

CANADA / JUDGMENT

R. v. Oldford

2002 BCSC 800

COURT

Supreme Court of British Columbia

DECIDED

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Citation: R. v. Oldford

Date: 20020523
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Docket: 20198
Registry: Vancouver
IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN: REGINA
APPELLANT

AND: JOHN MICHAEL OLDFORD
RESPONDENT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE TYSOE

Counsel for the Appellant:

Adrienne Lee

Counsel for the Respondent:

David N. Fai

Date and place of hearing:

May 8, 2002

Vancouver, B.C.

INTRODUCTION

- [1] At issue in this appeal by the Crown of Mr. Oldford's acquittal is whether the trial judge erred in connection with the issue of whether the consent of the complainant, Peter Gaffney, to a fist fight with Mr. Oldford was vitiated. The Crown alleges two further errors with respect to findings made by the trial judge, but these were findings of fact in respect of which there was no error of law and which cannot properly be disturbed on appeal.

FACTS

- [2] The facts related to the physical elements of the fight itself are not controversial because there was a videotape of the fight, which I had the benefit of watching. The fight took place on the sidewalk outside the Stages Bar at the Holiday Inn on West Broadway, Vancouver, next to the Great Canadian Casino which has surveillance cameras for security purposes. The disputed facts at trial related to the events leading up to the fight, the intention of Mr. Oldford during the fight and the extent of the injuries sustained by Mr. Gaffney.
- [3] Mr. Gaffney and Mr. Oldford were both drinking in the Stages Bar on December 4, 2000. Words were exchanged between them and they eventually went outside on to the sidewalk. At trial and on this appeal, the Crown conceded that Mr. Gaffney consented to a fight with Mr. Oldford. The men circled each other for a short while and then Mr. Oldford pushed Mr. Gaffney in the area of his upper chest and throat. Mr. Oldford was then able to strike Mr. Gaffney with two blows and Mr. Gaffney fell to the ground. Mr. Oldford walked over to Mr. Gaffney and struck him nine times in the area of his face. Mr. Oldford then went back into the bar, leaving Mr. Gaffney lying face down on the sidewalk.
- [4] Mr. Gaffney testified that the injuries he received from the fight consisted of four sizeable cuts to his face, a variety of small cuts on the back and side of his head, a broken bone to his left eye which required surgery, a broken nose and swelling of his face. He said that at the time of the trial he had scars on his forehead, nose and upper lip.
- [5] Mr. Oldford testified that his intention in punching Mr. Gaffney was to make sure that the fight stopped. In cross-examination, he agreed that he was throwing enough punches so that Mr. Gaffney would not get up.

DECISION OF THE TRIAL JUDGE

- [6] The trial judge reviewed the facts at some length and he summarized the cases dealing with consent and the mens rea requirement of the alleged offence of assault causing bodily harm. His reasoning in acquitting Mr. Oldford was contained in the following two paragraphs:

As I understand it, the effect of the authorities cited above on the defence of consent for the charge in this case means this court has to decide, in light of the complainant's injuries, whether the accused applied reasonable force in fighting with the complainant. In other words, if the force used by the accused is found to be unreasonable in causing harm to the complainant, which can only be inflicted by the use of unreasonable force, then the consent would be considered as being vitiated and there will be a conviction.

In addition to the findings that this court has made with respect to how the fight got started, the inaccuracies in the testimony of the complainant, the duration of the fight, and the number and the way the punches were delivered, I further find the testimony of the accused to be forthright and consistent with the overall evidence, and that he had no intention of causing serious harm to the complainant. Consequently, I am not satisfied beyond a reasonable doubt that the accused used unreasonable force; nor am I satisfied beyond a reasonable doubt that the injuries sustained by the complainant were as serious as alleged.

ISSUE

- [7] The question on this appeal is whether the trial judge misapplied the law relating to the vitiation of consent to a fist fight as set out in the decision of the Supreme Court of Canada in *R. v. Jobidon* (1991), 66 C.C.C. (3d) 454.

DISCUSSION

- [8] The circumstances leading up to the alleged offence in *Jobidon* were similar to the facts of this case. Both men had been drinking and they got into a fist fight in a parking lot outside the drinking establishment. Mr. Jobidon struck the other man with a blow which rendered him unconscious and caused him to fall backward onto the hood of a vehicle. The accused then struck the other man four to six times on the head. The other man fell limp to the ground and later died in the hospital as a result of contusions to his head. The trial judge found that the accused did not intend to kill or cause serious bodily harm to the deceased man, but he did intend to cause bodily harm to the deceased. Considering that he was bound by the decision in *R. v. Dix* (1972), 10 C.C.C. (2d) 324 (Ont. C.A.), the trial judge found the accused not guilty of manslaughter because the accused did not go beyond the bounds of the consent of the deceased to the fight. An appeal to the Ontario Court of Appeal was allowed on the basis that the applicable limitations on consent are those described in the decision of the English Court of Appeal in *Attorney-General's Reference* (No. 6 of 1980), [1981] 2 All E.R. 1057.
- [9] In upholding the guilty verdict imposed by the Ontario Court of Appeal, Gonthier J., on behalf of the majority of the Court, reviewed the law of England and Canada before formulating the appropriate public policy limitation on a consent to a fist fight. Gonthier J. summarized the decision in *Attorney-General's Reference* as follows:

The court held that because it is not in the public interest that people should cause each other bodily harm for no good reason, consent is no answer to a charge of assault when "actual bodily harm is intended and/or caused" (p. 482)

After reviewing the Canadian authorities, Gonthier J. stated the conclusion of the majority in these terms:

How, and to what extent is consent limited?

The law's willingness to vitiate consent on policy grounds is significantly limited. Common law cases restrict the extent to which consent may be nullified; as do the relevant policy considerations. The unique situation under examination in this case, a weaponless fist fight between two adults, provides another important boundary.

The limitation demanded by s. 265 as it applies to the circumstances of this appeal is one which vitiates consent between adults intentionally to apply force causing serious harm or non-trivial bodily harm to each other in the course of fist fight or brawl. (emphasis in original) (p. 494)

Gonthier J. did not articulate how he applied this general test to the case before the Court but the manslaughter conviction was upheld.

[10] Gonthier J.'s statement of the test contains two potential ambiguities which must be resolved from an interpretation of the decision as a whole. First, it is not clear whether the word "intentionally" modifies only the ingredient of application of force or whether it also applies to the effect of the force in causing harm. In other words, is it only necessary for there to be an intention to apply force or must there also be an intention to cause "serious harm or non-trivial bodily harm"? The second potential ambiguity is whether the phrases "serious harm" and "non-trivial bodily harm" were intended to be synonymous or, alternatively, whether the phrase "serious harm or non-trivial bodily harm" was intended to be conjunctive or disjunctive?

[11] Counsel for the Crown submits the test to be that the consent to a fist fight is vitiated if the accused intended to apply force and caused non-trivial bodily harm. Counsel for Mr. Oldford submits the test to be that the consent to a fist fight is only vitiated if the accused intended to apply force, intended to cause serious harm and did cause bodily harm. The trial judge appears to have applied the test advocated by Mr. Oldford's counsel. Apart from the fact that he referred to the concept of reasonable force (which applies to the defence of self-defence, not the issue of consent), the trial judge appeared to base his conclusion on this finding that Mr. Oldford did not intend to cause serious harm to Mr. Gaffney. In stating that he was not satisfied beyond a reasonable doubt that the injuries sustained by the complainant were as serious as alleged, the trial judge appeared to take the test beyond that advocated by Mr. Oldford's counsel to also require that the actual bodily harm be serious before the consent to the fight is vitiated.

- [12] In my opinion, Mr. Oldford's counsel is correct with respect to the aspect of intention and Crown counsel is correct with respect to the degree of harm required to be intended before the consent is vitiated. Hence, the test in my view is that the consent to a fist fight is vitiated if the accused (i) intended to apply force, (ii) intended to cause non-trivial bodily harm and (iii) did cause bodily harm. The first and third parts are actually elements of the offence of assault causing bodily harm.
- [13] With respect to the issue of intent, it is clear from the judgment that Gonthier J. did not adopt the English test which vitiates the consent if bodily harm is intended or caused. He said the following in that regard:

Attorney-General's Reference makes it clear that a conviction of assault will not be barred if "bodily harm is intended and/or caused". Since this test is framed in the alternative, consent could be nullified even in situations where the assailant did not intend to cause the injured person bodily harm but did so inadvertently. In Canada, however, this very broad formulation cannot strictly apply, since the definition of assault in s. 265 is explicitly restricted to intentional application of force. Any test in our law which incorporated the English perspective would of necessity have to confine itself to bodily harm intended and caused. (emphasis in original) (p. 490)

Support for the requirement for the double intention of applying force and causing bodily harm is also found in the portion of Gonthier J.'s reasons reviewing the English authorities. After reviewing the authorities, he stated that they undoubtedly supported the decision of the Court of Appeal to impose a conviction because "there is no question that the punches thrown by Jobidon were intentional applications of force intended to cause the deceased bodily harm" (emphasis added) (p. 482).

- [14] Turning to the degree of harm, it is my opinion that Gonthier J. was not intending to equate non-trivial bodily harm to serious harm (unless he meant that any non-trivial bodily harm would be considered to be serious harm). In my view, there is a spectrum of harm which lies between serious harm and non-trivial bodily harm. There can be harm which is non-trivial but which would not be considered serious. I believe that Gonthier J. was intending to convey that the consent would be negated if the accused intended to cause serious harm and that it would also be negated if the accused intended to cause non-trivial harm. After he formulated the test, Gonthier J. did specifically address the degree of harm contemplated in the test:

Finally, the preceding formulation avoids nullification of consent to intentional applications of force which cause only minor hurt or trivial bodily harm. The bodily harm contemplated by the test is essentially equivalent to that contemplated by the definition found in s. 267(2) of the Code, dealing with the offence of assault causing bodily harm. The section defines bodily harm as "any hurt or injury to the complainant that interferes with the health or comfort of the complainant and that is more than merely transient or trifling in nature". (p. 495)

The conclusion that Gonthier J. did not intend to equate "non-trivial bodily harm" to "serious harm" is evident from the decision in Jobidon itself. At p. 463, Gonthier J. recited that the trial judge found that Mr. Jobidon did not intend to cause serious bodily harm to the deceased. If consent was only to be vitiated if there was an intent to cause serious bodily harm, then the consent of the deceased in Jobidon would not have been vitiated and the Supreme Court of Canada would not have upheld the conviction. The Court did uphold the conviction because, although he did not intend to cause serious bodily harm, Mr. Jobidon did intend to cause non-trivial bodily harm to the deceased.

[15] After formulating the test, Gonthier J. addressed the situation of fist fights between children. He decided to leave open the issue of the circumstances in which the consent to a fist fight between children will be vitiated. However, the way in which he phrased the point is instructive of his intention in formulating the test:

However, I would leave open the question as to whether boys and girls under the age of 18 who truly intend to harm one another, and ultimately cause more than trivial bodily harm, would be afforded the protection of a defence of consent. (p. 496)

In my view, he was stating the circumstance where, according to the test he formulated with respect to adults, the consent would be vitiated, and he was leaving open whether that same test should apply to fist fights between children. In this passage, Gonthier J. made reference to the intent to harm the other person and he phrased the applicable degree of bodily harm in terms of more than trivial bodily harm (not serious bodily harm).

[16] My interpretation of Gonthier J.'s public policy limitation on consent is consistent with the interpretation given to Jobidon in a case cited by counsel for Mr. Oldford, *R. v. T.B.B.* (1994), 93 C.C.C. (3d) 191 (App. Div. - P.E.I.S.C.), a case which did involve a fight between minors. In upholding the acquittal of the accused, the Court stated that it was "quite clear from [Jobidon] that, especially when the participants in a consensual fight are minors, consent will not be vitiated if there is no intent to do more than trivial harm." The Court did speak in the following paragraph about an intent to cause serious harm, but that was in the context of distinguishing *R. v. W.(G.)* (1994), 90 C.C.C. (3d) 139 (Ont. C.A.), which involved a consensual fight between minors where the accused was found to have intended to cause serious harm.

[17] After drafting these Reasons for Judgment on the basis of the authorities cited to me by counsel, I requested my law clerk to note up the cases which had judicially considered Jobidon. There are other decisions which I believe have interpreted Jobidon in the same fashion as I have. The clearest statement is found in *R. v. Doherty*, [2000] N.B.J. No. 299 (Q.L.) (C.A.):

For his part, Justice Gonthier, with whom four other justices agreed, was moved by the common law and public policy considerations to read into s. 265(1)(a) a limitation on consent that negates its effectiveness when it relates to the application of force that is intended to cause and causes serious bodily harm. In this analysis, the scope of consent becomes irrelevant when serious bodily harm is intended and caused. Serious bodily harm in this context means hurt or injury that is more than transient or trifling in nature. (para. 19)

This statement confirms that there must be an intention to cause non-trivial bodily harm and that the degree of harm in question is "bodily harm" as defined in the Criminal Code.

[18] In the present case, there is no doubt that Mr. Oldford intended to apply force to Mr. Gaffney and that Mr. Gaffney sustained bodily harm. The trial judge possibly erred when he applied a test of unreasonable force (he may just have used unfortunate language in attempting to apply the mens rea requirement of the offence, which is objective foresight of a risk of bodily harm: see *R v. DeSousa* (1992), 76 C.C.C. (3d) 124 (S.C.C.) and *R. v. Godin* (1994), 89 C.C.C. (3d) 574 (S.C.C.)). He may also have erred in requiring Mr. Gaffney's injuries to have been serious. However, it is clear that the trial judge did err in requiring the Crown to prove beyond a reasonable doubt that Mr. Oldford intended to cause serious harm to Mr. Gaffney. The consent of Mr. Gaffney would have been vitiated if the Crown was able to prove beyond a reasonable doubt that Mr. Oldford intended to cause him non-trivial bodily harm.

[19] In taking the position that the only intent required to be proved was the intent to apply force, the Crown asked me to enter a guilty verdict because it was obvious that Mr. Gaffney suffered bodily harm. Although I had the benefit of seeing the fight on video, I did not have the advantage of hearing Mr. Oldford and the other witnesses testify. I am not in a position to say whether it was proved beyond a reasonable doubt that Mr. Oldford intended to cause non-trivial bodily harm to Mr. Gaffney. Accordingly, I allow the appeal and direct a new trial.

"D.F. Tysoe, J."

The Honourable Mr. Justice D.F. Tysoe

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