

CANADA / JUDGMENT

Sokoloski v. R.

[1977] 2 SCR 523

COURT

Supreme Court of Canada

DECIDED

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Sokoloski v. R.

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Date

1977-01-25

Report

[1977] 2 SCR 523

Judges

Laskin, Bora; Martland, Ronald; Judson, Wilfred; Ritchie, Roland Almon; Spence, Wishart Flett; Pigeon, Louis-Philippe; Dickson, Robert George Brian; Beetz, Jean; de Grandpré, Louis-Philippe

On appeal from

Ontario

Subjects

Criminal law

Decision Content

Supreme Court of Canada

Sokoloski v. R., [1977] 2 S.C.R. 523

Date: 1977-01-25

Robert Joseph Sokoloski (Plaintiff) Appellant;

and

Her Majesty The Queen (Defendant) Respondent.

1976: November 18; 1977: January 25.

Present: Laskin C.J. and Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz and de Grandpré JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Criminal law—Conspiracy—Conspiracy to traffic in a controlled drug—Evidence establishing conspiracy—Facts constituting conspiracy to traffic—Food and Drugs Act, R.S.C 1970, c. F-27, s. 34(1)—Criminal Code, s. 423(1)(d).

In April 1972 the police had under surveillance a motor vehicle driven by one Davis. When apprehended Davis was seen to pass a white powder substance (methamphetamine) to a companion who then threw it out of the window. After the arrest of Davis and his companion the police searched Davis' premises and found drug trafficking paraphernalia. In the course of the search the telephone rang, and was answered by a police officer. The caller, the appellant, asked the officer believing him to be Davis "Did that stuff finally come in?" The officer replied that it had and arranged a meeting with appellant to deliver it to him. It was agreed that appellant would have a cheque for \$1,100 and the amount of the substance to be purchased was one pound. The evidence at trial disclosed the drugs would have a resale value of \$9,000. The trial judge acquitted the appellant of conspiring with others to traffic in a controlled drug because the Crown failed to prove an agreement between the appellant and Davis to traffic. The Court of Appeal however set aside the acquittal and entered a conviction.

Held (Laskin C.J. and Judson, Spence and Dickson JJ. dissenting): The appeal should be dismissed.

Per Martland, Ritchie, Pigeon, Beetz and de Grandpré JJ.: It was an error in law to hold that to establish conspiracy as charged it was necessary to prove an agreement jointly to manufacture, sell, transport or deliver the drug without authority. The deal was for the sale of drugs with a resale value of \$9,000 not for the appellant's own consumption but for the purpose of trafficking and this constituted a conspiracy to traffic.

Per Laskin C.J. and Judson, Spence and Dickson JJ. dissenting: The question on appeal was whether a person purchasing a controlled drug may be found guilty of conspiracy with the seller to traffic in that drug by reason only of agreeing to purchase or have the drug delivered to him by the seller. The importance of the question lay in the fact that it is not an offence to buy or be in possession of a controlled drug. The only basis of an unlawful conspiracy would have been by proof of an agreement, which the trial judge said he could not find, between the appellant and Davis for the resale of the drug supplied by Davis.

APPEAL from a judgment of the Court of Appeal for Ontario setting aside an acquittal at trial and entering a conviction of conspiring with others to traffic in a controlled drug, methamphetamine, contrary to s. 34(1) of the Food and Drugs Act, R.S.C. 1970, c. F-27 and s. 423 (1)(d) of the Criminal Code.

Charles Ryall, for the appellant.

S.M. Froomkin, Q.C., and A. Fradkin, for the respondent.

The judgment of Laskin C.J. and Judson, Spence and Dickson JJ. was delivered by

THE CHIEF JUSTICE (dissenting)—The short and important question in this appeal is whether a person who purchases a controlled drug, for example methamphetamine, may be found guilty of conspiracy with the seller to traffic in that drug by reason only of agreeing to purchase or agreeing to have the drug delivered to him by the seller. The importance of this question lies in the fact that it is not an offence to buy a controlled drug, and it is not an offence to be in possession of a controlled drug. It is an offence to be in possession for the purpose of trafficking, but Crown counsel in this appeal made it clear that he was not contending that the conspiracy alleged lay in any agreement between the seller and the accused buyer to obtain the drug for the purpose of resale. What we are faced with is the resort—apparently for the first time since we are told that there are no reported cases of a similar kind—to a charge of conspiracy against a buyer who could not be charged with unlawful purchase nor with unlawful possession because neither of these is an offence.

The accused was acquitted at trial, and I shall refer later to the trial judge's findings of fact. They are important because on a Crown appeal against acquittal the Crown is limited to questions of law only: see Criminal Code, s. 605(1)(a). Needless to say, any further appeal to this Court can only be on a question of law, whether the appeal be by the Crown or by an accused: see ss. 618, 621. The Crown in the present case appealed the acquittal and the Ontario Court of Appeal, in reasons by Dubin J.A., set it aside and entered a conviction. The result is, on the view taken by the Ontario Court of Appeal, and this was the Crown's position in argument before this Court, that any purchaser of a controlled drug, perhaps a school boy, is party to a conspiracy to traffic in that drug, regardless of the quantity sold, and becomes liable, if prosecuted by indictment, to a penalty of imprisonment of up to ten years: see Criminal Code, s. 423(1)(d) and Food and Drugs Act, R.S.C. 1970, c. F-27, s. 34(3). I repeat that he cannot be prosecuted for mere purchase nor for mere possession. The laying of a charge of conspiracy in such circumstances seems to be an abuse if not also a distortion of the concept of conspiracy in our law.

It is said, however, that the result aforesaid inexorably follows from the definition of "traffic" in s. 33 of the Food and Drugs Act, this provision being in Part III of the Act entitled "Controlled Drugs". The definition is as follows:

“traffic” means to manufacture, sell, export from or import into Canada, transport or deliver, otherwise than under the authority of this Part or the regulations. This definition must be amplified by importing into it the definition of “sell”, found in s. 2 of the Act; it is defined to include

sell, offer for sale, expose for sale, have in possession for sale, and distribute.

Applying the law as reflected in the judgment of the Ontario Court of Appeal, and in the Crown’s argument before us, an accepted offer to sell a controlled drug makes the offeree liable, without more, to a conviction of conspiracy to traffic in that drug.

The trial judge made certain findings of fact, and I quote from his reasons:

The agreement to purchase that drug by the accused, Sokoloski, was not an unlawful act as far as he was concerned, I cannot find that there was an agreement between the accused, Davis, and the accused Sokoloski, that they would transport or deliver the Methamphetamine or that they would sell it. Certainly, the accused, Sokoloski, appreciated that the accused, Davis, would have to transport and deliver the drugs to carry out their agreement and by agreeing to purchase that drug, he may well have furthered the transporting and delivering but in my view, those acts would, at most, constitute aiding and abetting. From those acts, I cannot draw an inference of agreement to transport and deliver made by both of the accused before the Court.

I would be prepared to find that the accused, Sokoloski, agreed to buy Methamphetamine and I would be prepared to find that he bought it for the purpose of resale in view of the substantial amount that he was purchasing and in view of the evidence that such an amount would be sufficient to constitute at least four hundred dime bags, that these dime bags being the usual small amounts which, on the evidence, I find was sold by a seller of drugs. But I am unable to find that the accused, Davis, agreed to such a resale of the drugs although he may well have known that in all probability that was the reason for the purchase.

What I have been saying, in greater detail, is aptly reflected in the foregoing quoted reasons of the trial judge. His findings are findings of fact, and I do not think that there is any opening for saying that he has made errors in law because of any inferences he drew from the facts as found: see *Sunbeam Corp. (Canada) Ltd. v. The Queen*[1]; *Lampard v. The Queen*[2]. *Ciglen v. The Queen*[3] has no application to the present case.

In my opinion, the learned Justice of the Court of Appeal has, in his reasons, based the conviction of conspiracy on the mere consummation of a contract for sale and purchase of controlled drugs, not pointing out that purchase as such is not unlawful and that hence an agreement to purchase is likewise not unlawful. The relevant part of his reasons is as follows:

On the evidence accepted by the trial Judge Sokoloski agreed that Davis at the request of Sokoloski would do that which is prohibited by the provisions of the Food and Drugs Act, and, therefore, the learned trial Judge erred in holding that Sokoloski had not participated in an unlawful act. The trial Judge found that the accused Davis agreed to sell and the accused Sokoloski agreed to buy a prohibited drug, but held that the Crown had failed to prove that there was an agreement between the two that Davis would transport and deliver the drug to Sokoloski.

With deference to the learned trial Judge, it is clear that that is the very agreement which the evidence established. He appears to have been of mind that, although he found that Sokoloski was purchasing the drug for the purpose of resale, it was incumbent upon the Crown to establish the offence alleged that Davis had agreed with Sokoloski that Sokoloski would in fact sell the drugs. Although in the circumstances of this case that inference seems to be irresistible, it was not necessary for the Crown in order to prove the case against the accused to prove that fact.

I do not doubt that a person who sells or offers to sell a controlled drug is guilty of the offence of trafficking under s. 34(1) which says, clearly enough, that “no person shall traffic in a controlled drug or any substance represented or held out by him to be a controlled drug”. I do not understand, however, how a seller and a buyer can be guilty of conspiracy by the one being willing to sell and the other being willing to buy when it is not an offence to buy, and hence not an offence to agree to buy. There is no agreement here between them to support a charge of conspiracy, although one is likely to be misled by ordinary parlance, that is, the reference to a seller agreeing to sell and a buyer agreeing to buy. This is merely the indication of contract, and it is a distortion of conspiracy to say that there is an agreement between seller and buyer to sell so as to found a charge of conspiracy to traffic. The agreement between them is simply a reflection of different promises in a bilateral contract; they are not parties to the same promise.

I am of the view that the position is the same with respect to the elements of transport or delivery which are the only other parts of the definition of “traffic” remotely applicable here. Again, it seems to me to be a mistaken proposition to argue, as did Crown counsel, that the accused and the seller conspired to traffic because they “arranged” to have the drug transported or delivered. The introduction of contract language into this case to support a charge as serious as conspiracy is to me very odd. Every contract for the sale of goods can be said to involve delivery in execution of the contract, and if, as in my view is the case, by offering to buy there is no unlawful conspiracy in the act of selling or agreeing to sell, then there is equally no unlawful conspiracy in the delivery of the goods by the seller to the buyer. The delivery by the seller is a normal incident of a sale by him. Certainly, if the buyer himself picked up the goods, e.g. drugs, at the seller’s premises, it would be incongruous to urge that this amounts to a conspiracy to traffic, although the pick-up was “arranged” between the parties.

The problem raised in this case is one of a number of related problems arising in the law of criminal conspiracy, problems such as those arising where the consummation of the allegedly illegal design would not result in a known offence (cf. *R. v. Chow Sik Wah and Quon Hong*[4]) or where circumstances attending it indicate that it could not be carried out, this not being, however, a likely defence (see *R. v. Northern Electric Co.*[5] at p. 263): see Development Note, Criminal Conspiracy (1959), 72 Harv. L. Rev. 920, at p. 944; Goode, Criminal Conspiracy in Canada (1975), at pp. 41-46. The immediate one here is of a different order, touching not the position of all parties to an alleged conspiracy but the position of one of them who could not be found guilty of any substantive offence in carrying out the transaction on which the charge of conspiracy is based.

The statutory framework of the present issue suggests very strongly that Parliament was content, having made clear the liability of a seller of a controlled drug, to limit culpability of the buyer to those situations in which his purchase—and here quantity would be relevant—was for resale and thus to punish his possession only in that event. To mount conspiracy against a buyer on the basis of the seller's culpability in selling is, in my opinion, an overreaching of policy, not desirable in the criminal law field when effected by the Courts.

Although there do not appear to be any decisions directly in point in this country, there are conflicting decisions in the United States. *Nigro v. United States*[6] offers a parallel with the present case because there a charge against a physician for conspiracy with a drug addict to whom he gave numerous prescriptions for drugs was set aside because under the Anti-Narcotic Act, which prohibited the sale or the giving away of drugs, except in prescribed situations, the buyer was not guilty of an offence save in circumstances not present in the case. The Court held, accordingly, that since the legislative policy was to leave the buyer unpunishable, the prescribing physician could not be guilty of conspiring with himself. To a different effect are *Vanatta v. United States*[7] and *May v. United States*[8], holding that the person not punishable under the statute (in the *Vanatta* case, the buyer of liquor which it was unlawful to sell and in the *May* case, the person giving a bribe to a Congressman in whom it was a crime to receive it) could nonetheless be successfully prosecuted for conspiracy.

The issue is dealt with by Williams, *Criminal Law* (2nd ed. 1961) at pp. 356-357, in terms which commend themselves to me, as follows:

Where a statute refers to a bilateral transaction and makes it a crime in one of the parties to that transaction (e.g., a seller), the courts pass immediately to the conclusion that the other party can be charged as a principal in the second degree. They will not generally construe such a statute as impliedly excluding the guilt of the other party. Thus if a statute makes it an offence for a person to procure carnal connection or to receive a bribe, the person who is procured or who gives the bribe, as the case may be, is convicted as a party to the offence without express words in the statute. So also the two can be convicted of conspiracy to commit the forbidden act. In bigamy, the other party to the bigamous marriage is a principal in the second degree.

It may be thought that this rule is of doubtful policy. In the first place, where the legislature has specified a bilateral transaction and specified it as an offence in one party only, there is a strong argument for saying that the legislature must have intended the other party to go quit. For the concurrence of the two parties must have been present to the mind of the legislature, and the specification of the one should be an implied exclusion of the other. In the second place, to extend the number of accomplices aggravates the difficulty of convicting the principal offender. For (a) these accomplices will be reluctant to testify, (b) they will generally not be compellable to testify, (c) if they do testify, the "accomplice warning" will have to be given to the jury. For these solid reasons, the American Law Institute's Model Penal Code proposes that in such bilateral transactions only the party or parties named by the legislature should be responsible in crime.

The Model Penal Code of the American Law Institute, approved in 1962, provides in s. 2.06(6)(b) that “Unless otherwise provided by the Code or by the law defining the offense a person is not an accomplice in an offense committed by another if the offense is so defined that his conduct is inevitably incident to its commission”. It provides further in s. 5.04, dealing with “incapacity, irresponsibility or immunity of party to solicitation or conspiracy”, as follows:

5.04...

- (1) Except as provided in Subsection (2) of this Section, it is immaterial to the liability of a person who solicits or conspires with another to commit a crime that:
 - (a) he or the person whom he solicits or with whom he conspires does not occupy a particular position or have a particular characteristic which is an element of such crime, if he believes that one of them does.; or
 - (b) the person whom he solicits or with whom he conspires is irresponsible or has an immunity to prosecution or conviction for the commission of the crime.
- (2) It is a defense to a charge of solicitation or conspiracy to commit a crime that if the criminal object were achieved, the actor would not be guilty of a crime under the law defining the offense or as an accomplice under Section 2.06(5) or 2.06(6)(a) or (b).

The reference in sub. (2) aforesaid to section 2.06(6)(b) is a reference to the type of situation present here.

It is clear to me that the only basis of an unlawful conspiracy would have been by proof of an agreement between the seller Davis and the accused for the resale of the drugs supplied by Davis. It is such an agreement that the trial judge said he could not find and, moreover, counsel for the Crown was explicit that he did not—as, indeed, he could not in view of the adverse finding—rely on it on the argument of this appeal. In view of the fact that there is no offence in buying a controlled drug, but it is an offence to sell one, conspiracy could at best only be charged against the seller and not against the buyer: cf. *R. v. Duguid*[9]. This is not a case where the conduct on which conspiracy is based is itself a crime which, if carried out, would make each of the alleged conspirators liable to conviction apart from conspiracy. Even in such a case, this Court has held that neither party to an alleged conspiracy can be convicted of the crime if one does not have the requisite mens rea for the substantive offence: *R. v. O'Brien*[10]. Although the correctness of this decision has been doubted (see Williams, *Criminal Law* (2nd ed. 1961), at pp. 672-73), it does not call for any re-examination here.

The Ontario Court of Appeal referred in its reasons to *Poitras v. R.*[11] Although it was a drug trafficking case, it did not involve a charge of conspiracy and I do not consider it to have any bearing on the present case.

I would allow the appeal, set aside the judgment of the Ontario Court of Appeal and restore the judgment of acquittal.

The judgment of Martland, Ritchie, Pigeon, Beetz and de Grandpré JJ. was delivered by

MARTLAND J.—The appellant is appealing from the judgment of the Court of Appeal for Ontario which reversed the judgment of the trial judge who had acquitted the appellant on a charge of conspiring with others to traffic in a controlled drug, methamphetamine, contrary to s. 34(1) of the Food and Drugs Act, R.S.C. 1970, c. F-27, and s. 423(1)(d) of the Criminal Code.

The facts are set out in the reasons for judgment of the Court of Appeal delivered by Dubin J.A. They are as follows:

On or about April 17, 1972, members of the Royal Canadian Mounted Police, together with members of the Hamilton Police Department, took up surveillance of a motor vehicle driven by the accused Davis in company with the said Irene Bojkiwskij. In the course of his being apprehended, Davis was observed passing a white powder substance, which was methamphetamine, to Miss Bojkiwskij, who proceeded to throw the same out the window. Davis and Bojkiwskij were arrested, and the police proceeded to the premises of Davis. A search was conducted and paraphernalia used for trafficking in drugs was found. While the police were in the Davis' premises the telephone rang and the accused Sokoloski was on the phone. The officer disguised his voice as that of Davis and a telephone conversation ensued. During the telephone conversation Sokoloski asked the person whom he believed to be Davis, "Did that stuff finally come in?". The police officer advised him that it had and arranged a meeting with Sokoloski to deliver the same to him. It was agreed that Sokoloski would have a cheque for \$1100.00, and the amount of the substance to be purchased was one pound. Sokoloski attended at the place agreed upon at which time he was arrested and had a cheque in his possession payable to the accused Davis for the sum of \$1100.00. Sokoloski was thereupon arrested, taken to the jail and placed in a cell two away from that of Davis. A police officer was put in the cell between them and overheard conversations between Sokoloski and Davis in which Davis reported that he had gone to Toronto to buy the stuff for Sokoloski.

The evidence further disclosed that the drugs would have a resale value of \$9,000.00.

The relevant provisions of the Food and Drugs Act are as follows:

2. In this Act

"sell" includes, sell, offer for sale, expose for sale, have in possession for sale, and distribute.

33. In this Part

"Controlled drug" means any drug or other substance included in Schedule G.

"traffic" means to manufacture, sell, export from or import into Canada, transport or deliver, otherwise than under the authority of this Part or the regulations.

34. (1) No person shall traffic in a controlled drug or any substance represented or held out by him to be a controlled drug.

(2) No person shall have in his possession any controlled drug for the purpose of trafficking.

Schedule G

Methamphetamine and its salts.

Section 423(1)(d) of the Criminal Code provides that:

423. (1) Except where otherwise expressly provided by law, the following provisions apply in respect of conspiracy, namely,

- (d) every one who conspires with any one to commit an indictable offence not provided for in paragraph (a), (b) or (c) is guilty of an indictable offence and is liable to the same punishment as that to which an accused who is guilty of that offence would, upon conviction, be liable.

(Paragraphs (a), (b) and (c) are not applicable.)

The trial judge, in his reasons, accepted the evidence of the police officer as to the details of his telephone conversation with the appellant, and also the evidence of the police officer who had heard the conversation in the cell block between the appellant and Davis.

He found that there was an agreement by Davis to sell Methamphetamine to the appellant and an agreement by the appellant to buy it from Davis.

He also stated:

I would be prepared to find that the accused, Sokoloski, agreed to buy Methamphetamine and I would be prepared to find that he bought it for the purpose of resale in view of the substantial amount that he was purchasing and in view of the evidence that such an amount would be sufficient to constitute at least four hundred dime bags, that these dime bags being the usual small amounts which, on the evidence, I find was sold by a seller of drugs. But I am unable to find that the accused, Davis, agreed to such a resale of the drugs although he may well have known that in all probability that was the reason for the purchase.

His decision that a conspiracy between the appellant and Davis had not been proved is based upon his view that it would be necessary for the Crown to establish an agreement between them jointly to traffic in the controlled drug. This is made clear in the following passage from his reasons:

I cannot find that there was an agreement between the accused, Davis, and the accused, Sokoloski, that they would transport or deliver the methamphetamine or that they would sell it.

[The emphasis is mine.]

Similarly, in the passage previously quoted involving the finding that the appellant purchased the drug for resale, he says:

But I am unable to find that the accused, Davis, agreed to such resale of the drugs although he may well have known that in all probability that was the reason for the purchase.

In my opinion it was an error in law to hold that in order to establish a conspiracy, as charged, it was necessary to prove an agreement between the parties jointly to manufacture, sell, transport or deliver a controlled drug, without the requisite authority. The evidence establishes that Davis agreed with the appellant, at the appellant's request, to obtain for him, and to transport and deliver to him a substantial quantity of prohibited drugs. The appellant agreed to pay Davis for these services.

This was a deal for the sale of drugs with a resale value of \$9,000. The purchase by the appellant was not for his own consumption, but, as found by the trial judge, for the purpose of resale, i.e. for trafficking. Had the deal been consummated and the drugs received by the appellant, in the light of the trial judge's finding, the appellant would have been in breach of s. 34(2) of the Food and Drugs Act by being in possession of prohibited drugs for the purpose of trafficking. In those circumstances what Davis and the appellant were to do constituted trafficking within the meaning of the Food and Drugs Act.

In my opinion that agreement constituted a conspiracy to traffic.

I agree with the conclusion stated by Dubin J.A. in the Court of Appeal:

It is clear in my opinion that on the evidence accepted by the trial judge and the facts found by him, the Crown had proved every essential element of a conspiracy between the two to traffic in a controlled drug as defined in the Food and Drugs Act.

With great respect for those members of this Court who have taken the contrary view, I do not regard the view expressed by the Court of Appeal in this case as resulting in the proposition that any purchaser of a controlled drug, perhaps a school boy, is party to a conspiracy to traffic in that drug regardless of the quantity sold. The opinion of that Court and my own opinion, as previously expressed, relate to the existence of a conspiracy upon the facts of this case.

For these reasons, and for those stated by the Court of Appeal, I would dismiss this appeal. Appeal dismissed, LASKIN C.J. and JUDSON, SPENCE and DICKSON JJ. dissenting.

Solicitor for the appellant: Charles Ryall, Niagara Falls.

Solicitor for the respondent: The Attorney General of Canada, Ottawa.

[1] [1969] S.C.R. 221.

[2] [1969] S.C.R. 373.

[3] [1970] S.C.R. 804.

[4] [1964] 1 C.C.C. 313.

[5] (1955), 111 C.C.C. 241.

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- [6] (1941), 117 F. 2d 624.
- [7] (1923), 289 F. 424.
- [8] (1949), 175 F. 2d 994.
- [9] (1906), 75 L.J.K.B. 470.
- [10] [1954] S.C.R. 666.
- [11] [1974] S.C.R. 649.
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