

CANADA / JUDGMENT

Sellars v. The Queen

[1980] 1 SCR 527

COURT

Supreme Court of Canada

DECIDED

7 February 1980

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Sellars v. The Queen

Collection

Supreme Court Judgments

Date

1980-02-07

Report

[1980] 1 SCR 527

Judges

Martland, Ronald; Ritchie, Roland Almon; Pigeon, Louis-Philippe; Dickson, Robert George Brian; Beetz, Jean; Estey, Willard Zebedee; Chouinard, Julien

On appeal from

Quebec

Subjects

Criminal law

Decision Content

Supreme Court of Canada

Sellars v. The Queen, [1980] 1 S.C.R. 527

Date: 1980-02-07

James Edward Sellars Appellant;

and

Her Majesty The Queen Respondent.

1979: December 5; 1980: February 7.

Present: Martland, Ritchie, Pigeon, Dickson, Beetz, Estey and Chouinard JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Criminal law—Charge to jury—Testimony of an accessory after the fact—Rule of caution applicable—Opinion expressed by the Court earlier—Authority of this opinion—Obiter dictum—No substantial wrong or miscarriage of justice—Criminal Code, s. 613(1)(b)(iii).

Appellant was found guilty of murder after being tried by a court consisting of a judge and jury. At the hearing, the prosecution called as a witness one Welch who was admittedly an accessory after the fact. A majority of the Court of Appeal of Quebec upheld the guilty verdict. In this Court appellant raised only one question: he argued that the rule requiring a judge to warn the jury of the risk of basing a guilty verdict on the uncorroborated testimony of an accomplice extends to an accessory after the fact. Respondent contended that even if appellant was correct on this point, the appeal should be dismissed in accordance with s. 613(1)(b)(iii) of the Criminal Code, which provides that “notwithstanding that the Court is of the opinion that... the appeal might be decided in favour of the appellant”, on the ground that the trial judgment constituted an erroneous decision on a point of law, it may dismiss the appeal if “it is of the opinion that no substantial wrong or miscarriage of justice has occurred”.

Held: The appeal should be dismissed.

Appellant’s argument must be admitted on the first point. In *Paradis v. The Queen*, [1978] 1 S.C.R. 264, this Court in fact held that the same rule of caution must be applied to the testimony of an accessory after the fact as to that of an accomplice. Although it was not absolutely necessary to do so in order to dispose of the appeal, the Court has ruled on the point and this interpretation must be followed.

However, in light of the evidence and taking into consideration all the circumstances of the case, respondent’s argument based on s. 613(1)(b)(iii) Cr.C. must be allowed. Although the trial judge did not apply the rule of caution mentioned above to the testimony of an accessory after the fact, he nonetheless instructed the jury on the credibility of witnesses and the factors by which it may be affected. In particular, he asked the jury to consider Welch’s character, his reputation, in conjunction with his past conduct and his action in the case at bar. Urging the jurors to caution because Welch was an accessory after the fact would not have had a different effect on them from that produced by the caution contained in the judge’s remarks. Accordingly, no substantial wrong or miscarriage of justice occurred. Moreover, apart from Welch’s testimony, the evidence appears to be overwhelming.

Paradis v. The Queen, [1978] 1 S.C.R. 264, applied; Provincial Secretary of Prince Edward Island v. Egan, [1941] S.C.R. 396; Schwartz v. The Queen, [1977] 1 S.C.R. 673; Switzman v. Elbling, [1957] S.C.R. 285; R. v. Zelensky, [1978] 2 S.C.R. 940; Attorney General of Quebec v. Cohen, [1979] 2 S.C.R. 305; Patterson v. The Queen, [1970] S.C.R. 409; Ottawa v. Nepean Township et al., [1943] 3 D.L.R. 802; Avon v. The Queen, [1971] S.C.R. 650; Re Depagie and The Queen (1976), 32 C.C.C. (2d) 89, referred to.

APPEAL from a decision of the Court of Appeal of Quebec[1], affirming a guilty verdict rendered by a jury of the Superior Court, criminal side. Appeal dismissed.

Jean R. Salois, for the appellant.

Ronald Schachter, for the respondent.

English version of the judgment of the Court delivered by

CHOUINARD J.—Only one question is raised by appellant, namely whether the rule requiring a judge to warn the jury of the risk of basing a guilty verdict on the uncorroborated testimony of an accomplice extends to an accessory after the fact.

The justification for this rule is the interest which an accomplice is presumed to have in attributing responsibility for a crime to another person in order thereby to exculpate himself. Some believe that an accessory after the fact lacks this interest, since his crime is distinct and subsequent and he escapes all liability if the person he helped is acquitted. Others take the view that he may nonetheless have an interest likely to lessen his credibility, as for example in co-operating with the prosecution in the hope of a lighter sentence. Briefly stated, these are the two approaches between which opinion has long been divided.

However, in *Paradis v. The Queen*[2], a majority of this Court expressed the opinion that the same rule of caution must be applied to the testimony of an accessory after the fact as to that of an accomplice, and in my opinion, therefore, this is the interpretation that must prevail.

As it does from time to time, the Court has thus ruled on the point, although it was not absolutely necessary to do so in order to dispose of the appeal.

In *Provincial Secretary of Prince Edward Island v. Egan*[3], which has since been followed on the constitutional question decided in that case, Rinfret J., as he then was, wrote at pp. 411 and 412:

The Supreme Court en banc, however, thought it advisable to deal with the question of the constitutionality of section 84(1) of the Highway Traffic Act, 1936, since the Criminal Code has enacted sec. 285, subs. 7, amended by sec. 6 of ch. 30 of the Statutes of Canada, 3 Geo. VI (1939). And that Court declared ultra vires the provision of the Highway Traffic Act “as to cancellation of a licence on a conviction for driving a motor car whilst intoxicated.”

It is because of the declaration on that point that the Attorney-General of Prince Edward Island has carried his appeal to this Court and that the Attorney-General of Canada and the Attorney-General for Ontario have been allowed to intervene. It was represented to us that this declaration has an important and wide consequence and that, while only an obiter dictum, it might affect the jurisprudence not only in Prince Edward Island but also in other provinces. It appears desirable, therefore, that this Court should express its opinion upon the matter.

Similarly, in *Schwartz v. The Queen*[4], the Court, although this was not necessary to its decision, expressed a majority opinion on the meaning of the word “wrong” in s. 16(2) of the Criminal Code. Martland J. wrote at pp. 694 and 695: In my opinion the judge’s charge upon the meaning of the word “wrong” in s. 16(2) was not erroneous. I propose to deal with this issue only because the matter was fully argued before us, and it would be desirable that an expression of opinion on this point by this Court should be made.

See also *Switzman v. Elbling*[5], and *R. v. Zelensky*[6].

In *Attorney General for the Province of Quebec v. Cohen*[7], the Court affirmed the authority of a statement of principle contained in one of its decisions. Pigeon J., speaking for the Court, wrote at p. 308:

I cannot accept that what was said in *Patterson* by the two judges who disagreed with Judson J. on what he said in the last quoted paragraph, although one of them agreed on the conclusion, in any way detracts from the authority of this statement of principle approved by a majority of this Court.

The *Patterson*[8] decision, was also followed by the Court of Appeal of Alberta in *Re Depagie and The Queen*[9], in which McDermid J., citing the same passage as Pigeon J. in *Cohen*, wrote on behalf of the majority, at p. 92:

...However, even if the last paragraph of the judgment I have quoted is obiter, as stated by Bouck, J., in *R. v. Hubbard et al.*, [1976] 3 W.W.R. 152, I would not feel justified in not following it even if I thought it was not in accord with the previous authorities.

In *Ottawa v. Nepean Township et al.*[10], Robertson C.J. wrote for the Court of Appeal of Ontario, at p. 804:

...What was there said may be obiter, but it was the considered opinion of the Supreme Court of Canada, and we should respect it and follow it even if we are not strictly bound by it.

In the case at bar the trial judge did not apply the foregoing rule, as in his opinion it did not apply to the testimony of an accessory after the fact. He said the following in his charge to the jury: ... Witness Welch was not an accomplice because he was not one who knowingly and voluntarily cooperated with or assisted or advised or encouraged another to commit a crime.

If and it would appear that he was an accessory after the fact, he is not an accomplice in the sense that I must warn you of the danger of condemning the accused on the strength of his uncorroborated testimony.

It should be mentioned that the judge's charge dates back to July 5, 1976, before the judgment of this Court in Paradis, which was handed down on February 8, 1977. The trial judge properly relied on the judgment of the Court of Appeal in the same case, handed down on January 7, 1975.

However, in the case at bar, a majority judgment of the Court of Appeal of Quebec dismissed the ground of appeal based on the failure to apply this rule.

In view of the foregoing conclusion that, as determined by this Court in Paradis, the same rule must be applied to the testimony of an accessory after the fact, appellant's argument on this point must be upheld.

However, respondent contended that the appeal should be dismissed nonetheless, pursuant to s. 613(1)(b)(iii) of the Criminal Code, which reads:

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) ...

(b) may dismiss the appeal where

...

(iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred.

In light of the evidence, and taking into consideration all the circumstances of this case, I would dismiss the appeal on this ground. The facts are summarized by Dubé J. of the Court of Appeal as follows:

[TRANSLATION] Pierre Côté, a bachelor, residing at 34 rue Claudel, Lévis, was last seen alive on August 23, 1975 at Lévis by his sister-in-law, Mrs. Hélène Carrier Côté; at the time he was in possession of his car, a yellow-gold 1972 Mustang, registered in his name with licence number 254A671.

On October 4, 1975, at St-Philippe de Néri, ninety-five (95) miles east of Quebec City, a youth named Philippe Bélanger found a body in an advanced state of decomposition in the forest: subsequent research showed the body to be that of Pierre Côté.

Pierre Côté's cause of death was attributed to two 22-calibre revolver bullets found in the skull of the victim.

On February 3, 1976, a car which was subsequently identified as that of Pierre Côté was seen on a parking lot at Fredericton in New Brunswick; Joseph-Pierre Chauvin, a member of the RCMP disguised as an ordinary citizen, met with appellant Sellars who lived in Fredericton, and the latter told him that he had the car in question for sale for the sum of \$1,500 from the real owner, who was planning to report his car as stolen and so claim the amount from his insurance company.

The foregoing facts are not in dispute and no evidence was presented to rebut them.

At the hearing, one Ralph Welch testified that he was a friend of Sellars and that he had sold him an old 22-calibre revolver in July 1975. He stated that he saw Sellars in possession of Pierre Côté's automobile in Fredericton during the weekend before the Labour Day holiday, that is at the end of August; Sellars told him that he had received the car in payment of a debt, but that he had no registration; Welch further stated in his testimony that Sellars told him that he had killed a man with the 22 revolver which he had bought from him, and had subsequently gotten rid of the revolver by throwing it away.

Welch stated that he helped Sellars clean up Pierre Côté's car and found in it a watch, which he gave to one of his friends who had apparently since lost it; he also discovered a case used to keep identification papers, which he turned over to the RCMP.

Ralph Welch stated that he had previously been found guilty of unlawful possession of alcoholic beverages, and stated that he had obtained by theft the revolver which he sold to Sellars.

An expert witness for the Crown on firearms, a physicist named Antoons, stated that the two bullets found in the head of the victim, Pierre Côté, came from two different weapons; however, in a subsequent report Antoons added that it was possible for the two bullets to have been fired by the same weapon, if the weapon was an old and defective revolver. Welch stated that the weapon he sold Sellars was "sound, but it was very old and dirty".

Appellant did not testify and called no witnesses.

While the judge did not apply the rule mentioned above to the testimony of an accessory after the fact, he nonetheless instructed the jury on the credibility of witnesses and the factors by which it may be affected, in particular the interest which a witness may have, and in the case of Welch in particular, his reputation.

To begin with, he said:

The next subject I am going to speak to you about is the credibility or truthfulness of witnesses. You have had in this case an opportunity of hearing evidence by various witnesses; giving accounts of what occurred. You must bring to bear upon the question of credibility or the truthfulness of a witness your experience as men and women in the ordinary affairs of life. You may believe all the evidence given by a witness, a part of the evidence given by the witness or none of the evidence given by a witness.

When deciding upon the credibility of a witness or the weight you are going to give to the evidence of a witness you should consider what chance the witness had to observe the facts to which he or she testified and how capable the witness is of giving an accurate account of what he or she saw or heard. You must also decide whether the witness is biased or prejudiced. Whether the witness has any interest in the case. These are the principal factors which must be considered when deciding upon the credibility or the truthfulness of a witness or the weight to be attached to the evidence of a witness.

He later stated, with respect to Welch:

I want to say a word about Welch and how you should consider his testimony. Witness Welch was not an accomplice because he was not one who knowingly and voluntarily co-operated with or assisted or advised or encouraged another to commit a crime.

If and it would appear that he was an accessory after the fact, he is not an accomplice in the sense that I must warn you of the danger of condemning the accused on the strength of his uncorroborated testimony. But there have been statements by our higher Courts to the effect that evidence given by a disreputable person even though he is not an accomplice must be scrutinized and weighed with the greatest care. Is Welch a disreputable person in the eye of the law? Is he disreputable because he was convicted at an early age of possessing liquor? It is true he admitted that he stole the revolver in question and that he tried also to sell the automobile which he must have known did not come from the lawful owner.

I make those remarks about Welch's testimony. I leave it to you to decide how much credit you will place on his testimony after seeing him in the witness box.

In my opinion, the judge's remarks constitute a caution. In particular, the judge alluded to the interest which a witness may have, and this is the justification for the rule of caution regarding the uncorroborated testimony of an accomplice. He further asked the jury to consider Welch's character, his reputation, in conjunction with his past conduct and his actions in the case at bar, after telling them "evidence given by a disreputable person even though he is not an accomplice must be scrutinized and weighed with the greatest care". The judge then stated that he left it to the jury to determine the credibility of the witness. I do not consider that urging the jurors to caution because Welch was an accessory after the fact would have had a different effect on them from that produced by the foregoing remarks, and I have no hesitation in concluding that, in my opinion, no substantial wrong or miscarriage of justice occurred.

This conclusion is strengthened by the fact that, quite apart from Welch's testimony, the evidence appears to be overwhelming in the absence of some explanation: in particular, the possession of the victim's car, the attempt to sell it to a member of the RCMP, and the reasons given to the latter for selling it. In *Avon v. The Queen*[11], Fauteux C.J., speaking for the majority, wrote at pp. 656 and 657 a passage which I think it is appropriate to cite:

As far as the second grievance raised by appellant is concerned, namely the trial judge's failure to instruct the jury on an accomplice's testimony, Owen J. speaking on behalf of all his colleagues on the Court of Appeal, stated:

However, after considering the record I am of the opinion that a reasonable jury, after being properly directed, would necessarily have found the Appellant guilty of non-capital murder. Therefore, I think this is a case for the application of the provisions of Section 592(1)(b)(iii) Cr.C. In my opinion no substantial wrong or miscarriage of justice has occurred by reason of the defective charge with respect to accomplices.

I respectfully agree with these views, and would only add this passage taken from the reasons of Sloan C.J. in *The Queen v. Pavlukoff* (1953), 106 C.C.C. 249, 17 C.R. 215, 10 W.W.R. (N.S.)26:

...the fact that accused did not testify in the face of inculpatory facts was a matter which the Court of Appeal could place on the scale in applying s. 1014(2).

For these reasons, I would dismiss the appeal.

Appeal dismissed.

Solicitor for the appellant: Jean R. Salois, Montreal.

Solicitor for the respondent: Ronald Schachter, Montreal.

[1] [1978] C.A. 469.

[2] [1978] 1 S.C.R. 264.

[3] [1941] S.C.R. 396.

[4] [1977] 1 S.C.R. 673.

[5] [1957] S.C.R. 285.

[6] [1978] 2 S.C.R. 940.

[7] [1979] 2 S.C.R. 305.

[8] sub. nom. *Patterson v. The Queen*, [1970] S.C.R. 409.

[9] (1976), 32 C.C.C. (2d) 89.

[10] [1943] 3 D.L.R. 802.

[11] [1971] S.C.R. 650.

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Prepared on 25 October 2026 · Esheria