Supreme Court Judgments Date 2023-10-13 Neutral citation 2023 SCC 24 Case number 40330 Judges Rowe, Malcolm; Martin, Sheilah; Kasirer, Nicholas; Jamal, Mahmud; O'Bonsawin, Michelle On appeal from Ontario Notes Case in Brief SCC Case Information Decision Content SUPREME COURT OF CANADA Citation: R. v. Johnson, 2023 SCC 24 Appeal Heard: October 13, 2023 Judgment Rendered: October 13, 2023 Docket: 40330 Between: Don Johnson Appellant and His Majesty The King Respondent Coram: Rowe, Martin, Kasirer, Jamal and O'Bonsawin JJ. Unanimous Judgment Read By: (paras. 1 to 4) Kasirer J. Note: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports. Don Johnson Appellant v. His Majesty The King Respondent Indexed as: R. v. Johnson 2023 SCC 24 File No.: 40330. 2023: October 13. Present: Rowe, Martin, Kasirer, Jamal and O'Bonsawin JJ. on appeal from the court of appeal for ontario Criminal law — Charge to jury — Parties to offence — Accused convicted of two counts of first degree murder — Accused appealing convictions and claiming that trial judge erred by charging jury on party liability — Majority of Court of Appeal upholding convictions — Dissenting judge finding that there was insufficient evidentiary foundation to leave party liability with jury and that trial judge's instructions on party liability were inadequate — Trial judge properly left party liability with jury but erred in instructions on party liability — Curative proviso applies because errors harmless — Convictions upheld. Cases Cited Referred to: R. v. Abdullahi, 2023 SCC 19; R. v. Sarrazin, 2011 SCC 54, [2011] 3 S.C.R. 505. Statutes and Regulations Cited Criminal Code, R.S.C. 1985, c. C-46, s. 686(1)(b)(iii). APPEAL from a judgment of the Ontario Court of Appeal (Rouleau, Nordheimer and George JJ.A.), 2022 ONCA 534, 162 O.R. (3d) 92, 417 C.C.C. (3d) 233, [2022] O.J. No. 3246 (QL), 2022 CarswellOnt 10087 (WL), affirming the convictions of the accused for first degree murder. Appeal dismissed. Dirk Derstine and Tania Bariteau, for the appellant. Susan Reid, for the respondent. The judgment of the Court was delivered orally by

[1] Kasirer J. — We are all of the view that the majority in the Court of Appeal was correct to conclude that party liability was properly left to the jury by the trial judge (2022 ONCA 534, 162 O.R. (3d) 92). The evidence on the record provided party liability with an air of reality.

- [2] We agree, however, with Nordheimer J.A., dissenting, that the trial judge erred in law in his instructions on party liability. In one part of the charge, the judge gave instructions that resembled co-principal liability, but said he was instructing on aiding. In other parts of the charge, the jury was given partially correct instructions on aiding. We share Nordheimer J.A.'s view that the jury was never clearly told that the appellant would have needed to know that the principal intended to kill the victims in a planned and deliberate manner in order to be liable for first degree murder as an aider.
- [3] That said, we would apply the curative proviso in s. 686(1)(b)(iii) of the Criminal Code, R.S.C. 1985, c. C-46, because these errors were harmless. There is no reasonable possibility that the jury would have reached a different verdict had these errors not been made (see *R. v. Abdullahi*, 2023 SCC 19, at para. 33; *R. v. Sarrazin*, 2011 SCC 54, [2011] 3 S.C.R. 505, at para. 25). The evidence that supported party liability was the same as the evidence for co-principal liability. Moreover, the appellant's defence was not undermined by the jury charge.
- [4] Accordingly, we would dismiss the appeal. Judgment accordingly. Solicitors for the appellant: Derstine Penman Criminal Lawyers, Toronto. Solicitor for the respondent: Ministry of the Attorney General, Crown Law Office — Criminal, Toronto.

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