

CANADA / JUDGMENT

R. v. Sit

[1991] 3 SCR 124

COURT

Supreme Court of Canada

DECIDED

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R. v. Sit

Collection

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Date

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Report

[1991] 3 SCR 124

Case number

21369

Judges

Lamer, Antonio; La Forest, Gérard V.; Sopinka, John; Gonthier, Charles Doherty; McLachlin, Beverley; Stevenson, William; Iacobucci, Frank

On appeal from

Ontario

Subjects

Constitutional law

Criminal law

Notes

SCC Case Information: 21369

Decision Content

R. v. Sit, [1991] 3 S.C.R. 124

Dennis Tatwing Sit Appellant

v.

Her Majesty The Queen Respondent

Indexed as: R. v. Sit

File No.: 21369.

1991: June 21; 1991: October 3.

Present: Lamer C.J. and La Forest, Sopinka, Gonthier, McLachlin, Stevenson and Iacobucci JJ.

on appeal from the court of appeal for ontario

Constitutional law -- Charter of Rights -- Fundamental justice -- Presumption of innocence -- Constructive murder -- Party to offence -- Whether ss. 213(c) and/or 21(2) of the Criminal Code violate ss. 7 or 11 (d) of the Charter -- If so, whether such violation justified under s. 1 of the Charter -- Criminal Code, R.S.C. 1970, c. C-34, ss. 21(2), 213(c) -- Canadian Charter of Rights and Freedoms, ss. 1 , 7 , 11 (d).

Criminal law -- Constructive murder -- Party to offence -- Whether ss. 213(c) and/or 21(2) of the Criminal Code violate ss. 7 or 11 (d) of the Charter -- If so, whether such violation justified under s. 1 of the Charter .

The appellant was tried by a judge and jury on a charge of second degree murder. In his charge to the jury, the trial judge described three possible grounds upon which the appellant could be found guilty. First, the jury was instructed that the appellant could be found guilty of aiding and abetting an intentional killing by the combined operation of ss. 21(1) and 212 (a) of the Criminal Code . Secondly, the jury was instructed that the appellant could be found guilty as a party to a murder by the combined operation of ss. 21(2) and 213 (a) of the Criminal Code . Thirdly, the jury was instructed that the appellant could be found guilty as a party to a murder by the combined operation of ss. 21(2) and 213 (c) of the Criminal Code . The trial judge clearly stated that the appellant could be found guilty of murder whether or not he knew or ought to have known that the victim's death would result in the circumstances. The charge was given before the Supreme Court's decisions in R. v. Vaillancourt, R. v. Martineau, and R. v. Logan, and was appropriate at the time.

The jury found the appellant guilty on the charge of second degree murder and this verdict was upheld on appeal. The Court of Appeal held unanimously that the trial judge's instructions to the jury were inconsistent with R. v. Vaillancourt since they allowed the appellant to be convicted on the combined application of ss. 21(2) and 213 (c) as a party to murder even if he did not have objective foresight of the death of the victim. The majority of the Court of Appeal, however, invoked the curative provisions of s. 686(1)(b)(iii) (formerly 613(1)(b)(iii)) of the Criminal Code in order to uphold the appellant's conviction.

The appellant appealed as of right on the question whether his conviction was properly sustained through the application of s. 686(1)(b)(iii) and with leave at large. The appellant submitted that s. 213 (c) was inconsistent, both alone and in combination with s. 21(2) of the Criminal Code , with ss. 7 and 11 (d) of the Charter . He also submitted that this restriction could not be justified under s. 1 of the Charter .

Held: The appeal should be allowed. Section 213 (c) of the Criminal Code contravenes ss. 7 and 11 (d) of the Charter and is not justified under s. 1 . Section 21(2) contravenes ss. 7 and 11 (d) of the Charter with respect to offences for which subjective foresight is a constitutional requirement in so far as it permits a party to be convicted on the basis that he or she "ought to have known" that the commission of the offence would be a probable consequence of carrying out the common purpose. This restriction of ss. 7 and 11 (d) is not justified under s. 1 .

In *R. v. Martineau*, it was necessary for the Court to determine the minimum degree of mens rea required by the Charter for the offence of murder in order to assess the constitutional validity of s. 213 (a) of the Criminal Code . The determination of this minimum degree of mens rea was therefore the live issue before this Court. Consequently, the finding in *Martineau* that proof of subjective foresight of death is necessary in order to sustain a conviction for murder and that s. 213 (a) of the Criminal Code violated the Charter since it did not embrace this requirement was the ratio decidendi and not obiter dictum. Similarly, since the principles of fundamental justice constitutionally require proof of subjective foresight of death in order to sustain a conviction of a principal for murder, that same degree of mens rea is constitutionally required to sustain the conviction of a party to the offence of murder: *R. v. Logan*.

Section 213 (c) of the Criminal Code , as worded, violates ss. 7 and 11 (d) of the Charter and is, therefore, of no force or effect. An accused may be convicted of murder under s. 213 (c) without proof beyond a reasonable doubt that he had subjective foresight of the death of his victim.

The appellant's conviction should not be sustained through the application of s. 686(1) (b)(iii) of the Criminal Code .

Cases Cited

Applied: *R. v. Martineau*, [1990] 2 S.C.R. 633; *R. v. Logan*, [1990] 2 S.C.R. 731; referred to: *R. v. Vaillancourt*, [1987] 2 S.C.R. 636.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1 , 7 , 11 (d).

Constitution Act, 1982, s. 52(1) .

Criminal Code, R.S.C. 1970, c. C-34, ss. 21(1), (2), 212(a), 213(a), (c) [am. 1974-75-76, c. 93, s. 13; 1974-75-76, c. 105, s. 29; 1980-81-82-83, c. 125, s. 15].

Criminal Code, R.S.C., 1985, c. C-46, ss. 229 (a), 230 (a), (c), 686(1) (b)(iii).

APPEAL from a judgment of the Ontario Court of Appeal (1989), 47 C.C.C. (3d) 45, 31 O.A.C. 21, dismissing an appeal from conviction by O'Driscoll J. sitting with jury. Appeal allowed.

Michael Lomer and Damien R. Frost, for the appellant.

W. J. Blacklock and Kenneth L. Campbell, for the respondent.

//Lamer C.J.//

The judgment of the Court was delivered by

Lamer C.J. -- This appeal involves a constitutional challenge, under ss. 7 and 11 (d) of the Canadian Charter of Rights and Freedoms , to s. 213(c) of the Criminal Code, R.S.C. 1970, c. C-34 (now s. 230 (c)). The appellant challenges the constitutional validity of s. 213(c) both alone and in combination with s. 21(2) of the Criminal Code .

The appellant was tried by a judge and jury on a charge of second degree murder. In his charge to the jury, the trial judge described three possible grounds upon which the appellant could be found guilty. First, the jury was instructed that the appellant could be found guilty of aiding and abetting an intentional killing by the combined operation of ss. 21(1) and 212 (a) (now 229(a)) of the Criminal Code . Secondly, the jury was instructed that the appellant could be found guilty as a party to a murder by the combined operation of ss. 21(2) and 213 (a) (now 230(a)) of the Criminal Code). Thirdly, the jury was instructed that the appellant could be found guilty as a party to a murder by the combined operation of ss. 21(2) and 213 (c) of the Criminal Code . The trial judge clearly stated that the appellant could be found guilty of murder whether or not he knew or ought to have known that the victim's death would result in the circumstances.

The jury found the appellant guilty on the charge of second degree murder. This verdict was upheld by the Ontario Court of Appeal: (1989), 47 C.C.C. (3d) 45, 31 O.A.C. 21. The Court of Appeal held unanimously that the trial judge erred in instructing the jury that the appellant could be convicted on the combined application of ss. 21(2) and 213 (c). The trial judge informed the jury that, by the operation of ss. 21(2) and 213 (c), the appellant could be convicted as a party to murder even if he did not have objective foresight of the death of the victim. The Court of Appeal found, therefore, that the instructions were not consistent with the judgment of this Court in *R. v. Vaillancourt*, [1987] 2 S.C.R. 636. (It should be noted that the Court of Appeal's judgment in this case was rendered prior to the judgment of this Court in *R. v. Martineau*, [1990] 2 S.C.R. 633.) The majority of the Court of Appeal, however, invoked the curative provisions of s. 686(1) (b)(iii) of the Criminal Code, R.S.C., 1985, c. C-46 (formerly s. 613(1) (b)(iii)), in order to uphold the appellant's conviction. In dissenting reasons, Cory J.A. (as he then was) disagreed with the majority on this point.

The appellant now appeals to this Court as of right on the question whether his conviction was properly sustained through the application of s. 686(1) (b)(iii) and with leave at large. He requests a new trial on the grounds that the trial judge erred in instructing the jury that the combined application of ss. 21(2) and 213 (a) or ss. 21(2) and 213 (c) could provide the bases for a conviction

for second degree murder. He argues that a conviction for murder will not lie in the absence of proof beyond a reasonable doubt that an accused had subjective foresight of the death of his or her victim. An accused, in his opinion, may only be convicted of murder if the trier of fact is satisfied that the accused intended to cause the death of an individual or knew that the death of that individual would be the likely result of his conduct. Similarly, he submits that an accused may only be convicted as a party to murder upon proof that he or she had subjective foresight of the death of the victim. The appellant also submits that the majority of the Court of Appeal erred in applying the curative provisions of s. 686(1) (b)(iii) in this case.

The appellant relies on the judgment of this Court in *R. v. Martineau*, supra. *Martineau* involved a challenge to the constitutional validity of s. 213 (a) of the Criminal Code . A majority of the Court (Dickson C.J., Lamer C.J. and Wilson, Gonthier and Cory JJ.) held that s. 7 of the Canadian Charter of Rights and Freedoms requires proof that an accused had subjective foresight of the death of his or her victim before a conviction for murder can be sustained. Under s. 213(a), however, an accused could be convicted of murder whether or not he intended to kill his victim or knew that death was a likely result of his conduct. The provision thus violated ss. 7 and 11 (d) of the Charter and was declared to be of no force or effect pursuant to s. 52(1) of the Constitution Act, 1982 .

The respondent argued before this Court that the finding of the majority in *Martineau* that subjective foreseeability of death is the minimum constitutional mens rea requirement for murder is obiter dictum. The respondent emphasized that, under s. 213(a) of the Code, an accused could be convicted of murder in the absence of proof that he had objective foresight of the death of his victim. Section 213(a), therefore, could have been found to violate ss. 7 and 11 (d) of the Charter on the basis that the provision did not require objective foresight of death as an essential element of the offence. In this light, our findings regarding subjective foresight of death were arguably unnecessary to the resolution of the case.

In my opinion, a correct reading of *Martineau* does not support the respondent's submission. In *Martineau*, as I noted above, this Court was asked to pronounce on the constitutional validity of s. 213 (a) of the Criminal Code . To answer this question, it was necessary to determine the minimum degree of mens rea required by the Charter for the offence of murder. The determination of this minimum constitutional mens rea requirement was therefore the live issue before this Court. Consequently, our finding in *Martineau*, that proof of subjective foresight of death is necessary in order to sustain a conviction for murder and that s. 213 (a) of the Criminal Code violated the Charter since it did not embrace this requirement, was not obiter dictum. This finding was the ratio decidendi of the decision.

Similarly, it was held by this Court in *R. v. Logan*, [1990] 2 S.C.R. 731, that when the principles of fundamental justice constitutionally require, under s. 7 of the Charter , that there be a minimum degree of mens rea for conviction of a particular offence to be sustained, the same minimum degree of mens rea is constitutionally required for an accused to be convicted under s. 21(2) as a party to that offence. Since the principles of fundamental justice constitutionally require proof of subjective foresight of death in order to sustain a conviction of a principal for murder, that same degree of mens rea is constitutionally required to sustain the conviction of a party to the offence

of murder.

An accused may be convicted of murder under s. 213(c) without proof beyond a reasonable doubt that he had subjective foresight of the death of his victim. Accordingly, s. 213(c), as worded, infringes the rights guaranteed by ss. 7 and 11 (d) of the Charter . The provision cannot be saved by s. 1 of the Charter : see Martineau, *supra*, at p. 647, and Logan, *supra*, at pp. 745-47. Section 213 (c) is therefore of no force or effect pursuant to s. 52(1) of the Constitution Act, 1982 . The trial judge's charge to the jury was incorrect in law since the jury was instructed that the appellant could be convicted as a party to murder, on the combined application of ss. 21(2) and 213 (a) or ss. 21(2) and 213 (c), in the absence of proof that the appellant had subjective foresight of the death of the victim. I note, however, that his charge to the jury was entirely appropriate at the time since it was rendered prior to the decisions of this Court in Vaillancourt, Martineau and Logan, *supra*.

I agree with the dissenting reasons of Cory J.A. in the Court of Appeal that the appellant's conviction should not be sustained through the application of s. 686(1) (b)(iii) of the Criminal Code .

Consequently, I would allow the appeal and order a new trial. I would answer the constitutional questions as follows:

1.Does s. 213(c) of the Criminal Code [now s. 230 (c)] contravene the rights and freedoms guaranteed by ss. 7 and/or 11(d) of the Canadian Charter of Rights and Freedoms ?

Yes.

2.If the answer to question 1 is in the affirmative, is s. 213 (c) of the Criminal Code [now s. 230 (c)] justified under s. 1 of the Canadian Charter of Rights and Freedoms , and therefore not inconsistent with the Constitution Act, 1982 ?

No.

3.Does s. 21(2) of the Criminal Code contravene the rights and freedoms guaranteed by ss. 7 and/or 11(d) of the Canadian Charter of Rights and Freedoms ?

Yes, s. 21(2) of the Criminal Code contravenes the rights and freedoms guaranteed by ss. 7 and 11 (d) of the Charter with respect to offences for which subjective foresight is a constitutional requirement in so far as it permits a party to be convicted on the basis that he or she "ought to have known" that the commission of the offence would be a probable consequence of carrying out the common purpose.

4.If the answer to question 3 is in the affirmative, is s. 21(2) of the Criminal Code justified under s. 1 of the Canadian Charter of Rights and Freedoms , and therefore not inconsistent with the Constitution Act, 1982 ?

No.

Appeal allowed.

Solicitor for the appellant: Damien R. Frost, Toronto.

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

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