Case Name:

R. v. Murdock

Between
Her Majesty the Queen, respondent, and
Kevin Prince Murdock, appellant

[2003] O.J. No. 2470
Docket No. C37954

Ontario Court of Appeal
Toronto, Ontario
Catzman, Doherty and Goudge JJ.A.

Heard: March 4, 2003.
Judgment: June 23, 2003.
(42 paras.)

On appeal from the conviction imposed by Justice B.C. Hawkins of the Superior Court of Justice dated October 16, 2001 and the sentence imposed on October 30, 2001.

Counsel:

David E. Harris, for the appellant.
Robert Frater, for the respondent.

The judgment of the Court was delivered by

DOHERTY J.A.:—

¶ 1 Section 5(1) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19 (the "Act") makes it a crime to traffic in a narcotic. Traffic is broadly defined in s. 2 of the Act to include offering to sell or give a narcotic to another. As interpreted by various appellate courts, the offence of trafficking by offer is made out if an offer to traffic in a narcotic is made regardless of whether the accused actually intends to sell or give the narcotic offered.

¶ 2 The appellant submits that as presently interpreted, the offence of trafficking by offer falls short of the minimum substantive requirements imposed on crime creating statutes by s. 7 of the Charter. He contends that the offence will pass constitutional muster only if it is interpreted as requiring an intention to actually sell or give the narcotic offered. If this interpretation prevails, the appeal must be allowed and the appellant acquitted.

¶ 3 I would dismiss the appeal. [See Note 1 below] The crime of trafficking by offer as presently defined does not infringe s. 7 of the Charter.

Note 1: The appellant also alleged that the trial judge reversed the burden of proof and that the Crown's cross-examination on his criminal record resulted in a miscarriage of justice. The court did not call on the respondent on either submission. In my view, neither has any merit and I do not propose to address them in these reasons.

II

¶ 4 The facts giving rise to this appeal can be stated briefly. An undercover police officer testified that the appellant offered to sell him crack cocaine and later withdrew that offer. The appellant did not have any drugs in his possession when he was arrested several minutes later.

¶ 5 The appellant testified that he knew from the outset that he was dealing with an undercover police officer. According to the appellant, the officer made several requests to purchase drugs. The appellant testified that he never offered to sell drugs to the officer.

¶ 6 The trial judge convicted the appellant. In his reasons, he said:

> ... It is submitted on behalf of the accused that there was, as his counsel puts it, no legitimate offer to sell. In my view, there is no legal validity to that argument. The essence of the offence is an intention to make an offer, it is irrelevant whether the person intends to carry out that offer, or whether he is capable or incapable of carrying it out. As I say, the offence is complete when the officer is made [emphasis added].

III

Trafficking by Offer: The Present Interpretation

¶ 7 Section 5(1) of the Act provides:

> No person shall traffic in a substance included in Schedule I, II, III, or IV or in any substance represented or held out by that person to be such a substance.

The definition of the word "traffic" as set out in s. 2 of the Act includes the following:

(a) to sell, administer, give, transfer, transport, send or deliver the substance

(c) to offer to do anything mentioned in paragraph (a).

¶ 9 Provincial appellate courts have repeatedly held that where an accused is charged with trafficking by offer, the Crown is not required to prove that the accused actually intended to go through with the offer and sell or otherwise provide the offered narcotic: R. v. Petrie, [1947] O.W.N. 601 at 603 (C.A.); R. v. Sherman (1977), 36 C.C.C. (2d) 207 (B.C.C.A.), leave to appeal to S.C.C. refused 17 N.R. 178n; R. v. Mamchur, [1978] 4 W.W.R. 481 (Sask. C.A.); R. v. Mancuso (1989), 51 C.C.C. (3d) 380 (Que. C.A.), leave to appeal to S.C.C. refused (1990), 58 C.C.C. (3d) vi; R. v. Reid (1996), 155 N.S.R. (2d) 368 at 370 (C.A.).

¶ 10 In Sherman, supra, at p. 208, the trial judge said:

> Now, in my reading of the cases an offer to sell or deliver a narcotic is complete once the offer is put forward by the accused in a serious manner intending to induce officer White [the undercover officer] to act upon it and to accept it as an offer. ... [emphasis added].

¶ 11 MacFarlane J.A. agreed with the trial judge and added at p. 208:

> I accept the argument made by counsel for the Crown that the actus reus in this case is the making of an offer. There can be no doubt that the appellant intended to make an offer to sell or deliver heroin and that provides in my opinion, the mens rea necessary to prove the offence.

¶ 12 In Mancuso, supra, at pp. 389-90, the Quebec Court of Appeal approved of a jury instruction in these terms:

> [I]f I offer to you to provide you, to sell you cocaine, whether or not the transaction goes through I made the offer, therefore I have trafficked in cocaine. The offence was complete with my offer and I gave you reason to believe that I was serious in that offer to provide you with cocaine. I trafficked by making that offer, ... [emphasis added].

¶ 13 The appellate authorities referred to above were cited with approval in R. v. Shirose, [1999] 1 S.C.R. 565. In Shirose, the lawfulness of a "reverse sting" operation conducted by undercover police officers was in issue. During that operation, the undercover officers had offered to sell narcotics to the accused. The officers did not intend to go through with the sale, but intended to arrest the accused when they attended to make the purchase. Binnie J. observed at para. 25:

> The conclusion that the RCMP acted in a manner facially prohibited by the Act is inescapable ... The actus reus of the offence of trafficking is the making of an offer, and when accompanied by intent to do so, the necessary mens rea is made out: see R. v. Mancuso (1989), 51 C.C.C. (3d) 380 (Que. C.A.) at p. 390, leave to appeal refused, [1990] 2 S.C.R. viii, 58 C.C.C. (3d) vi. There is no need to prove both the intent to make the offer to sell and the intent to carry out the offer: see R. v. Mamchur, [1978] 4 W.W.R. 481 (Sask. C.A.). See also, e.g., R. v. Sherman (1977), 36 C.C.C. (2d) 207 (B.C.C.A.) at p. 208, upholding a conviction where there was evidence that the accused had offered to sell heroin to a person he knew was an undercover police officer, with a view to "rip off" the officer and not complete the sale. Sherman was later followed on this point in Mancuso, supra, at pp. 389-90, where the accused argued unsuccessfully that he did not intend actually to sell narcotics to a police informer, but really wished to steal his money [emphasis added].

On these authorities, the offence of trafficking by offer is made out if the accused:

* offers to traffic in a narcotic [the actus reus]; and
* intends to make an offer that will be taken as a genuine offer by the recipient [the mens rea]. [See Note 2 below]

Note 2: Section 4(3) of the Misuse of Drugs Act, 1971 (U.K.) which prohibits offers to supply controlled drugs has been interpreted in the same way: R. v. Goodard, [1992] Crim. L.R. 588 (C.A. Crim. Div.).

The Constitutional Challenge

¶ 15 The constitutionality of the offence of trafficking by offer was not before the court in Shirose, supra. This court, however, in a brief endorsement in 1990 upheld the constitutionality of the offence and specifically rejected one of the two arguments made on behalf of the appellant: R. v. Manion, [1990] O.J. No. 716 (C.A.). It may be that this appeal should be dismissed simply on the basis of the binding authority in Manion. I will, however, examine the merits of the appellant's constitutional argument.

¶ 16 The appellant relies on s. 7 of the Charter:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

¶ 17 Section 7 recognizes the right not to be deprived of one's liberty except in accordance with the principles of fundamental justice. Trafficking by offer is punishable by life imprisonment. The appellant's liberty interest protected by s. 7 of the Charter was clearly engaged when he was charged.

¶ 18 Statutes that create crimes are subject to substantive review under s. 7 of the Charter: See Reference re s. 94(2) of the Motor Vehicle Act, [1985] 2 S.C.R. 486 at 513; Rodriguez v. British Columbia (A.G.), [1993] 3 S.C.R. 519 at 589. Mr. Harris, for the appellant, relies on two principles of fundamental justice. He submits that if an accused does not actually intend to traffic in a narcotic, the imposition of criminal liability rests on findings that do not comport with the minimum fault requirement demanded by s. 7. In making this submission, Mr. Harris relies on the seriousness of the crime of trafficking as reflected by the maximum penalty of life

imprisonment and the stigma attached to those who are convicted of dealing in drugs. Mr. Harris also submits that an accused who makes an offer to traffic without actually intending to traffic in a narcotic is engaged in conduct which is not sufficiently harmful to constitutionally justify the criminalization of that conduct.

¶ 19 Mr. Harris points out, quite accurately, that if either submission is accepted, there is no need to declare any part of the Act inoperative. It is only necessary to re-interpret s. 5(1) of the Act so as to require that the Crown proves an actual intention to traffic in the narcotic.

¶ 20 The first of these two submissions failed in Manion, supra, but I will reconsider the argument in the light of case law which postdates Manion.

¶ 21 It is well established that it is a principle of fundamental justice that a person cannot be convicted of a true crime without a finding of personal fault: R. v. DeSousa, [1992] 2 S.C.R. 944 at 956. Trafficking by offer is a true crime. Fault may be objectively or subjectively based: R. v. Creighton, [1993] 3 S.C.R. 3; D. Stuart, Canadian Criminal Law: A Treatise, 4th ed. (Scarborough, ON: Carswell, 2001). Some crimes, because of the stigma attached to their commission demand subjectively based fault: R. v. Vaillancourt, [1987] 2 S.C.R. 636.

¶ 22 Mr. Harris submits that there is no fault component to the offence of trafficking by offer as presently defined. Relying on R. v. Guggenmoos (1986), 27 C.R.R. 55 at 57 (Ont. Dist. Ct.), he contends that the offence as defined is one of absolute liability, since guilt follows upon proof of the prohibited conduct.

¶ 23 This submission ignores the requirement that the Crown must prove an intention to make an offer. The words or actions which constitute the offer do not, standing alone, prove the crime. I agree with Mr. Frater, counsel for the Crown, that the words of an offer spoken in jest would not attract criminal liability as the Crown would have failed to prove an intention to make an offer to traffic in narcotics. The Crown must show that the alleged maker of the offer intended that the offer would be taken as a true and genuine offer to traffic in narcotics.

¶ 24 Trafficking by offer is what is referred to as a conduct offence in that the crime as defined by Parliament does not require that any consequence flow from the prohibited conduct. The fault component of conduct crimes attaches to the prohibited conduct, which in this case is the making of the offer to traffic in a narcotic. The offence as presently defined requires that the Crown prove an actual intention to do the prohibited conduct. The fault requirement is subjective and is consistent with the standard of blameworthiness usually associated with true crimes: R. v. Sault Ste. Marie (City), [1978] 2 S.C.R. 1299 at 1309.

¶ 25 The case law subsequent to Manion, supra, confirms the correctness of that decision. As is presently interpreted, the fault requirement in the crime of trafficking by offer meets the requirements of s. 7 of the Charter.

¶ 26 The appellant's second submission rests on the assertion that it is a principle of fundamental justice that conduct can only be criminalized if it meets a minimum level of harm. The appellant submits that as the criminal sanction represents the state's ultimate weapon against the individual, it can be unsheathed only where the conduct in issue poses a sufficient danger to the safety of others in the community. Put in the language of s. 7, the appellant contends that the imposition of a criminal sanction for conduct which is not harmful results in an interference with an individual's right to liberty that is not in accordance with the principles of fundamental justice.

¶ 27 I am spared much of the intellectual heavy lifting involved in a consideration of this submission. Braidwood J.A. in a well reasoned analysis in R. v. Malmo-Levine (2000), 145 C.C.C. (3d) 225 at 246-82 (B.C.C.A.), leave to appeal to S.C.C. granted [2000] S.C.C.A. No. 490, accepted that the "harm principle" was a principle of fundamental justice. He framed the principle in these words at p. 275:

> The proper way of characterizing the "harm principle" in the context of the Charter is to determine whether the prohibited activities hold a "reasoned apprehension of harm" to other individuals or society: ... the degree of harm must be neither insignificant nor trivial.

¶ 28 In R. v. Clay (2000), 146 C.C.C. (3d) 276 at 289-90 (Ont. C.A.), leave to Supreme Court of Canada granted [2000] S.C.C.A. No. 492, Rosenberg J.A. accepted "for the purposes of the appeal" that the harm principle as articulated by Braidwood J.A. in R. v. Malmo-Levine, supra, was a principle of fundamental justice.

¶ 29 I find the analysis provided by Braidwood J.A. in Malmo-Levine, supra, persuasive. In addition to the sources he refers to in support of his conclusion that the harm principle is a principle of fundamental justice, I would add that the concept has strong common law roots. The "de minimis" defence at common law operated to prevent the conviction of those whose conduct, while falling within the four corners of the penal provision, were so trivial as to pose no risk to the public interest: Stuart, supra, at pp. 594-98. The harm principle also underlies the long accepted rule of statutory interpretation which directs that criminal statues, where possible, should not be read so as to encompass conduct which is trivial or harmless: R. v. Hinchey, [1996] 3 S.C.R. 1128 at para. 36; Ontario v. Canadian Pacific Ltd., [1995] 2 S.C.R. 1031 at 1082.

¶ 30 The harm principle fits comfortably among those principles of fundamental justice that are engaged by a substantive review of criminal legislation. Like the fault principle, (DeSousa, supra) and the voluntariness principle, (R. v. Daviault, [1994] 3 S.C.R. 63 at 102-103), the harm principle precludes the conviction of those "who have not really done anything wrong" Reference re s. 94(2) of the Motor Vehicles Act, supra, at p. 293. The criminalization of harmless conduct like the criminalization of blameless or involuntary conduct violates individual autonomy by imposing the sanction and stigma of the criminal law process on individuals absent any legitimate state interest justifying interference with the individual's autonomy.

¶ 31 Although I accept that the harm principle is a principle of fundamental justice, like my colleague Rosenberg J.A. in Clay, supra, at p. 289, I recognize that the concept of harm as employed in the criminal law can be a nebulous and unruly standard. The harm principle, like other principles of fundamental justice, does not give the judiciary licence to review the wisdom of legislation: Creighton, supra, at p. 378; Rodriguez v. British Columbia (A.G.), supra, at p. 65. Nor should the harm principle be taken as an invitation to the judiciary to consecrate a particular theory of criminal liability as a principle of fundamental justice. This is so even if that theory has gained the support of law reformers, some of whom also happen to be judges. Judicial review of the substantive content of criminal legislation under s. 7 should not be confused with law reform. Judicial review tests the validity of legislation against the minimum standards set out in the Charter. Law reform tests the legal status quo against the law reformer's opinion of what the law should be.

¶ 32 The nature and degree of harm said to justify resort to the criminal sanction is a matter of debate among philosophers and criminal law theorists. To some, harmful conduct has a broad meaning encompassing any conduct which threatens or harms any legitimate individual or societal interest: Canada, Department of Justice, The Criminal Law in Canadian Society (Ottawa: Government of Canada, 1982) at p. 45. Others prefer a more restricted notion of harm. Some reject self-harm as a basis for the imposition of criminal liability because it is unduly paternalistic. Still others reject public morality [See Note 3 below] as an appropriate basis upon which to impose the criminal sanction: A. Ashworth, Principles of Criminal Law 2d ed. (Oxford: Clarendon Press 1985, chap. 2); J.P. McCutcheon, "Morality in the Criminal Law: Reflections on Hart-Devlin" (2002) 47 Crim. L.Q., at p. 15.

Note 3: The contention that R. v. Butler, [1992] 1 S.C.R. 452 forecloses reliance on morality as justification for the imposition of the criminal sanction is wrong. In fact, the opposite is true. Sopinka J. said at p. 156: "On the other hand, I do not agree with the suggestion of the appellant that Parliament does not have the right to legislate on the basis of some fundamental conception of morality for the purpose of safeguarding values that are integral to a free and democratic society." Sopinka J. clearly distinguishes between morality in the sense of conventional notions of acceptable conduct and morality in the sense of bedrock principles that reflect society's shared values.

¶ 33 It is not for the judiciary under the guise of applying the harm principle as a principle of fundamental justice to choose from among the competing theories of harm advanced by criminal law theorists. The harm principle, as a principle of fundamental justice, goes only so far as to preclude the criminalization of conduct for which there is no "reasoned apprehension of harm" to any legitimate personal or societal interest. If conduct clears that threshold, it cannot be said that criminalization of such conduct raises the spectre of convicting someone who has not done anything wrong. Difficult questions such as whether the harm justifies the imposition of a criminal prohibition or whether the criminal law is the best way to address the harm are policy questions that are beyond the constitutional competence of the judiciary and the institutional competence of the criminal law adversarial process. [See Note 4 below]

Note 4: For example, many argue that the criminal sanction should be a last resort employed only if other forms of governmental action cannot adequately address the harm flowing from the conduct. This minimalist approach to criminal law may well be sound criminal law policy. However, it hardly reflects the historical reality of the scope of the criminal law so as to be properly described as a principle of fundamental justice. Any attempt to apply minimalist doctrine to a specific piece of legislation would raise complex questions of social policy which would defy effective resolution in the context of the adversarial criminal law process.

¶ 34 The distinction I have attempted to draw between the harm principle as a principle of fundamental justice and closely related, but distinct policy questions surrounding the application of the criminal law leads me to the one difference between my analysis and that provided by Braidwood J.A. in Malmo-Levine, supra, and adopted "for the purposes of the appeal" by Rosenberg J.A. in Clay, supra. In his analysis, Braidwood J.A. identified the harm principle as a principle of fundamental justice and defined that principle (pp. 262-75). He then considered whether the prohibition against possession of a narcotic conformed with the harm principle as he had defined. He concluded that it did (pp. 275-77, 281). Braidwood J.A. next proceeded to a consideration of whether the impugned legislation struck a proper balance between the individual and the state (p. 277). In this part of the analysis he considered many factors such as the deleterious effects flowing from the criminal prohibition both as applied to the individual subject of the prohibition and society at large.

¶ 35 With respect, having concluded that the relevant statutory provisions accorded with the harm principle, I do not agree that a further consideration of whether the provisions struck "the right balance" was mandated by the harm principle as a principle of fundamental justice. In my view, the harm principle as described by Braidwood J.A. (Malmo-Levine, supra, at p. 275) itself reflects the balancing of societal and individual interests required by s. 7. The state interest is the protection of individuals in the community from the harm occasioned by the conduct in issue. The individual interest is the right to be left alone by the state. The harm principle, as described by Braidwood J.A., balances those competing interests by directing that the state can interfere with individual autonomy by way of a criminal prohibition only where there is a reasoned apprehension of harm occasioned by the conduct of the individual. To engage in a further balancing process based on harm related concerns, after it is determined that the impugned legislation complies with the harm principle, leads inevitably to a review of policy choices and goes beyond protecting those who have done nothing wrong from the criminal sanction. For example, I do not think that considerations of the overall harm caused to the due administration of justice by the criminalization of conduct has anything to do with whether criminalization of that conduct offends the harm principle. The effect of criminalization on the overall administration of justice is an important question, but it is a policy question which is not germane to the judicial review contemplated by s. 7 of the Charter.

¶ 36 In holding that the harm principle as a principle of fundamental justice contemplates only a determination of whether the prohibited conduct presents a reasoned apprehension of harm, I do not suggest that the substantive review of crime creating statutes is limited to that narrow question. The harm principle is but one of several related principles of fundamental justice that are engaged on a substantive review of criminal legislation. Principles of fault, overbreadth, vagueness, and gross proportionality between the harm caused and

the punishment imposed are among the principles of fundamental justice that are germane to a substantive review of criminal legislation under s. 7: see R. v. Smith, [1987] 1 S.C.R. 1045; R. v. Nova Scotia Pharmaceutical Society (No. 2), [1992] 2 S.C.R. 606; R. v. Heywood, [1994] 3 S.C.R. 761. In addition, other specific provisions of the Charter impose constitutional limits on the availability of the criminal law sanction: see R. v. Zundel, [1992] 2 S.C.R. 731.

¶ 37 The harm caused by the crime of trafficking by offer was not canvassed at trial. In support of his contention that the conduct prohibited by that offence poses no real harm to society, Mr. Harris analogizes the offence to the law of attempt. He submits that trafficking by offer is a form of attempt in that it is preparatory to the offence of actually trafficking in a narcotic. Mr. Harris correctly observes that attempts to commit an offence require proof of an actual intention to complete that offence: Criminal Code s. 24(1).

¶ 38 I do not find the attempt analogy helpful. No doubt, in many cases, an offer to traffic is preparatory to an actual act of trafficking, however, the offence of trafficking by offer as defined by Parliament is a substantive and not an inchoate offence. I know of no constitutional principle that precludes Parliament from defining conduct as a substantive crime, even though that very conduct may be preparatory to the commission of a further crime. The Criminal Code is replete with this kind of offence: See e.g. Criminal Code s. 119(1)(b); s. 120(b); s. 121(1)(a)(i); s. 143(c); s. 353(1)(a); s. 369(b).

¶ 39 The harm to society, occasioned by the drug trade cannot be gainsayed. The appellant does not suggest that drug trafficking is not harmful in the relevant sense, but rather contends that his conduct is sufficiently removed from actual drug trafficking so as not to constitute the harm associated with the drug trade. I disagree.

¶ 40 Offers to traffic in narcotics even when there is no intention to traffic, induce recipients of the offers to participate in drug trafficking and thereby promote and expand the illicit drug trade. It is also entirely reasonable to conclude that those who are prepared to make serious offers to traffic in narcotics will, if the opportunity presents itself, complete the transaction. Furthermore, offers to traffic in narcotics, even if there is no intention to actually carry through with the offer, raise the same risks of collateral criminal activity that "true" offers to traffic precipitate. Finally, the criminalization of trafficking by offer can reasonably be viewed as aimed at the very harm occasioned by the actual trafficking in narcotics. By criminalizing conduct which in many occasions will be preparatory to actual trafficking in narcotics, Parliament may reduce the incidence of actual trafficking and the harm caused by it.

¶ 41 For the reasons set out above, I am satisfied that offers to traffic intended to be received as genuine offers cause a reasoned apprehension of significant harm to other individuals and to society such that criminalization of that conduct is not inconsistent with the fundamental principles of justice.

¶ 42 I would dismiss the appeal.

DOHERTY J.A.
CATZMAN J.A. — I agree.
GOUDGE J.A. -- I agree.

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