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Criminal Law: Regina v. Coté, [1964] S.C.R. 1

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CRIMINAL LAW

Regina v. Coté, [1964] S.C.R. 1.

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CAPITAL MURDER — ACCUSED AND COMPANION COMMITTING ROBBERY — VICTIM DYING FROM INJURIES INFLICTED TO FACILITATE OFFENCE —INJURIES MUST BE CAUSED OR AIDED BY ACCUSED'S OWN ACT TO BE GUILTY OF CAPITAL MURDER — DRUNKENESS AS A POSSIBLE DEFENCE — WHETHER JURY PROPERLY DIRECTED — CRIMINAL CODE, SS. 202, 202A.

The accused, Marcel Coté, was charged and found guilty[1] of the offence of capital murder under the combined effect of s. 202A(2)(b)(i)[2] and s. 202(a)(i) and (ii)[3] of the Canadian Criminal Code.[4]

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1 The trial decision was not reported.

2 202A(2). Murder is capital murder, in respect of any person, where
(b) it is within section 202 and such person
(i) by his own act caused or assisted in causing the bodily harm from which death resulted.

3 202. Culpable homicide is murder where a person causes the death of a human being while committing or attempting to commit treason or an offence mentioned in section 52, piracy, escape or rescue from prison or lawful

[Footnote Continued Next Page.]

By a decision of three to two the Quebec Court of Appeal set aside this verdict and ordered a new trial on the charge.[5] Relying on the provisions of s. 598(1) (a),[6] the Crown brought this appeal in the Supreme Court of Canada.[7]

The facts of the assault, as revealed by the testimony of the accused's accomplice, who was the only person to give testimony on this matter, are not in dispute in the appeal. Coté (the accused) and Dumas (his accomplice), knowing that the victim kept a sum of money in a valise in his home, broke into the house at night with the intention of stealing this money. While Dumas went to the room where the money was kept, the accused entered the victim's room, where a fight ensued. Hearing the sound of fighting and the victim calling for help, Dumas entered the room and found the accused struggling with the victim. Dumas then proceeded to tie and gag the victim while the accused held him. Dumas also testified that he felt something warm on his hands after tying the victim, which he later realized was blood. The victim was found dead beside his bed two days later. The evidence showed that he had been brutally attacked: almost all the bones of his face as well as several ribs were broken.

Two objections to the charge of the trial judge were raised on this appeal. The first involved the question whether, in failing to delineate the respective roles of the accused and his accomplice in the commission of the offence and in failing to submit the alternative of non-capital murder as a possible verdict, the judge left the jury with the impression that they could convict the accused even if they thought the fatal injuries were caused by Dumas alone without the assistance of the accused. It was the theory of the defence that the direction of the learned judge may have left such an impression, whereas the definition of the crime of capital murder in s. 202A(2) (b) (i) expressly requires that the accused *by his own act* contribute to the causing of the death.

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custody, resisting lawful arrest, rape, indecent assault, forcible abduction, *robbery*, burglary or arson, whether or not the person means to cause death to any human being and whether or not he knows that death is likely to be caused to any human being, if

(a) he means to cause bodily harm for the purpose of
  (i) facilitating the commission of the offence, or
  (ii) facilitating his flight after committing or attempting to commit the offence.

and death ensues from the bodily harm. (1960-61, c. 44, s. 1).

4 Stat. Can. 1953-54, 2-3 Elizabeth II, c. 51 as amended by 1960-61, c. 44, s. 1.

5 *Coté v. The Queen*, [1963] Que. Q.B. 895, 43 C.R. 150, (Que. Q.B., Appeal Side).

6 598 (1). Where a judgment of a court of appeal sets aside a conviction pursuant to an appeal taken under section 583 or 583A or dismisses an appeal taken pursuant to paragraph (a) of subsection (1) of section 584, the Attorney General may appeal to the Supreme Court of Canada. (1960-61 c. 44, s. 12)

(a) on any question of law on which a judge of the court of appeal dissents.

7 *Regina v. Coté*, [1964] S.C.R. 1, 43 C.R. 165, 3 C.C.C. 301, 47 D.L.R. (2d) 573.

The second issue raised, but not considered by the Supreme Court to merit as full a discussion as the first, was the trial judge's failure to direct the jury on the possible defence of drunkenness.

As to the first issue, all the Justices of the Supreme Court were agreed on the principles of law involved. They were unanimous in their opinion that in order for an accused to be convicted of capital murder under s. 202A in respect of murder falling under s. 202, it is necessary that he participate by his own act in causing the death and that it would be a fatal misdirection to charge the jury that it was not material whether the injuries were caused by the accused or his companion. However they did not agree as to whether the learned trial judge did properly direct the jury; the majority holding that he did so, the minority that he did not.

Fauteux J., speaking for the majority,[8] disposed of the issue in the following way: From the evidence adduced at the trial only two alternatives were possible. The jury could either accept the testimony of Dumas as to the details of the assault or they could reject it and accept the theory of the defense that the murder was committed later by third parties. (Because the accused did not himself take the stand, Dumas's testimony as to the details of the assault is the only testimony on the subject.) If they accepted the testimony (which they must have done in view of their verdict) they must find him guilty of capital murder. If, on the other hand, they rejected Dumas's story then the only possible verdict was one of acquittal. Because there were only two factual alternatives available from the evidence (either he assisted Dumas or he was not involved in the crime at all), there were only two legal results which could follow (if he assisted Dumas, he was guilty of capital murder; if he had no part in the murder, he was entirely innocent). There was no source from which the jury could find the elements necessary to constitute the offence of non-capital murder, except from the testimony of Dumas, but having accepted that testimony the jury must reasonably conclude that the assault was the work of two attackers, each assisting the other. (Logically, of course, there was another alternative, and that was that the jury might have believed Dumas *in part only*. They might have believed him as to the happening of the fatal assault, but have concluded that the accused had not actively participated.)

In any case Fauteux J. held that the trial judge did *not* leave the jury with the impression that even if the injuries were caused only by Dumas without the assistance of the accused, they might still find the accused guilty of capital murder. While there may be isolated passages in the charge which might leave the jury with this impression, the charge read as a whole could not be so construed. He cited *D.P.P. v. Beard*[9] as authority for the proposition that a judge in directing a jury is not writing *in abstracto* a treatise on the criminal law and

[8] Including Taschereau C.J.C., Abbott, Martland, Judson and Ritchie JJ..
[9] [1920] A.C. 479, 495-6.

that his words must be considered in relation to the facts before the jury.[10]

Cartwright J.[11] dissented from the majority, preferring instead the reasoning of Tremblay C.J.Q. and Hyde J. in the Court of Appeal, where it was held that the learned trial judge failed to delineate the respective roles of the accused and his accomplice to determine if the accused assisted by his own act and thereby committed capital murder. Cartwright J. held that the trial judge erred in instructing the jury that if they were satisfied beyond a reasonable doubt that Dumas and the accused had formed a common intention to carry out the burglary and to assist each other for that purpose and that the accused knew or ought to have known that the infliction of bodily harm would be a probable result of carrying out the common purpose, then Coté would be guilty of capital murder even if the bodily harm which caused the death was inflicted by Dumas alone without the assistance of the accused. He pointed out that the portions of the charge which related to the Crown's burden of proving that death resulted from blows administered by the accused *and* Dumas were directed to the theory of the defence that the murder was committed by third parties who arrived later. Nowhere in the charge was this mistaken view of the law clarified. And, according to Cartwright J., this error was fatal to the validity of the conviction in that the provisions of s. 592(1)(b)(iii)[12] of the Code cannot be invoked where the jury has been misdirected as to an essential element of the charge.

The principles of law on which the learned trial judge proceeded in his direction, and particularly those objected to by Cartwright J., seem to follow logically from a combination of s. 21(2)[13] and s. 202A. The effect of s. 21(2) *may* be that a person is guilty of capital murder where he knew or ought to have known that that offence would be a probable consequence of his carrying out an unlawful purpose in combination with another, even though he has not actually participated by his own act in causing the injuries which bring about death. What little

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10 See also Annotations:
Correlating the evidence to the issues for the benefit of the jury, 15 C.R. 262;
Summing up the evidence in a criminal case, 15 C.R. 190; Jurys right to determine the facts, 12 C.R. 180.

11 With whom Hall and Spence JJ. concurred.

12 592(1) on the hearing of an appeal against a conviction, the court of appeal
(b) may dismiss the appeal where
(iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (ii) of paragraph (a) 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.

13 21(2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose *is a party to that offence.*

case law there is on the subject, however, does not support this conclusion.[14]

In the recent case of *Regina v. Cassidy and Letendre*,[15] two accused were charged jointly with murder and the Alberta Court of Appeal held that there was nothing to prevent the jury from finding one guilty of capital murder and the other of non-capital murder where the elements necessary to s. 202A were not present in the case of the second accused. The following statement of Anglin J. (as he then was) in *Remillard v. The King*,[16] a decision of the Supreme Court of Canada, was expressly adopted:

> The character of the offence actually committed by each must be decided by the jury charged with the disposition of the indictment against him.

This statement, though directed to the situation where two accused are tried jointly, does serve to emphasize that in all cases where more than one person is involved in the commission of an offence, it is necessary to distinguish the rôle of each in order to attach liability accordingly.

And this view is again upheld in the recent case of *Regina v. Leclair*,[17] a case which reached the Supreme Court of Canada after the *Coté* case. Here the accused was charged and convicted of capital murder. He was alleged to have been one of two persons who, in attempting to rob a service station, inflicted injuries on the victim which caused his death. The Quebec Court of Appeal unanimously held that there should be a new trial on the grounds that the trial judge had erred in failing to direct the jury that they must, to convict, find that the accused assisted by his own act in causing the death. Montgomery J. clearly and boldly declared that s. 21 had been modified in the case of murder by the provisions of s. 202A(2). Unfortunately the Supreme Court never had the opportunity to adopt this view expressly. On the appeal, the Supreme Court held that it had no jurisdiction under s. 598(1) (a) because there was no dissent in law.[18]

In summary, therefore, it is submitted that first, the operation of s. 21(2) has been limited with regard to murder by s. 202A, and that second, the accused may only be convicted under s. 202A where he assists *by his own act* in bringing about the death (or counsels or procures it to be done).[19] With respect to the learned Justices it is to be

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14 On this subject see also:
Practice Note: Murder, aiding and abetting, common intention, (1957), 26 C.R. 28.
Annotation: Constructive complicity in crime.

15 (1963), 41 W.W.R. 669, 40 C.R. 171 (Alta. C.A.).

16 (1921), 62 S.C.R. 21, at 24, 35 C.C.C. 227.

17 (1964), 43 C.R. 184, (Que. Q.B., Appeal Side) on appeal, 43 C.R. 196 (S.C.C.).

18 *Supra*, footnote 6.

19 202A(2) Murder is capital murder, where
(b) it is within section 202 and such person
(v) counselled or procured another person to do any act mentioned in sub-paragraph (i), (ii) or (iii) or to use any weapon mentioned in sub-paragraph (iv).

regretted that the majority overlooked the problem posed by s. 21(2) altogether and that Cartwright J., though recognizing the problem, did not speak boldly and decisively, as did Montgomery J. in the Court of Appeal.

The second objection taken to the direction of the trial judge was that he failed to instruct the jury on the possible defense of drunkenness. At the trial no evidence was adduced by defense counsel to suggest that the accused and his friend were incapable of forming the specific intent to cause bodily injury for the purpose of facilitating the commission of the offence or their subsequent escape, though there was evidence of consumption of alcohol on the day of the crime. With this in mind, the trial judge concluded that it was not necessary to put the possible defense to the jury.

However, two judges (Hyde and Casey JJ.) of the Quebec Court of Appeal were of the opinion that drunkenness should have been submitted to the jury for a decision on the basis of the reasoning in *Wu v. The King*[20] and *Henderson v. The King.*[21] And, having accepted this principle, they did not think that the evidence fell short of what was required.

The reasoning of the Appeal Court Justices was not discussed in any of the judgments in the Supreme Court, but was dismissed rather summarily by both Fauteux J. and Taschereau J. in no more than a few sensences.[22]

It seems clear on the basis of the case law[23] that:

> The fact that a defending counsel does not stress an alternative case before the jury (which he may well feel it difficult to do without prejudicing the main defense) does not relieve the judge from the duty of directing the jury to consider the alternative if there is material before the jury which would justify a direction that they should consider it. . . . Whatever the line of defense adopted by counsel at the trial of a prisoner, we are of the opinion that it is for the judge to put such questions as appear to him properly to arise upon the evidence, even though counsel may not have raised some question himself.[24]

This statement was expressly adopted by Hyde J. in *Langlois v. The Queen.*[25] In this case the accused had relied entirely on the defense of self-defense and the trial judge instructed the jury that if they accepted this defense they should acquit the accused; but if they accepted the Crown's version they should convict on a charge of

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20 [1934] S.C.R. 609, 62 C.C.C. 90, [1934] 4 D.L.R. 459.
21 [1948] S.C.R. 226, at 241, 5 C.R. 112, 91 C.C.C. 97.
22 [1964] S.C.R. 1.
23 *Rex v. Swanson* (1950), 10 C.R. 81, 96 C.C.C. 227, [1950] 1 W.W.R. 1001 (B.C.C.A.).
Langlois v. The Queen (1962), 38 C.R. 246.
Rex v. Krawchuk, [1914] 3 W.W.R. 540, 56 B.C.R. 7, 75 C.C.C. 16; affirmed, 75 C.C.C. 219, [1914] 2 D.L.R. 353.
Kwaku Mensah v. The King, [1946] 2 W.W.R. 455, 2 C.R. 113, [1946] A.C. 83, 115 L.J.P.C. 20.
Rex v. Hughes, [1942] S.C.R. 517, 78 C.C.C. 257, [1943] 1 D.L.R. 1.
24 *Mancini v. D.P.P.,* [1942] A.C. 1, at 7.
25 (1962), 38 C.R. 246.

murder. But he did not tell the jury that they might bring in a verdict of manslaughter if they believed the accused acted under provocation. A new trial was ordered.

However, a trial judge is not required to instruct a jury on an alternative defense which is not raised by counsel where there is no evidence or foundation of fact which would justify such a direction or which cannot reasonably be supported on any view of the evidence.[26] It is submitted that in this case there was no sufficient foundation in fact justifying a direction of a possible verdict of drunkenness and that the Supreme Court was correct in restoring the decision of the trial judge on the matter.