IN THE SUPREME COURT OF YUKON

Citation: *R. v. Parker*, 2011 YKSC 72

Date: 20110927
S.C. No. 10-AP020
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

Respondent

And

PATRICK ALLAN PARKER

Appellant

Before: Mr. Justice R.S. Veale

Appearances:

Malcolm Campbell — Counsel for the Appellant
Bonnie MacDonald — Counsel for the Respondent

REASONS FOR JUDGMENT

INTRODUCTION

[1] Mr. Parker appeals his conviction as a party to the offence of mischief contrary to s. 430(4) of the *Criminal Code*. Although Mr. Parker also filed an appeal of his sentence, it was abandoned at the hearing of the appeal. For the reasons that follow, I dismiss his appeal of the conviction.

BACKGROUND

[2] Mr. Parker was convicted by Judge Faulkner in Territorial Court on November 29, 2010, following a trial. The Crown called three witnesses, and the defence called one. Mr. Parker did not testify.

[3] The conviction relates to an offence that took place on August 22, 2009. Early that morning, Mr. Parker and a number of friends attended at the White residence in the Yukon suburb of Crestview. At the time, Dustin White, a teenage resident of the house, was home with a number of his friends playing video games. The evidence is that there was a relatively minor confrontation between the two groups outside the house, following which the police were called by Mr. White. No charges were laid at this time, however a short time later, Dylan Wabisca threw a vodka bottle that broke a house window, resulting in this charge. Mr. Parker was with Mr. Wabisca at the time the bottle was thrown. There is no dispute that Mr. Parker was present throughout the evening or that he was with Mr. Wabisca at the time the bottle was thrown, and the sole issue on appeal is whether he was properly convicted as a party to the bottle-throwing that grounds the mischief conviction.

[4] Although the Crown called evidence from three witnesses, only Dustin White's evidence was relevant to Mr. Parker's conduct at the time the bottle was thrown. According to Mr. White, Mr. Parker passed the vodka bottle to Mr. Wabisca and said "Are you going to throw it, man?" prior to Mr. Wabisca throwing the bottle. Mr. White was able to see and hear this from his vantage point behind a log pile. Mr. White and Mr. Wabisca were unaware of his presence.

[5] Mr. White's evidence about Mr. Parker was contradicted by Mr. Wabisca, who testified as a defence witness. According to Mr. Wabisca, he was sharing the vodka with Mr. Parker, and, when he finished the bottle, he 'just threw it' and it smashed a window. According to Mr. Wabisca, Mr. Parker had said nothing about throwing the bottle.

[6] The trial judge preferred the evidence of Mr. White over Mr. Wabisca, finding that Mr. Wabisca was substantially intoxicated at the time all of this transpired and was an unreliable witness. On Mr. Wabisca's evidence, he had consumed eight or ten beer and a few shots of vodka.

[7] In the result, the trial judge found that Mr. Parker "did ... either urge, encourage, or counsel" Mr. Wabisca to throw the bottle, by using words to the effect of "Aren't you going to throw the bottle?"[1]. He acknowledged that this wording may not be exact and that, on some interpretations, the words could even be somewhat equivocal. However, given the overall context of the evening, he was satisfied that they amounted to urging, counselling or encouraging and convicted Mr. Parker as a party to mischief. Based on the Crown's submissions at the trial and the trial judge's somewhat ambiguous language, Mr. Parker's conviction as a party could have been either on the basis of s. 21(1)(c) (abetting an offence) or on s. 22 (counselling an offence).

ISSUES AND ANALYSIS

[8] Essentially, the appellant's position is that the trial judge erred by convicting him on evidence that failed to prove he had the high level of subjective intent required for party liability. In support of this position, the appellant submits that the evidence indicated

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[1] It seems to be generally agreed that the trial judge misquoted the words that Dustin White testified he heard the appellant utter. However, nothing was made of it before me, and in the context, I do not think anything turns on the difference between "Aren't you going to throw the bottle?" and "Are you going to throw the bottle, man?".

Dylan Wabisca was reckless in throwing the vodka bottle and that it was factually inconsistent to find that the appellant had a higher *mens rea* than Mr. Wabisca. The appellant also submits that the trial judge erred in finding that the words "Aren't you going to throw the bottle?" were conclusive evidence of encouragement. He raised a further issue about the trial judge giving insufficient weight to Mr. Wabisca's evidence.

[9] To deal with the last submission first, it was open to the trial judge to prefer the evidence of Mr. White over Mr. Wabisca, and to the extent that they were inconsistent, he rejected Mr. Wabisca's version of events. He gave reasons for why he found Mr. Wabisca to be an unreliable witness and clearly accepted Mr. White's account of the moments before the bottle was thrown. This finding with respect to Mr. White's credibility is entitled to significant deference by an appellate court.

[10] With respect to the evidence of encouragement, if the evidence before the trial judge was reasonably capable of supporting his conclusions, they will stand (*R. v. Burns,* [1994] 1 S.C.R. 656). Here, Judge Faulkner found that the sentence 'Aren't you going to throw the bottle?' was encouraging or counselling Mr. Wabisca to commit mischief. While he acknowledged that the sentence could be ambiguous standing alone, given the events over the course of the evening and the earlier conduct of the appellant, he was satisfied here that they were encouraging. As well, as the Crown points out, the trial judge heard the evidence from Mr. White directly, and so benefited from not only hearing the words but also hearing Mr. White's recollection of the tone in which they were uttered, which could also go towards the meaning. I find that the trial judge's conclusion on the encouraging nature of the appellant's sentence was reasonably supported on the evidence before him.

[11] The last of the appellant's submissions relate to the appellant's *mens rea* and whether he had the subjective intent required to either abet or counsel Mr. Wabisca in the offence of mischief. I will deal with each party provision separately, although there is considerable overlap between the tests for abetting and counselling.

Abetting (s. 21(1)(c))

[12] Section 21(1) of the *Criminal Code* reads:

> 21. (1) Every one is a party to an offence who
> (a) actually commits it;
> (b) does or omits to do anything for the purpose of aiding any person to commit it; or
> (c) abets any person in committing it.

[13] Abet is commonly accepted to mean 'encourage', and the definition also includes instigating, promoting or procuring (*R. v. Briscoe,* 2010 SCC 13 at para. 14, citing *R. v. Greyeyes*, [1997] 2 S.C.R. 825).

[14] As I understand the authorities, in order to found a conviction under s. 21(1)(c), the Crown must prove (i) the offence, (ii) the act of the accused in encouraging the offence, and (iii) the accused's subjective intent to encourage the offence when he committed the act (*R. v. Curran* (1978), 7 A.R. 295 (CA)).

[15] The subjective intent required for a person to be found guilty as a party to an offence under 21(1)(b) or (c) is high. Recklessness cannot satisfy the *mens rea* requirement; rather a conviction must rest on a finding of intent or purpose to achieve the prohibited result (see *R. v. Roach* (2004), 192 C.C.C. (3d) 557 (Ont. CA), at para. 36, citing Professor Roach). The offender must know the type of crime to be committed and

the circumstances necessary to constitute the crime, either through actual knowledge or wilful blindness.

[16] Here, there is no issue that the offence of mischief occurred, and the trial judge accepted the evidence that the accused encouraged the offence through his words. The issue arises with respect to Mr. Parker's subjective intent.

[17] Both parties agree that a finding of recklessness is sufficient *mens rea* to convict a principal of mischief (*R. v. Toma*, 2000 BCCA 494). Counsel for the appellant submits that the trial judge found that Mr. Wabisca was reckless in throwing the bottle. How then, he asks, could Mr. Parker have been deemed to have known the consequences, when Mr. Wabisca only had to anticipate the risk associated with throwing the bottle?

[18] At paragraph 3 of his judgment, the trial judge said the following:

> The evidence appears clear and, indeed, it is common ground that the person who actually threw the bottle was Dylan Wabisca, who was one of Mr. Parker's associates on the evening in question. For his part, Mr. Wabisca claims that he decided to do that all on his own and without any urging from the defendant, Mr. Parker. As to what Mr. Wabisca's intentions were, and what Mr. Parker was or was not a party to, in my view, it is clear that Mr. Wabisca did not need to have a specific intention to hit and break the window. He threw the bottle toward the house intending to break the bottle, obviously, against the house or something nearby. So the fact that it struck a window is unfortunate, but it is not the law that Mr. Wabisca's intention in throwing the bottle toward the house had to extend to some sort of specific intention to hit and break the window. So if Mr. Parker was a party to the throwing of the bottle toward the house, then, in my view, the charge has been made out.

[19] I think that the appellant overstates the finding of the trial judge in his argument. It seems to me that in outlining the *mens rea* requirement of a principal to mischief in his

decision, he correctly set out that negligence is sufficient but did not make a finding with respect to Mr. Wabisca's intent. Indeed, he did not have to.

[20] However, if I am wrong in this respect and the trial judge did make the determination that Mr. Wabisca was reckless in his actions that night, I do not think that this is a bar to a finding that Mr. Parker had the different and higher *mens rea* required for his conviction.

[21] In *R. v. Helsdon*, 2007 ONCA 54, the Court was considering the appeal of a journalist who had failed to comply with a publication ban in sexual assault case. The appellant was acquitted at trial but, after an appeal by the Crown, convicted by the summary conviction appeal court as an aider or abettor to the publication offence pursuant to s. 21(1). The trial and first instance appeal had proceeded on the basis that the underlying offence required only objective *mens rea,* and the same objective test was applied to the determination of party liability. In his appeal, the accused argued that his guilt as an aider or abettor required proof of subjective intent. The sole issue before the Court of Appeal was whether the *mens rea* necessary to hold the appellant liable as a party was the same or higher than that necessary for the principal, and the Crown took the position that requiring a party have a higher *mens rea* than the principal created an 'anomalous' situation. The Court expressly disagreed and restored the acquittal.

[22] While *Helsdon* took place in a different factual context and does not totally answer the issue before me, it is clear from that case that circumstances can and do arise where a party has a subjective intent that is higher than the principal's. Here, given the appellant's earlier presence at the house and conduct throughout the evening, it is conceivable that he had more complete knowledge of the consequences of throwing the

bottle than did Mr. Wabisca. The evidence before the trial judge was that Mr. Wabisca came along after the initial confrontation between the appellant and Mr. White's friends and was not on the White property for as long a time. He may also have thrown the bottle from behind a tree line and not fully appreciated where the house and any windows were. It could have been the case that the appellant knew or was wilfully blind to the fact that property damage would ensue when the bottle was thrown, whereas Mr. Wabisca may have only anticipated a risk of the same consequence. I do not need to decide this, however, as the only issue before the trial judge was Mr. Parker's subjective *mens rea*. He found on the evidence that it amounted to knowledge or wilful blindness of the circumstances necessary to result in damage to property, and, absent an error in law, I will not interfere with this finding.

Counselling (s. 22)

[23] Section 22 of the *Criminal Code* provides:

> 22. (1) Where a person counsels another person to be a party to an offence and that other person is afterwards a party to that offence, the person who counselled is a party to that offence, notwithstanding that the offence was committed in a way different from that which was counselled.
>
> (2) Everyone who counsels another person to be a party to an offence is a party to every offence that the other commits in consequence of the counselling that the person who counselled knew or ought to have known was likely to be committed in consequence of the counselling.
>
> (3) For the purposes of this Act, "counsel" includes procure, solicit or incite.

[24] Crown counsel provided me with the relevant pages from the Canadian Criminal Jury Instructions ("CRIMJI"). It sets out four elements required to be established for party liability via counselling, and they bear great similarity to the elements required for a

finding of guilt pursuant to s. 21(1)(c). In order to convict a party pursuant to s. 22 of the *Criminal Code*, the trier of fact must be satisfied of (i) the offence itself, (ii) the act of the accused in counselling the offence, (iii) a linkage between the counselling and the offence, and (iv) that the accused knew or intended his conduct would lead to the commission of the offence.

[25] According to the authors of CRIMJI the causal requirement in (iii) has not been well defined (or universally accepted) in Canadian law, but, in any event, it is a low threshold, requiring only a determination that the counselling did not have 'no effect whatsoever'.

[26] Again, in this case, the trial judge made clear positive findings about the offence and the act of the appellant in counselling the offence. It is not disputed that on these findings he was able to conclude that the appellant's words had some effect on the ensuing actions of Mr. Wabisca.

[27] With respect to the fourth element and the appellant's *mens rea*, my earlier reasoning with respect to abetting applies. If the trial judge did make a finding of recklessness with respect to Mr. Wabisca's conduct, which I find he did not, this, in any event, would not have prevented him from reaching the conclusion that the appellant had a higher level of specific intent with respect to the property damage that resulted. I also note that, unlike abetting, counselling can be made out where the counsellor has been shown to have acted with a high degree of recklessness that falls short of intent or wilful blindness (*R. v. Hamilton*, 2005 SCC 47). As I have already found that there was no error in the trial judge being satisfied beyond a reasonable doubt of the appellant's actual knowledge or wilful blindness with respect to the consequences of his encouraging or

counselling words, the appellant is also properly convicted as a party under s. 22.

[28] The appeal is dismissed.

Veale J.