

CANADA / JUDGMENT

R. v. Verrette

[1978] 2 SCR 838

COURT

Supreme Court of Canada

DECIDED

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R. v. Verrette

Collection

Supreme Court Judgments

Date

1978-05-01

Report

[1978] 2 SCR 838

Judges

Laskin, Bora; Martland, Ronald; Ritchie, Roland Almon; Spence, Wishart Flett; Pigeon, Louis-Philippe; Dickson, Robert George Brian; Beetz, Jean; Estey, Willard Zebedee; Pratte, Yves

On appeal from

Quebec

Subjects

Criminal law

Decision Content

Supreme Court of Canada

R. v. Verrette, [1978] 2 S.C.R. 838

Date: 1978-05-01

Her Majesty The Queen Appellant;

and

Richard Verrette Respondent.

1978: February 1; 1978: May 1.

Present: Laskin C.J. and Martland, Ritchie, Spence, Pigeon, Dickson, Beetz, Estey and Pratte JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Criminal law—Nudity in a public place—Meaning of the expression “a person is nude who is so clad”—Deeming provision—Statutory fiction—“Is” meaning “shall be deemed to be”—Proof of offending against public decency or order not necessary—Costs of the appeal—Criminal Code, ss. 138, 163, 170, 771.

Respondent was charged with an offence under s. 170(1)(a) of the Criminal Code in that, without lawful excuse, he was nude in a public place. He was found guilty by a provincial magistrate. It is admitted that respondent danced while totally exposed on the stage in the hotel where he was performing before some 60 persons of both sexes. The appeal by trial de novo was dismissed by the Superior Court, but the majority in the Court of Appeal, being of the view that the prosecution had to establish that the act in question offended against public decency or order and that the Superior Court ought to have considered and decided whether the defence urged by respondent amounted to a lawful excuse, quashed the conviction and remitted the case to the Superior Court. Hence the appeal by the Crown to this Court.

Held: The appeal should be allowed.

Since lawful excuse was not urged as a defence by the respondent, the Court refrains from expressing any view on whether a legitimate theatrical performance may constitute a lawful excuse for nudity. The only question for determination by this Court is whether “nude” in s. 170(1)(a) of the Criminal Code refers to the sole fact of complete nudity or whether it should be read in the light of s. 170(2) so that it is incumbent upon the prosecution to establish that the nudity offended against public decency or order.

In the old s. 205A of the Criminal Code the expression used was “shall be deemed to be nude...”. This was clearly a deeming provision which assimilated scantiness of dress to complete nudity provided that scantiness of dress was such as to offend against public decency or order. A deeming provision is a statutory fiction which plays a function of enlargement. Thus in the old s. 205A, far from restricting the ordinary meaning of “nude”, the provision enlarged the meaning by bringing scantiness of dress within its scope. The new version of the Criminal Code simplified and shortened the section and “anyone shall be deemed to be nude” was replaced by “a person is nude”. This change is one of style which does not alter the deeming nature of the provision. Even though Parliament uses “is”, this is still a statutory fiction and “nude” in s. 170(1)(a) retains its normal meaning of total bareness, which however is notionally extended to certain ways of being clothed by s. 170(2). The word “nude” simply means “completely bare”, without reference to public decency or order. It follows that where there is complete nudity without lawful excuse in a public place, proof by the accused that the nudity was compatible with public decency or order is

not a defence just as proof that the nudity offended against public decency or order is not required from the prosecution.

The conviction having been restored, respondent must pay the fine of \$150 which he was condemned to pay. He should not, however, have to bear the costs of the appeal because the Crown wished a point of law to be clarified.

Johnson v. The Queen, [1975] 2 S.C.R. 160, (1973), 13 C.C.C. (2d) 402, 40 D.L.R. (3d) 215; R. v. McCutcheon, [1977] C.A. 103, (1977), 1 C.R. (3d) 39, distinguished; Barbeau v. The Queen, [1976] C.S. 704; R. v. Benolkin et al. (1977), 36 C.C.C. (2d) 206, referred to.

APPEAL from a decision of the Court of Appeal of Quebec,[1] allowing the appeal from a judgment of the Superior Court, criminal side, upholding a conviction by a magistrate. Appeal allowed and conviction restored.

Denis Robert, for the appellant.

Pierre Labrie, for the respondent.

The judgment of the Court was delivered by

BEETZ J.—With the consent of the Attorney General, respondent was charged with an offence under s. 170(1)(a) of the Criminal Code in that on May 31, 1975, without lawful excuse, he was nude in a public place, the Hotel St-Paul in St-Paul of Abbotsford, District of St-Hyacinthe. Respondent was tried by a provincial magistrate, Dumaine J., who found him guilty and condemned him to pay a fine of \$150 or to one month in gaol for default of payment. Respondent appealed to the Superior Court but the trial de novo was on the record of the evidence which had been heard by the provincial magistrate. His appeal was dismissed by Beauregard J. He further appealed to the Quebec Court of Appeal with leave of that Court. On January 20, 1977, the Court of Appeal allowed the appeal, quashed the conviction and remitted the case to the Superior Court; Bélanger J.A., dissenting, would have dismissed the appeal: [1977] C.A. 96. The Crown now appeals from the judgment of the Court of Appeal, with leave of this Court.

Section 170 of the Criminal Code provides:

170. (1) Every one who, without lawful excuse,

(a) is nude in a public place, or

(b) is nude and exposed to public view while on private property, whether or not the property is his own,

is guilty of an offence punishable on summary conviction.

(2) For the purpose of this section a person is nude who is so clad as to offend against public decency or order.

- (3) No proceedings shall be commenced under this section without the consent of the Attorney General.

The facts are not in dispute. Kaufman J.A., speaking for himself and for Turgeon J.A. described them as follows (at p. 97):

The uncontradicted evidence shows that the Appellant was a “gogo boy”, that is to say a male dancer, who performed on a stage in the hotel. At one point he was dressed in small “panties”, but as the performance progressed he took these off and continued to dance while totally exposed. It was dark in the hall, but a spotlight illuminated the stage. The music, described as typically “gogo”, was rather fast, and the Appellant’s testicles and penis “swung back and forth”. A mixed crowd of about 60 persons watched the performance. Some found it amusing, while others appeared to be embarrassed. The main defence urged by counsel for respondent before Dumaine J. was to the effect that the sixty persons of both sexes who watched respondent’s performance had not been shocked having gone to the hotel to see precisely this sort of spectacle and knowing what to expect; in those circumstances, respondent had neither offended against public decency nor breached public order. In the course of argument, Dumaine J. said this was not a defence; he also expressed the view that while respondent’s performance had not breached public order, there was no doubt it had offended against public decency.

In the Superior Court, Beauregard J. made no finding on those points. The record does not disclose what was argued before him but, in his short reasons for judgment, he held that the Hotel St-Paul was a public place within the meaning of s. 138 of the Criminal Code, that s. 163, which deals with immoral, indecent or obscene theatrical performances, did not prevent the application of s. 170 and that, to be nude within the purview of s. 170 means either to be totally unclothed or to be so clad as to offend against public decency or order. The main thrust of this judgment as I understand it is that respondent had infringed s. 170(1)(a) by the sole fact that he had been completely nude in a public place, whether or not his nudity had offended against public decency or order.

On the latter point, the majority in the Court of Appeal reached a different conclusion:

Assuming, then, that Section 170 was not intended to cover immoral, indecent or obscene theatrical performances, is the wording sufficiently wide to include nude performers?

The conclusion I have reached—not without difficulty and indeed some doubt—is that theatrical performances are included, provided, however, that there is proof that they “offend against public decency or order”.

This conclusion is based on the wording of sub-section (2), which states that, “For the purposes of this section a person is nude who is so clad as to offend against public decency or order”. It does not say, for instance, that nudity “includes” persons clad offensively, which would have been a different matter altogether. But, as it stands, I am satisfied that sub-section (2) is more than just a definition, and that sub-section (1), even in cases of total exposure, must be read with this in mind. Therefore, in order to convict, proof that the act offended against public decency or order

is an essential element. (Per Kaufman J.A. at p. 99).

The Court of Appeal also took the view that the Superior Court ought to have considered and decided whether the defence urged by respondent amounted to a lawful excuse: nudity might offend against public decency or order in a cabaret but not in a legitimate theatre and there might be some overlapping between public decency or order on the one hand and lawful excuse on the other. Since however, by the terms of s. 771 of the Criminal Code, appeals to the Court of Appeal in summary conviction matters are confined to questions of law, the Court of Appeal held that it was precluded from weighing the evidence and remitted the case to the Superior Court to be dealt with according to the evidence and the law.

In this Court, neither party challenged the conclusion of the Court of Appeal that the wording of s. 170 is sufficiently wide to embrace a performance such as that given by respondent. Whether respondent had a lawful excuse was not discussed either in the factums or in oral argument. As I read the record which was before the provincial magistrate and the Superior Court, it was not argued that respondent had a lawful excuse in that his dance was part of an overall legitimate theatrical performance but rather that, in the circumstances of this case, the spectators could not have been shocked by his dancing in the nude. I cannot distinguish the latter proposition from the submission that respondent's nudity had not offended against public decency or order. Lawful excuse is a defence which must be urged by the accused. I take it that respondent is no longer urging such a defence if indeed he ever did. I accordingly refrain from expressing any view on whether a legitimate theatrical performance may constitute a lawful excuse for nudity as well as upon other possible examples of lawful excuse which were discussed below in this and other cases such as escaping from a house on fire, running away from a rapist, modeling in a lecture hall for art students (on the assumption that a lecture hall is a public place). The only question argued before this Court and the only one for determination therefore is whether "nude" in s. 170(1)a) of the Criminal Code refers to the sole fact of complete nudity or whether it should be read in the light of s. 170(2) so that it is incumbent upon the prosecution to establish that the nudity offended against public decency or order. In other words, should s. 170(2) be construed as restricting the ordinary meaning of nudity for the purposes of the section or as extending the scope of s. 170(1) so as to include within nudity certain ways of being clothed?

This question has recently given rise to conflicting judicial opinions apart from those expressed below in the instant case. Thus, in *Barbeau v. The Queen*, a judgment of the Superior Court[2], dated February 24, 1976, and now inscribed in appeal, the facts were similar except that the accused was a female dancer; she was convicted and her appeal by way of trial de novo was dismissed by Deslandes J. who construed s. 170(2) as extending the scope of s. 170(1); Deslandes J. expressly agreed with the reasons of Beauregard J. in the present case and declined to follow those of Phelan J. in *McCutcheon v. The Queen*, an unreported judgment of the Superior Court, dated May 7, 1975. The facts were slightly different in the *McCutcheon* case where the accused, a female strip-tease artist, had removed all her clothes save a light, transparent veil fastened at her throat. Phelan J. acquitted the accused having found that her strip-tease had neither offended the spectators' sense of decency nor breached public order. But in a somewhat elaborate dictum,

Phelan J. expressed the opinion that s. 170(2) restricted the scope of s. 170(1). The Quebec Court of Appeal dismissed the Crown's appeal in *McCutcheon*. Its judgment, also dated January 20, 1977, is reported at (1978), 1 C.R. (3d) 39[3]. Owen J.A. agreed with Phelan J. on the law; Lajoie J.A. pointed out that this was not a case of total nudity and held that the finding of Phelan J. that the accused's performance had not offended against public decency or order was one of fact which could not be reviewed by the Court of Appeal; Bélanger J.A. agreed with Lajoie J.A. but disagreed with Owen J.A. on the law, referring to his dissent in the case at bar.

In the case at bar, the Court of Appeal said that s. 170(2) is "more than just a definition" and indicated that the situation would be different should the subsection provide that nude persons "include" persons clad offensively. In definition provisions, the word "includes" is generally used extensively in contradistinction to the restrictive word "means". To underline that the word "includes" has not been used is to suggest, a contrario, that the word "means" might have come closer to expressing the real intent. The Court of Appeal stopped short at that point; if that suggestion were accepted, the subsection would be construed as if it read:

For the purposes of this section, "nude" means to be so clad as to offend against public decency or order.

An anomalous consequence would follow: to be clad in a certain way would be an offence under s. 170; to be completely naked would not.

Neither "includes" nor "means" were used and I think little is to be gained by the consideration of words which are not in the section.

The key word of s. 170(2) is the verb "is" in the proposition "a person is nude". In my opinion "is" here means "shall be deemed to be", the very expression used in the predecessor of s. 170 which was added to the Criminal Code as s. 205A by the Statutes of Canada, 1931, c. 28, s. 2:

205A. (1) Every one is guilty of an offence and liable upon summary conviction to three years' imprisonment who, while nude,

- (a) is found in any public place whether alone or in company with one or more other persons who are parading or have assembled with intent to parade or have paraded in such public place while nude, or
- (b) is found in any public place whether alone or in company with one or more persons, or (c) is found without lawful excuse for being nude upon any private property not his own, so as to be exposed to the public view, whether alone or in company with other persons, or
- (d) appears upon his own property so as to be exposed to the public view, whether alone or in company with other persons.

For the purposes of this subsection any one shall be deemed to be nude who is so scantily clad as to offend against public decency or order.

- (2) No action or prosecution for a violation of this section shall be commenced without the leave of the Attorney General for the province in which the offence is alleged to have been committed.

It was said that s. 205A was aimed at the conduct of members of a religious sect who by way of protest sometimes paraded in the nude. This appears to be substantiated by the text of subs. (1)a of s. 205A although the letter of s. 205A, as that of the present s. 170, is broader in scope than would be required to achieve this alleged purpose and whatever acts or behaviour come within the four corners of the prohibition are caught by its terms. The problem we have to solve did not arise under the old section: it forbade nudity, in the normal dictionary sense of complete nudity, whenever it occurred in a public place, or on a private property if there was exposure to public view. It would have been easy however to circumvent the law by the wearing of some microscopic garment. The last paragraph of s. 205A(1), a deeming provision, accordingly assimilated scantiness of dress to complete nudity provided that scantiness of dress was such as to offend against public decency or order. A deeming provision is a statutory fiction; as a rule it implicitly admits that a thing is not what it is deemed to be but decrees that for some particular purpose it shall be taken as if it were that thing although it is not or there is doubt as to whether it is. A deeming provision artificially imports into a word or an expression an additional meaning which they would not otherwise convey beside the normal meaning which they retain where they are used; it plays a function of enlargement analogous to the word “includes” in certain definitions; however, “includes” would be logically inappropriate and would sound unreal because of the fictional aspect of the provision. Thus, a scantily dressed person is not really nude; but if under certain conditions that person be deemed to be nude in a provision prohibiting nudity, the word “nude” keeps its ordinary meaning which at the same time is extended to something which is not nudity. That is why, under the old s. 205A, in cases of complete nudity, it was clearly unnecessary for the prosecution to prove that the nudity offended against public decency or order: far from restricting the ordinary meaning of “nude”, the deeming provision preserved that meaning and at the same time enlarged it by bringing scantiness of dress within its scope.

Explicit deeming provisions having the same effect are still to be found in the present Criminal Code. For instance, s. 308(b)(ii) extends the meaning of breaking and entering to entry without lawful justification.

Old s. 205A was given its present form as s. 159 in the 1953-54 revision of the Code, c. 51. The maximum sentence was shortened; the defence of lawful excuse was generalized; it must also have been thought that the expression “so scantily clad” was inadequate since one can imagine ways of being heavily clothed which are capable of offending against public decency or order; the provision was refined accordingly; finally, the whole section was shortened and simplified although there is nothing to indicate that its general intent was otherwise modified.

In that process of simplification, the words “anyone shall be deemed to be nude” were replaced by the words “a person is nude”. In my view, this change did not alter the deeming nature of the provision; it merely expressed it in a simpler and more figurative way, a matter of style, not of substance. To say in a statute that a person is nude when he is clothed is to create a legal fiction

whether the verb “is” or the expression “shall be deemed to be” are used: even Parliament cannot turn fiction into reality whatever words it uses. Because of that fiction, “nude” in s. 170(1)a retains its normal dictionary meaning of total bareness which however is notionally extended to certain ways of being clothed by s. 170(2). To hold otherwise involves an unwarranted departure from the ordinary sense of the word “nude”; “nude” does not mean “shockingly bare”, or “offensively bare”; it simply means “completely bare”, without reference to public decency or order. If the Court of Appeal is right, s. 170(1)a should be construed as if it read:

is nude in a public place so as to offend against public decency or order.

Parliament could easily have said so if that is what it intended but it did not.

Section 170(2) is not the only one in the Criminal Code where the verb “is” must be taken in the sense of “shall be deemed to be”. Section 649(5) provides:

An application for leave to appeal is an appeal for the purposes of this section.

An application for leave to appeal is clearly not an appeal. Here again the verb “is” constitutes a short-hand way of saying “shall be deemed to be”.

Counsel for respondent drew our attention to s. 16(2) of the Criminal Code which defines insanity:

For the purposes of this section a person is insane when he is in a state of natural imbecility or has a disease of the mind to an extent that renders him incapable of appreciating the nature and quality of an act or omission or of knowing that an act or omission is wrong.

The submission was that as s. 16(2) provides an exhaustive definition of insanity, s. 170(2), which is structurally drafted in the same manner, should similarly be construed as an exhaustive definition of nudity. I disagree. The proposition “a person is insane” in s. 16(2) is not a deeming provision because natural imbecility or a disease of the mind do qualify as insanity. No legal fiction is involved there as in saying that a person is nude who is clad in a certain way. Also and as was noted above, such an exhaustive definition of nudity would entail an incongruous result in excluding complete nudity from the reach of the section.

Counsel for respondent argued in his factum that the matter had been resolved by the decision of this Court in *Johnson v. The Queen*[4]. I do not think so. Appellant in that case had been charged with an offence under what is now s. 163(2) of the Criminal Code in that she had unlawfully appeared as a performer in an immoral performance, having danced in the nude in a theatre before a paying audience. This Court held that the trial judge and the Appellate Division had erred in holding that s. 170 is to be construed as meaning that nudity in a public place constitutes an immoral performance within the meaning of s. 163(2); accordingly the prosecution could not obtain a conviction for an immoral performance under s. 163(2) simply by proving total nakedness and referring to s. 170. It is true that my brother Ritchie who spoke for the majority said (at p. 172) that s. 170 is confined to the case of a person “who is so clad as to offend against public decency or order”. But the question whether nudity per se is an offence under s. 170(1) did

not arise in the Johnson case. All that was decided was that nudity per se is not immoral for the purpose of s. 163(2). Furthermore, my brother Ritchie explicitly refrained from expressing any opinion (and I do not express any either) as to what the result would have been had the appellant in the Johnson case been charged with participating in an indecent performance (at p. 174). In my view, Bélanger J.A. correctly interpreted the Johnson case and I agree with the following reasons of his dissenting opinion (at p. 102):

[TRANSLATION] In my view this decision is authority only for the following proposition: the Crown cannot obtain a conviction for taking part in an immoral performance (s. 163(2) C.C.) by restricting its evidence to the total nudity of the performer and referring only to s. 170 C.C. as establishing its immoral character. It cannot be concluded from the same decision that a person who is completely nude, without lawful excuse, in a public place may be found guilty of the offence in s. 170 C.C. only on evidence that this nudity offended against public decency or order. In my view this latter evidence is required only in cases where the accused was not completely nude and the Crown wished him to be considered as having been nude. The offence we are concerned with is that of being nude in a public place without lawful excuse, nothing more. In reality one cannot be nude in different ways; however, one can be dressed in many different ways that amount to nudity if, for the purposes of the Act, these ways offend against public decency and order. I would add that nude or clothed, one can behave immorally: it is not such behaviour which concerns us at present.

Counsel for respondent referred us to the case of *Regina v. Benolkin et al.*[5] where three young men who had been swimming in the nude in the South Saskatchewan River were charged and convicted under s. 170(1)a. McPhefson J. of the Saskatchewan Queen's Bench quashed their conviction holding that their conduct was neither disorderly, indecent or immoral, which was their lawful excuse. Earlier in the course of his judgment he had said (at p. 207):

Whatever the technicalities of procedure may be, I am of the view that the acts of the accused in the circumstances did not constitute an offence and that the convictions should be quashed. It cannot be an offence to swim in the nude at a lonely place in Canada in summer. That is part of the pleasure of summer in Canada, particularly to young males. If somebody comes along unexpectedly or if the swimmer misjudged the loneliness of the place the act cannot suddenly become criminal.

Section 170 was "aimed at such conduct as was exhibited not infrequently by members of a certain radical religious sect", per Spence J., in *Johnson v. The Queen* (1973), 13 C.C.C. (2d) 402 at p. 417, 40 D.L.R. (3d) 215, [1975] 2 S.C.R. 160. It certainly was not aimed at nude swimming, or nudity on a shore in a lonely place, public or not.

I am not called upon to say whether there was lawful excuse in that case. But where there is complete nudity without lawful excuse in a public place, proof by the accused that the nudity was compatible with public decency or order is not a defence in my opinion just as proof that the nudity offended against public decency or order is not required from the prosecution. On the other hand, lawful excuse is a full defence even if it is proved that the nudity did offend against

public decency or order. It was finally submitted in respondent's factum that while charges for much more serious offences do not require the consent of the Attorney General, still this consent is necessary for proceedings to commence under s. 170 as under ss. 124 (contradictory evidence), 162 (restriction of publication of reports of judicial proceedings), 281.1 (advocating genocide), 281.2 (public incitement of hatred), 281.3 (seizure of hate propaganda), 343 (fraudulent concealment of title documents) and 380 (criminal breach of contract). The provisions creating those offences, it was contended, have one common feature: they restrict fundamental civil liberties and should be construed accordingly. I fail to see how the requirement of the Attorney General's consent can be of help in construing such a variety of provisions and, while I have had occasion to read many bills of rights, I have yet to find one where public nudity was declared to be a matter of fundamental freedom.

The laying of charges under s. 170 instead of s. 163 in theatrical performance cases was disapproved of by some members of the Bench as an attempt to sidestep the obligation to prove immorality, indecency or obscenity. That was the view expressed in the McCutcheon case by Owen J.A. who added (at p. 50):

If the proper interpretation of s. 170 Cr. C. is that in all prosecutions under that section the Crown must show that the nudity involved offended against public decency or order there would not be the same temptation to invoke s. 170 Cr. C. for purposes other than that for which it was intended. Otherwise this abuse could be avoided if the Attorney General would refuse to give his consent to the commencement of the proceedings under s. 170 Cr. C with respect to theatrical performances which are adequately covered by s. 163 Cr. C.

With deference, I do not think that we should endeavour to construe the Criminal Code so as to make the task of the prosecution easier or more difficult. The selection of the charges is entirely a matter for the Crown. The consent of the Attorney General in a case such as this one is also discretionary. And if it be thought that a provision of the Code is imperfect or has become antiquated, it is for Parliament to change it.

I have come to the conclusion that the appeal must be allowed. In his factum, respondent prays that if such be the case he be not condemned to pay the costs. I agree. We have occasionally granted leave to the Crown in summary conviction cases provided it undertook to pay respondent's costs on a solicitor-client basis. (See *The Queen v. Moreau*, a case which has been heard on March 15, 1978, and which has been reserved[6]; see also *The Queen v. Chapin*, where leave to appeal was granted on January 24, 1978.) Respondent was condemned to pay a fine of \$150. He should not have to bear all the costs of being brought to this Court in a case of this kind because the Crown wishes a point of law to be clarified.

I would allow the appeal without costs in this Court, set aside the judgment of the Court of Appeal and restore the judgment of the Superior Court.

Appeal allowed without costs.

Solicitor for the appellant: Denis Robert. Saint-Hyacinthe, Quebec.

Solicitor for the respondent: H. Pierre Labrie, Saint-Hyacinthe, Quebec.

[1] [1977] C.A. 96, (1977), 1 C.R. (3d) 58.

[2] [1976] C.S. 704.

[3] [1978] C.A. 103, summary only.

[4] [1975] 2 S.C.R. 160.

[5] (1977), 36 C.C.C. (2d) 206.

[6] Judgment delivered on October 17, 1978.

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