
CANADA / JUDGMENT

R. v. Pringle

[1989] 1 SCR 1645

COURT

Supreme Court of Canada

DECIDED

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R. v. Pringle

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Report

[1989] 1 SCR 1645

Case number

19975

Judges

McIntyre, William Rogers; Lamer, Antonio; Wilson, Bertha; L'Heureux-Dubé, Claire; Sopinka, John

On appeal from

Ontario

Subjects

Courts

Criminal law

Notes

SCC Case Information: 19975

Decision Content

R. v. Pringle, [1989] 1 S.C.R. 1645

Her Majesty The Queen Appellant

v.

Julian Charles Pringle Respondent

indexed as: r. v. pringle

File No.: 19975.

1988: October 13; 1989: June 22.

Present: McIntyre, Lamer, Wilson, L'Heureux-Dubé and Sopinka JJ.

on appeal from the court of appeal for ontario

Criminal law -- Offence of using a firearm while committing an indictable offence -- No conviction for underlying indictable offence -- Facts established sufficient to prove an indictable offence but charges for that offence not laid -- Whether offence requires conviction for the underlying indictable offence or whether it requires only proof of facts sufficient to ground an indictable offence -- Criminal Code, R.S.C. 1970, c. C-34, s. 83(1)(a).

Criminal law -- Kienapple principle -- Conviction precluding convictions for lesser and included offences from being entered -- Conviction overturned on appeal but convictions for lesser and included offences not entered -- Whether Court of Appeal erred in not entering convictions -- Criminal Code, R.S.C. 1970, c. C-34, ss. 84(1), 85.

Jurisdiction -- Supreme Court of Canada -- No appeal to Supreme Court from judgment or order made in exercise of judicial discretion -- Whether Supreme Court precluded from remitting matter of entering conviction to trial judge for determination -- Supreme Court Act, R.S.C. 1970, c. S-19, s. 44 -- Criminal Code, R.S.C. 1970, c. C-34, s. 623.

Respondent was arrested after pointing a loaded shotgun at a person and threatening to "blow him away". He was acquitted of unlawful confinement contrary to s. 247(2) of the Criminal Code which was the offence the Crown may have had in mind when it charged him of using a firearm while committing an indictable offence contrary to s. 83(1) (a). The trial judge, however, found respondent guilty under s. 83(1) (a), even though the count disclosed no indictable offence, because he held that the Crown had established that he had committed an assault as defined in the Code. Respondent pleaded guilty to possession of a weapon for a purpose dangerous to the public peace, contrary to s. 85 of the Code, and was found guilty of unlawfully pointing a firearm, contrary to s. 84(1) of the Code. The trial judge applied the Kienapple principle in respect to these counts and entered no conviction. The Court of Appeal quashed the conviction under s. 83(1) but made no disposition with respect to the two for which no conviction had been entered.

Two issues were before this Court. Firstly, whether a conviction can obtain under s. 83(1) absent a conviction for the indictable offence whose commission involved the use of a firearm. Secondly, whether the Court of Appeal erred when it did not enter the convictions for the two counts to which the Kienapple principle had been applied when the conviction giving rise to its application was overturned.

Held: The appeal should be dismissed.

A conviction for an offence under s. 83(1) cannot stand alone. This Court has identified the purpose of this section as a measure to enable the Crown to obtain additional penalties where a firearm is used during the commission or the attempt to commit an offence. This purpose can logically be achieved only if a sentence is tacked on to a previous one. A prerequisite, therefore, is a sentence for the conviction of the underlying and distinct offence, as opposed to only a finding of fact. The conviction and sentence for the underlying offence prerequisite to s. 83(1) need not be obtained and imposed contemporaneously. Furthermore, while it is desirable that the two offences be in separate counts if in the same charge, they could well be both in the same count.

It was not necessary to identify with certainty the underlying offence for disposing of the case at bar. If the offence of unlawful confinement was the underlying offence that the Crown had in mind at the time of the laying of the indictment, the Court of Appeal was justified in quashing the guilty verdict pronounced with respect to s. 83(1) as the respondent had been acquitted of the count of unlawful confinement. Alternatively, the trial judge committed an error in law in finding the accused guilty of having used a firearm while committing an assault. The accused was not charged with any count of assault, either in that count or in a distinct count, and accordingly could not be convicted of that offence.

The count, even though an accused may have been convicted of offences during which he used a firearm, must clearly indicate the offence for which the accused person is charged with having used a firearm.

Section 623 of the Criminal Code enables this Court to remit the case to the trial judge for a determination of whether guilty verdicts should be entered with respect to the two counts for which no convictions had been entered and to make any order that the Court of Appeal might have made. Section 44 of the Supreme Court Act, which states (with certain exception not applicable here) that "No appeal lies to the Supreme Court from a judgment or order made in the exercise of judicial discretion", does not affect this power. It aims solely at preventing parties from bringing an appeal from a purely discretionary decision.

This Court, while usually reluctant to intervene in a lower court's decision in the context of a discretionary power, should do so here given that the Court of Appeal neither addressed the question of whether or not it would be appropriate to return the matter to the trial judge nor exercise its discretion one way or the other. The Court of Appeal, on allowing the appeal under s. 613(2), might have ordered that the file be remitted to the trial judge pursuant to s. 613(8). This Court has the power to make this order by virtue of s. 623 .

Cases Cited

Applied: McGuigan v. The Queen, [1982] 1 S.C.R. 284; referred to: Kienapple v. The Queen, [1975] 1 S.C.R. 729; R. v. Terlecki, [1985] 2 S.C.R. 483.

Statutes and Regulations Cited

Criminal Code, R.S.C. 1970, c. C-34, ss. 5(1), 83(1)(a), (b), (c), (d), (2), 84(1), 85, 244(1)(b), (c), 247(2) , 302 , 303 , 613(1) (a), (2), (4), (6), (7), (8), 623(1).

Supreme Court Act, R.S.C. 1970, c. S-19, s. 44(1).

APPEAL from a judgment of the Ontario Court of Appeal (1986), 15 O.A.C. 108, 29 C.C.C. (3d) 150, 52 C.R. (3d) 350, setting aside a conviction by Quinlan Dist. Ct. J. and entering an acquittal. Appeal dismissed.

David A. Fairgrieve, for the appellant.

James M. Novak, for the respondent.

//Lamer J.//

The judgment of the Court was delivered by

LAMER J. --

Introduction

This is an appeal by the Crown against a judgment of the Court of Appeal of Ontario which set aside Mr. Pringle's conviction for using a firearm while committing an indictable offence, and entered an acquittal. The Crown asks this Court to restore the conviction or, in the alternative, if the acquittal is to be upheld, to remit the case to the trial judge for the entering of convictions on charges stemming from the same set of events. These latter convictions were not entered due to an application by the trial judge of the principle commonly known as the Kienapple principle: see Kienapple v. The Queen, [1975] 1 S.C.R. 729.

The Facts

Mr. Pringle suspected his wife of having an affair with her employer. He went to her place of employment with a loaded shotgun. He confronted the employer with the gun, pointed it at him and told him that he was going to "blow him away". He raised the gun but, when the employer moved towards him, he brought the gun back down. The police arrived, arrested him and charged him with four counts.

The Charge

Count 1: unlawful confinement of the employer, contrary to s. 247(2) of the Criminal Code, R.S.C. 1970, c. C-34.

Count 2: using a firearm while committing an indictable offence, contrary to s. 83(1) (a) of the Criminal Code .

Count 3: possession of a weapon (the shotgun) for a purpose dangerous to the public peace, contrary to s. 85 of the Criminal Code .

Count 4: unlawfully pointing a firearm at the employer, contrary to s. 84(1) of the Criminal Code .

Count two did not disclose the indictable offence which the accused was alleged to have committed while using the firearm.

The trial judge acquitted the accused of the first count, that of unlawful confinement. This acquittal was not appealed and is not before us.

The trial judge found the accused guilty of the second count on the basis that the Crown had established beyond a reasonable doubt that Mr. Pringle had committed an assault as defined by s. 244(1) (b) or (c) of the Criminal Code as a result of Mr. Pringle's threat to shoot the employer.

Pringle pleaded guilty to count three and the judge found him guilty on the fourth count. However, no convictions were entered pursuant to an application of the Kienapple principle because of the conviction on count 2. The Court of Appeal quashed the conviction but made no disposition with respect to the two counts on which the convictions were not entered pursuant to Kienapple v. The Queen.

The only count on appeal below and in this Court is the count of using a firearm while committing an indictable offence.

The Issues

There are two issues before us:

1. Can there be a conviction under s. 83(1) without there first being a conviction for the indictable offence during the commission of which it is alleged that a firearm was used;
2. Having entered an acquittal, was the Court of Appeal wrong in not making an order in relation to counts three and four.

Relevant Legislative Provisions

The legislative provisions pertinent to the disposition of this appeal are ss. 83 , 613(1) (a), (2) , (8) and 623(1) of the Criminal Code and s. 44 of the Supreme Court Act, R.S.C. 1970, c. S-19.

Criminal Code

83. (1) Everyone who uses a firearm

- (a) while committing or attempting to commit an indictable offence, or
- (b) during his flight after committing or attempting to commit an indictable offence,

whether or not he causes or means to cause bodily harm to any person as a result thereof, is guilty of an indictable offence and is liable to imprisonment

- (c) in the case of a first offence under this subsection, except as provided in paragraph (d), for not more than fourteen years and not less than one year; and
- (d) in the case of a second or subsequent offence under this subsection, or in the case of a first such offence committed by a person who, prior to the coming into force of this subsection, was convicted of an indictable offence or an attempt to commit an indictable offence, in the course of which or during his flight after the commission or attempted commission of which he used a firearm, for not more than fourteen years and not less than three years.

(2) A sentence imposed on a person for an offence under subsection (1) shall be served consecutively to any other punishment imposed on him for an offence arising out of the same event or series of events and to any other sentence to which he is subject at the time the sentence is imposed on him for an offence under subsection (1).

613. (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit, on account of insanity, to stand his trial, or against a special verdict of not guilty on account of insanity, the court of appeal

- (a) may allow the appeal where it is of the opinion that
- (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,

(ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or

(iii) on any ground there was a miscarriage of justice;

...

(2) Where a court of appeal allows an appeal under paragraph (1)(a), it shall quash the conviction and

- (a) direct a judgment or verdict of acquittal to be entered, or

(b) order a new trial.

...

(8) Where a court of appeal exercises any of the powers conferred by subsections (2), (4), (6) or (7), it may make any order, in addition, that justice requires.

623. (1) The Supreme Court of Canada may, on an appeal under this Part, make any order that the court of appeal might have made and may make any rule or order that is necessary to give effect to its judgment.

Supreme Court Act

44. (1) No appeal lies to the Supreme Court from a judgment or order made in the exercise of judicial discretion except in proceedings in the nature of a suit or proceeding in equity originating elsewhere than in the Province of Quebec and except in mandamus proceedings.

Decision of the Court of Appeal (1986), 29 C.C.C. (3d) 150

Dubin J.A. (as he then was), with whom Thorson and Grange JJ. concurred, held that s. 83 was adopted to impose additional liability on an accused who used a firearm while committing an indictable offence. The purpose of its enactment was, as stated by Dickson J. (as he then was) in *McGuigan v. The Queen* [1982] 1 S.C.R. 284, to change the common law rule against multiple convictions and enable the Crown to obtain additional penalties where a firearm is used during the commission of an offence. Dubin J.A. also underlined the fact that s. 83(2) requires that the sentence for a conviction under s. 83(1) must be served consecutively to any other sentence arising from the same event or series of events. Consequently he held that in order for a person to be convicted of using a firearm under s. 83(1) there must be a conviction for the indictable offence in which it is alleged that the firearm was used.

Dubin J.A. held that in this case the accused was not convicted of the offence of unlawful confinement, the offence which the Crown had in mind when charging the accused under s. 83(1). He further found that the accused was not charged or convicted of assault, and therefore is presumed innocent of that offence in light of s. 5(1) of the Criminal Code. Since, in his opinion, a conviction for an offence under s. 83(1) cannot stand alone, he allowed the appeal, set aside the conviction and entered an acquittal.

Analysis

1. Prior Conviction as Condition Precedent under s. 83(1)

I am in full agreement with Dubin J.A.

The text alone of s. 83(1) does not permit one to determine with certainty if it is necessary that the accused be found guilty of the underlying offence before he can be found guilty of the offence of having used a firearm while committing the underlying offence.

The Crown claims that this question must be answered in the negative since nothing in the terms used in s. 83(1) indicates that the legislator intended such a requirement. It claims, more precisely, that it would have been possible for the legislator, if that had been his intention, to indicate clearly the necessity of a finding of guilt with respect to the underlying offence before an accused could be found guilty of an offence under s. 83(1) .

I cannot share the Crown's opinion in this regard. The fact that such a requirement could have been expressly provided for does not automatically imply that such a requirement does not exist where it has not been expressly enacted. In my view, we must take many factors into account when determining whether the requirement exists or not, notably the nature and the purpose of the legislative provision, the goal the legislator seeks to attain, the result each solution would bring about, the wording of the section and, the counterproductive result, as regards the purpose, a given interpretation would result in.

The goal pursued by Parliament when enacting s. 83(1) was, as underlined by Dubin J.A. in the court of appeal, clearly identified by Dickson J. (as he then was) in the case of *McGuigan v. The Queen*, *supra*, at p. 318:

It seems clear that what was intended in the enactment of s. 83 was to impose an additional penalty for what is, in effect, an aggravated form of robbery. Robbery can be committed without either the possession or the use of a firearm. The "use" of a "firearm" is not an essential element of the crime of robbery. A person may be convicted of that crime in the absence of a pistol, revolver or other firearms. [Emphasis added.]

The purpose of this statutory disposition was to enable the Crown to obtain additional penalties where a firearm is used during the commission or the attempt to commit an offence. The Crown argues that Dickson J.'s comments were only obiter since, in that case, both the underlying offence (robbery) and the use of a firearm during the commission of that offence were prosecuted and the accused was found guilty of both. I cannot accept this argument. The comments of Dickson J. were, under the circumstances of the case, more than an obiter. In my opinion, they were of general application and were necessary to the conclusion he arrived at. I do not contest the fact that this decision does not settle the question raised in the case at bar. Nonetheless, it is highly useful since the goal and purpose of s. 83(1) are well identified in it. Indeed, it seems to me indisputable that the goal and purpose of a provision remain the same, generally speaking, notwithstanding the circumstances in which the provision is relied upon.

The imposition of additional punishment, in this case minimum punishment, for using a firearm in the commission of an indictable offence could have been achieved by Parliament in more than one way.

One way would have been to do it through a sentencing provision, as the Code does for certain repeat offenders. Another way would have been to create an aggravated form of offence, such as was done for aggravated assaults. Noticeable is the fact that the additional punishment for the aggravated offence is obtained through the availability in either case of a higher maximum penalty sometimes coupled with a minimum sentence.

If the Crown were right we would have an aggravated offence with a maximum penalty (14 years) that is less than many indictable offences in the Code (murder, burglary in a dwelling house, robbery and others) and a minimum (1 year) which, at least in the case of murder, is a lesser one. The only way s. 83(1) will logically achieve the purpose this Court has identified as being the one Parliament is seeking, that is an additional penalty, is to provide for a sentence that will be tacked on to a previous one. This can only be achieved by the prerequisite of a sentence for the underlying offence, and that sentence can only be imposed (albeit a suspended sentence) if there has been a distinct conviction and not only a finding of fact as would be sufficient if the Crown's contention were right.

I should add that while the conviction and sentence for the underlying offence is a prerequisite to those under s. 83(1), this is not to say that they will not be obtained and imposed contemporaneously as in this case. Furthermore, while it is always preferable that, if in the same charge, the two offences be in separate counts, they could well be both in the same count. Of course to meet the prerequisite I have just set out, that is a distinct previous conviction, the count would have to be a truly duplicitous count (not to be confused with a multiplicitous count); that is the count would have to be worded in such a way that it would be clear to the accused that he is in jeopardy of being found guilty of two offences, clearly identified, the underlying offence and the offence of having used a firearm while committing that offence. A charge of having used a firearm while committing an assault is not duplicitous but a charge under s. 83 and cannot be dealt with unless there is another count and conviction for assault.

But a charge of having committed an assault and of having used a firearm in the commission thereof, contrary to ss. 244(1) (b) and 83 of the Criminal Code meets the requirement. However, the judge must convict for assault in order to convict for the use of the firearm.

But as I said, duplicitous counts are highly undesirable because of all kinds of procedural complications and the better way is to have distinct counts or charges.

In the case at bar, the underlying offence, in the context of the charge of having used a firearm while committing a criminal offence, seems to be the offence of unlawful confinement. However, the terms used in the indictment do not permit us to be certain in this regard. Nonetheless, I am of the view that it is not necessary to identify with certainty this underlying offence for disposing of the case at bar.

If the offence of unlawful confinement was the underlying offence that the Crown had in mind at the time of the laying of the indictment, the Court of Appeal was justified in allowing the appeal and quashing the guilty verdict pronounced with respect to s. 83(1) since the respondent has been acquitted of the count of unlawful confinement of Mr. Standish, the employer.

If the offence was not unlawful confinement, the trial judge has nevertheless committed an error in law in finding the accused guilty of having used a firearm while committing an assault. The accused has not been charged with any count of assault, whether in that count or in a distinct count, and, as such, he could not have been and in fact has not been found guilty of such an offence.

Finally, the Crown's argument to the effect that the Court of Appeal committed an error of law in quashing the guilty verdict with respect to the offence under s. 83(1), since the accused had been convicted of offences during which he used a firearm, does not affect my conclusion. This argument seems to me to be without merit since, in my opinion, the count must clearly indicate the offence during which the accused person is charged with having used a firearm. Furthermore, the fact that the Crown raises this question demonstrates the importance of clearly identifying the underlying offence. This illustrates one of the many difficulties which could arise in the absence of a clear indication concerning the underlying offence.

2. Returning the Matter to the Trial Judge

The Crown argues that the Court of Appeal, after having allowed the appeal and quashed the guilty verdict with respect to the offence under s. 83(1), should have exercised its discretionary power conferred by virtue of s. 613(8) of the Criminal Code and should have remitted the case to the trial judge for a determination whether guilty verdicts should be entered with respect to counts 3 and 4.

Guilty verdicts were in fact pronounced with respect to these two offences but the guilty verdicts were not entered against the respondent in view of the Kienapple principle. The guilty verdict pronounced with respect to the offence under s. 83(1) having been quashed, the application of this principle is open to review.

Section 623 of the Criminal Code enables this Court, in the opinion of the appellant, to remit the case to the trial judge for a determination whether guilty verdicts should be entered with respect to counts 3 and 4 since it states, among others things, that this Court may make any order that the court of appeal might have made.

The Respondent, on the other hand, argues that this Court does not have this power in view of s. 44 of the Supreme Court Act. This section states that "No appeal lies to the Supreme Court from a judgment or order made in the exercise of judicial discretion" except in the case of certain exceptions with which we are not concerned in the case at bar.

Section 44 of the Supreme Court Act , in my view, aims solely at preventing parties from bringing an appeal from a purely discretionary decision. In the case at bar, the Crown does not bring an appeal from a discretionary decision. It appeals from a judgment on the basis that it involves an error of law and in the course of this appeal asks for a revision of the exercise of a discretionary power ancillary to the contested decision. As such, s. 44 of the Supreme Court Act does not constitute an impediment to the request made by the Crown.

There remains to be determined, since it is a matter of discretion, whether this Court should exercise its discretion in the way requested by the Crown. This Court is usually reluctant to intervene and to quash a decision handed down by a lower court in the context of a discretionary power.

However, I am of the opinion that this Court should intervene given the circumstances of this case. The Court of Appeal did not exercise its discretion one way or the other. It seems rather that it did not even address the question whether it would be appropriate to return the matter to the trial judge. This is understandable since it appears that no request in this regard was made by the Crown and as well that no arguments concerning this question were made by the parties. As such, it is not a case where the appellant is unsatisfied with the way the Court of Appeal exercised its discretion and asks this Court to intervene. Consequently, this Court, in my view, should feel free to intervene and to exercise its own discretion as requested by the Crown.

This Court has the discretion and the power to make the order requested by the Crown. Section 613(8) of the Criminal Code clearly gives this power to the Court of Appeal by stating that where the Court of Appeal exercises any of the powers conferred by subss. (2), (4), (6) or (7), it may make any order, in addition, that justice requires. Section 623 of the Code, on the other hand, states that this Court may make any order that the Court of Appeal might have made. Since the Court of Appeal might have ordered, upon allowing the appeal under s. 613(2) , that the file, in virtue of s. 613(8) , be remitted to the trial judge, this Court, by virtue of s. 623 , has the power to make this order.

Thus, I am of the opinion that, given the circumstances of this case, we should, as in *R. v. Terlecki*, [1985] 2 S.C.R. 483, in dismissing the appeal, order that the file be remitted to the trial judge so that he may determine whether to register a conviction on counts 3 and 4 or on one of them and if so, to impose sentence.

I should finally mention the fact that the Crown did not bring an appeal from the trial judge's decision not to enter the guilty verdicts with respect to counts 3 and 4 and, consequently, the application of the Kienapple principle made by the trial judge to either or both those counts was and remains beyond our reach.

Accordingly, I would dismiss the appeal against the acquittal and order that the file be remitted to the trial judge for him to register a conviction or a stay in accordance with *Kienapple v. The Queen* as regards counts 3 and 4 and then to impose sentence.

Appeal dismissed.

Solicitor for the appellant: The Attorney General for Ontario, Toronto.

Solicitor for the respondent: James M. Novak, Toronto.

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