Court of Appeal for Saskatchewan

Date: 19890508

Docket: No. 4290

HER MAJESTY THE QUEEN

APPELLANT

— and —

ROGER CEY

RESPONDENT

CORAN: Cameron, Wakeling and Gerwing JJ.A.

JUDGMENT DELIVERED May 8, 1989.

COUNSEL: C. Snell for the Crown

G. Dufour for the respondent

GERWING J.A.

The Crown appeals the acquittal of the accused by a Provincial Court judge on a charge of assault causing bodily harm contrary to s. 245(1)(b) of the Code.

The incident which gave rise to the charge occurred in the course of a hockey game. The hockey game was between two teams in the Wild Goose Hockey League, which is composed of amateur players of the average age of 24 to 28. The League was governed by the rules of the Canadian Amateur Hockey Association.

The accused in the course of the game checked an opposing player. The incident was described by the referee, whose evidence was accepted by the trial judge, as follows:

> A My view was - total view of the whole situation. I saw the exact incident that happened. Perry was playing the puck, he had his back to the boards, approximately four feet away, three feet away

from the boards. Roger came in from in front of the crease area, which is two feet past the goal line and held his stick out and checked him approximately, in the neck area. He did not make a jabbing motion, it was just he held his stick out and hit him.

Q Let's take it back now.

A Okay.

Q You testified that Mr. Kingwell had his back to the boards.

A Yes.

Q So, he was--

A Or, sorry, his face to the boards, his back to Roger coming in.

At the time, the victim was facing the boards attempting to retrieve the puck. His face was pushed into the boards and he suffered injuries to his mouth and nose. He had to be carried from the ice and. was found at the hospital to be suffering from a concussion and a whiplash. He was in hospital for approximately three days. The accused received from the referee a five minute penalty for cross-checking.

The complainant, although saying he had never been hit so severely before said, in examination-in-chief:

Q If I was to ask you - or tell you that it was a fair chance that in the course of a hockey game you were going to suffer these injuries that you did sustain November 27th, would you continue to play hockey?

A Yeah.

It is difficult to ascertain the precise ratio of the oral judgment of the Provincial Court. Though he did not expressly say so, it may be assumed the trial judge was satisfied the Crown had made out its case in relation to three of the four elements of the offence, namely that the accused had (i) intentionally (ii) applied force to the victim, thereby (iii) causing the victim bodily harm. All that remained then was the issue of consent. The trial judge appears to have addressed this issue from the perspective, first, of the accused and his intentions and, thence, from

the point of view of the victim and the scope of his implied consent, having regard for the standards and rules of play.

As for the first, the remarks of the trial judge make it clear he was not satisfied the accused had intended (a) to cause injury: "It was not a deliberate attempt to injure"; or (b) to apply any greater force to the victim then was customary in the game: "There was certainly no intention on the part of Cey to do anything else than what has really been the standard of play in hockey for a long time".

As for the consent of the victim, the trial judge appears

to have taken the man's expressed willingness to continue to play the game, despite the injury, as having amounted to a consent to the bodily contact which had occurred: "Would you, having suffered the kind of injuries you did, continue playing hockey?

The answer was yes. That's your consent. He's accepted this basic standard of play".

Having made these findings the trial judge concluded by saying:

> Well, the one other area that I wanted to mention was the CAHA rules and the application of those. We have a check that was illegal under the provisions of the CAHA rules, but it's acceptable, as a standard of play in what happens in the CAHN, say, if you check this way, this is what can happen to you. It will happen to you. It's a major and a game misconduct. That is a long cry, a far cry from saying it bears penal consequences as an infraction of the Criminal Code of Canada. If you make a criminal out of person who has committed an offence in a hockey game that says he shall get a five minute major and a game misconduct, if you make a criminal out of that person and of course, maybe you can if you can find that the offence committed was one which was intended deliberately to harm the other person. To cause him bodily harm, to, in the phrase used by the Defence counsel, stop his career in hockey, cut it off. Maybe, I think that's an appropriate area where you say to the person, what you did is beyond the limits acceptable in hockey. Beyond the type of situation where all you get is a game misconduct and a five major. Where it is clearly intended that there shall be damage to the other person. But, I have not been able to come to that conclusion here and I have not been able to come to

> that conclusion based on the evidence given by the referee in charge of the game, by a Rosetown fan who was here and a Wilke fan who was here. So, I think that under the circumstances I don't think we can make a criminal out of this hockey player and I'm not going to and I'm going to dismiss the charge against him.

The Crown appeals suggesting that the learned judge misdirected himself. It is my view that he did in fact misdirect himself and that a new trial should be ordered.

Assault for the purposes of 245.1(1)(b) was defined by then s. 244 which reads in material part:

> 244.(1) A person commits .an assault when
>
> > (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
> >
> > (b) he attempts or threatens, by an actor gesture, to apply force to another person, if he has, or causes that other person to believe upon reasonable grounds that he has, present ability to effect his purpose; or
> >
> > (c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.
>
> (2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.
>
> (4) Where an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, is satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief.

In this case it appears clear beyond peradventure that force was intentionally applied to the victim, causing him bodily harm. That being so, the sole remaining issue was whether the Crown had negatived

consent. It might be noted that the accused did not advance the defence contemplated by s. 244(4), which is to say he did not allege that he had an honest belief in the victim having consented to the conduct that is the subject-matter of the charge. Instead he relied upon the Crown's failure to negative consent as required by s. 244(1).

Consent to the application of force may be actual or implied, and in any event its scope is limited both by circumstance (R. v. St. Croix (1979) 1979 CanLII 2973 (ON SC), 47 C.C.C. (2d) 122) and by law (R. v. Jobidon (Ont C.A., Nov. 22, 1988, unreported).

Intentional bodily contact in the context of an organized sporting situation requires that implied consent be considered. Decisions in this jurisdiction starting with R. v. Langton (unreported October 2, 1974, Saskatchewan Court of Appeal) have contemplated that assaults in connection with hockey games may be such as to be beyond the scope of consent and hence an offence under the Code.

Many convictions for hockey violence such as R. v. Gray, 1981 CanLII 2481 (SK PC), [1981] 6 W.W.R. 654, R. v. Mayer (1985), 1985 CanLII 3816 (MB PC), 41 Man. R. (2d) 73, R. v. Henderson, 1976 CanLII 1531 (BC CC), [1976] 5 W.W.R. 119 and R. v. Watson (1975), 1975 CanLII 1493 (ON CJ), 26 C.C.C. (2d) 150 relate to incidents which occurred after play had been halted, but it is clear from other cases such as R. v. Maki, [1970) 1970 CanLII 569 (ON CJ), 3 O.R. 780 and R. v. Maloney (1976), 1976 CanLII 1393 (ON CJ), 28 C.C.C. (2d) 323 that the courts have considered assaults during the course of the game. Acquittals were entered in these cases but not expressly for that reason.

It is clear that in agreeing to play the game a hockey player consents to some forms of intentional bodily contact and to the risk of injury therefrom. Those forms sanctioned by the rules are the clearest example. Other forms, denounced by the rules but falling within the accepted standards by which the game is played, may also come within the scope of the consent.

It is equally clear that there are some actions which can take place in the course of a sporting conflict that are so violent it would be perverse to find that anyone taking part in a sporting activity had impliedly consented to subject himself to them. As the Court said in R. v. Maki, supra, at p. 272:

> Thus all players when they step onto a playing field or ice surface assume certain risks and hazards of the sport and in most cases the defence of consent as set out in s. 230 (now s. 244) of the Criminal Code would be applicable. But as stated above, there is a question of degree involved and no athlete should be presumed to accept malicious, unprovoked or overly violent attack. Bastin J. states it this way in Agar v. Canning (1965), 1965 CanLII 872 (MB QB), 54 W.W.R. 302 at 304, affirmed 55 W.W.R. 384 (Man. C.A.):
>
> > … But injuries inflicted in circumstances which show a definite resolve to cause serious injury to another, even when there is provocation and in the heat of the game, should not fall within the scope of the implied consent.

In John Barnes' Sports and the Law in Canada, (2d ed. 1988) it is stated:

> The primary issue in assault cases involving contact sports participants is whether the conduct falls within the ordinary implied consent of the game, or whether it exceeds this consent by reason of being deliberately and unnecessarily violent, the participant foresees, expects and agrees to the normal blows and collisions incidental to play but does not license the use of unlimited force against himself. The limits of the implied consent have been considered in the following reported cases: R. v. Maki, R. v. Green, R. v. Leyte, R. v. Langton, R. v. Watson, R. v. Maloney, R. v. Henderson, R. v. Lecuyer, R. v. St. Croix, R. v. Cote, R. v. Gray, R. v. Milligan, R. v. Thiel, and R. c. Tardy.
>
> This case law recognizes that participants agree to the risk of blows provided they are unintentional, instinctive or reasonably incidental to the game:
>
> > ... the players in competitive sport such as this game [school handball] must be deemed to enter into such sport knowing that they may be hit in one of many ways and must be deemed to consent thereto so long as the reactions of the players are instinctive and closely related to the play and whether or not a foul is being committed. [R. v. Leyte (1973), 1973 CanLII 1449 (ON CJ), 13 C.C.C. (2d) 458 (Prov. Ct.)]

> He agrees to those assaults which are inherent in and reasonably incidental to the normal playing of the game of hockey. [R. v. Maloney (1976), 1976 CanLII 1393 (ON CJ), 28 C.C.C. (2d) 323 (Ont. Co. Ct.)]
>
> Surely the risks of injury he assumes are those which are incidental to the particular game or are those risks which fall within the bounds of fair play ... .Included here must be those unintentional injuries which are received as a result of one or more of the infractions which occur during the game. [R. v. Henderson, 1976 CanLII 1531 (BC CC), [1976] 5 W.W.R. 119 (B.C. Co. Ct.)]

It is also recognized that, in the course of a vigorous contest, players cannot be expected to stop and check themselves from committing what would "normally be considered assaults in ordinary walks of life".

The types of conduct not consented to have been described as follows:

> However, where there is a significant time interval between the termination of play and the blows struck, and where the players by their conduct have after the stoppage of play ceased to be aggressive so that their subsequent actions should no longer be instinctive, then the players cannot be deemed to consent to assaults at that stage. [R. v. Leyte, supra]
>
> ... no athlete should be presumed to accept malicious, unprovoked or overly violent attack. [R. v. Maki, 1970 CanLII 569 (ON CJ), [1970] 3 O.R. 780]
>
> … an incision across his face which would require 75 stitches ... one of the players continues to pummel the other, who at that time is either unconscious or rendered helpless ... the use of an instrument such as a hockey stick ... one of the players uses the ice in such a way that the opposing player's head comes into frequent and violent contact with it... . Surely these are not the risks which the injured player assumed by participation in the sport... . where there is conduct which

> shows a deliberate purpose to inflict injury, then no immunity is accorded to the offending player.[R. v. Henderson, supra]

The cases to which the author refers illustrate the difficulty not only in determining the scope of the implied consent from case to case but in constructing a suitable framework by which that determination can be made.

Between, on the one hand, those forms of intentional bodily contact sanctioned by the rules and thus ordinarily included within the scope of the implied consent and, on the other, those forms which are beyond the rules and so violent as to be obviously excluded from consent, lie a host of others, many of which will present uncertainty. .,Since this is a matter of degree, the question becomes what, in general, is it that serves to distinguish those which exceed the ambit of the implied consent from those which do not.

Ordinarily consent, being a state of mind, is a wholly subjective matter to be determined accordingly, but when it comes to implied consent in the context of a team sport such as hockey, there cannot be as many different consents as there are players on the ice, and so the scope of the implied consent, having to be uniform, must be determined by reference to objective criteria. This is so with respect at least to those forms of conduct covered by the initial general consent. A fight between two players, where there may be additional, more specific consents, is perhaps another matter, but it is unnecessary to get into that.

As a general matter, conduct which is impliedly consented to can vary, for example, from setting to setting, league to league, age to age, and so on: See R. v. St. Croix, (supra) at p. 124. In other words, one ought to have regard for the conditions under which the game at issue is played in determining the scope of the implied consent.

That case suggested, as well, that implied consent is limited both "qualitatively and quantitatively". By this we take it to mean that in determining whether, in any given case, the conduct complained of exceeds the scope of the prevailing implied consent, it is well to think in terms of (a) the nature of the act at issue and (b) the degree of force employed.

It is well, too, to think in terms of what most deeply underlies the issue, namely the risk of injury and the degrees thereof. Some forms of bodily

contact carry with them such a high risk of injury and such a distinct probability of serious harm as to be beyond what, in fact, the players commonly consent to, or what, in law, they are capable of consenting to. Such are the violent acts referred to earlier.

The conditions under which the game in question is played, the nature of the act which forms the subject matter of the charge, the extent of the force employed, the degree of risk of injury, and the probabilities of serious harm are, of course, all matters of fact to be determined with reference to the whole of the circumstances. In large part, they form the ingredients which ought to be looked to in determining whether in all of the circumstances the ambit of the consent at issue in any given case was exceeded.

Setting aside the defence available to an accused under ss. 244(4), and speaking generally, the state of mind of the accused while relevant will not be especially significant to this inquiry and to this element of the offence. Whether the accused intentionally applied force to the body of the victim must, of course, be determined in the context of that element of the offence; and if the body contact at issue should be found to have been unintentional, that of course will end the matter. On the other hand, should it be found to have been intentional, the trier of fact must then move on to determine whether the Crown has negatived consent. At that stage and for that purpose the accused's state of mind will form but one aspect of the whole of the circumstances to be looked to.

Turning then to the case at hand, it may be seen that the trial judge did not address the issue within this framework. Instead he directed his mind, first, to whether the accused intended (a) to cause serious injury or (b) to exceed the standards by which the game of hockey has long been played. And in his only explicit reference to consent, he appears to have confined himself to the statement of the victim that he would continue to play the game despite the injury, taking that statement to amount to consent. Moreover he seemed to think that the nature of the act, the degree of force, and the accompanying intent had to be such as to amount to an intended and deliberate incapacitation of the victim in order to constitute the offence. He said:

> ... if you make a criminal out of that person [one who draws a five minute major and a game misconduct], maybe you can if you can find that the offence committed was one which was intended deliberately to harm the other person. To cause him bodily harm,

> to, in the phrase used by the defence counsel, stop his career in hockey, cut it off. Maybe [then] what [he] did is beyond the limits acceptable to hockey.

With respect, the trial judge ought to have addressed himself to the question of implied consent according to the general framework mentioned and ought to have determined as a matter of fact whether the action of cross-checking from behind across the back of the neck (assuming he found this to be the conduct intended by the accused), in such close proximity to the boards, and with such force as was employed, was so violent and inherently dangerous as to have been excluded from the implied consent.,

The trial judge, if he found either express or implied consent, was in my view required to consider whether the nature of the act was such that the victim could in law consent to it. I am in agreement with the analysis of the term "assault" and the limits for a victim to consent thereto in the decision of the Ontario Court of Appeal in R. v. Jobidon (unreported November 22, 1988). The Court there said:

> In my respectful view, the concept of consent as it appears in s. 244 of the Criminal Code should be construed subject to the same limitations as are imposed by the common law. There are good reasons for so doing. Firstly, this interpretation conforms with the traditional understanding of the law which existed for a very long time prior to 1972. Secondly, this interpretation is in accord with the overall purpose of the Criminal Code, i.e. the protection of the public and keeping the peace. Lastly, this interpretation accords with sound policy. The so-called consents to fight are often more apparent than real and are obtained in an atmosphere where reason, good sense and even sobriety are absent. In a case such as the one at hand it seems scarcely necessary to mention that often the results are very serious. To interpret the Criminal Code otherwise would continue to legitimize the uncivilized brawling which because of Dix is not the subject of the criminal sanction.
>
> I conclude therefore that R. v. Dix, supra, was wrongly decided and that consent as used in s. 244 of the Criminal Code should be interpreted subject to the same limitations as are expressed in Attorney General's Reference (No. 6 of 1980), supra.

The earlier quote referred to from the Attorney General's Reference (No. 6 of 1980) reads as follows:

> Finally, in 1980, the English Court of Appeal was asked to state the law and did so in Attorney General's Reference (No. 6 of 1980), [1981] 2 All E.R. 1057. The English Court of Appeal was asked the following question at p. 1058:
>
> > Where two persons fight (otherwise than in the course of sport) in a public place can it be a defence for one of those persons to a charge of assault arising out of the fight that the other consented to fight?

And at p. 1059 provided the answer as follows:

> > The answer to this question, in our judgment, is that people should try to cause or should cause each other actual bodily harm for no good reason. Minor struggles are another matter. So, in our judgment, it is immaterial whether the act occurs in private or in public; it is an assault if actual bodily harm is intended and/or caused. This means that most fights will be unlawful regardless of consent.
> >
> > Nothing which we have said is intended to cast doubt on the accepted legality of properly conducted games and sports, lawful chastisement or correction, reasonable surgical interference, dangerous exhibitions etc. These apparent exceptions can be justified as involving the exercise of a legal right, in the case of chastisement or correction, or as needed in the public interest, in the other cases.
>
> Thus it would appear that while the common law defines assault in the same terms as the Criminal Code the concept of consent is limited and extends only to the application of force where bodily harm is neither caused nor intended.

While the Jobidon case dealt with a consensual fight outside a bar and while the English reference case referred to activity outside of sport, I see no reason in principle why the consent, express or implied, to assault in the context of a sporting event should not be considered similarly. That is in sporting events as well the mere fact that a type of

assault occurs with some frequency does not necessarily mean that it is not of such a severe nature that consent thereto is precluded. In a sport such as hockey, however, I believe the test may be more limited than in the Attorney General's Reference case--that is, I think the alternate reference to "caused" to be inappropriate where actions to which there is implied consent may in extraordinary circumstances cause harm.

Thus, in summary, in view the Provincial Court judge ought to have directed himself to the question of whether there was express or implied consent to this type of contact and whether the contact was of such a nature that in any event no true consent could be given. Accordingly, the acquittal is set aside and the matter is returned to the Provincial Court for a new trial.

DATED at the City of Regina, in the Province of

Saskatchewan, this 8th day of May, A.D. 1989.

GERWING J.A.

I concur.

CAMERON J.A.

File No. 4290

IN THE COURT OF APPEAL FOR SASKATCHEWAN

HER MAJESTY THE OUEEN

APPELLANT

— and —

ROGER CEY

RESPONDENT

CORAM: Cameron, Wakeling and Gerwing JJ.A.

JUDGMENT DELIVERED May 8, 1989

COUNSEL: C. Snell for the Crown

G. Dufour for the Respondent

WAKELING J.A.

I have had the opportunity to consider the judgment of my colleague, Gerwing J.A., and while I agree with much of what she has said, I find it easier to write a separate judgment than to qualify some of her conclusions where my thoughts are at variance.

The issue here is what approach the Court should take to the application of the assault provisions of the Code to conduct which takes place in the game of hockey. At the root of this question lies a need to determine the extent to which a player consents to violent conduct and resultant risk of injury as a consequence of his decision to play the game.

But for the element of consent, the game of hockey involves a continuous series of assaults. Obviously, most of the body contact is consented to merely by the decision to participate in the sport. To determine at what point this consent disappears is not an easy task, but it must be identified in order to determine when a player moves from conduct calling for the imposition of a penalty into conduct which involves a criminal assault calling for a criminal conviction and sentence.

I conclude that a person who plays hockey expects the game to be played according to its rules, but recognizes that penalties are the appropriate sanction for disobedience. A player also expects that in the heat of action, some contact will take place which is dangerous and will therefore occasionally cause injury, even severe injury, but no injury is intended. This conduct will likewise call for a penalty, but not criminal charges, for it is such an integral part of the game a player cannot expect to avoid it and therefore must be taken to have given his consent. There is a further classification of conduct which may or may not be brought about by the pace of the action, which is sometimes motivated by retaliation and, in any event, is intended to do bodily harm. I do not believe this level of conduct should be taken as consented to in any league or age group, and therefore should not be insulated from the assault provisions of the Code. It may even be that this is the point at which a player cannot legally give consent to such a standard of violence. That there may be such a point has been suggested in the judgment of my colleague, but I find it unnecessary to determine that

issue in this appeal, although I find the proposition essentially sound and attractive. It seems to me to be sufficient, at least for the purposes of this appeal, to conclude that playing hockey does not carry with it either specific or implied consent to violence that is employed with the intent to do injury. Otherwise, hockey leaves the category of sport and becomes a gladiatorial spectacle.

There is nothing new or innovative in the approach I am suggesting, for when the cases relating to hockey violence are reviewed, it is apparent that when the incident has its source in the heat of action it has generally been seen as having been consented to, and is therefore not a criminal act, as in the following cases:

> R. v. Maki, 1970 CanLII 569 (ON CJ), [1970] 3 O.R. 780
>
> R. v. Maloney (1976), 1976 CanLII 1393 (ON CJ), 28 C.C.C. (2d) 323
>
> R. v. Taysup (1977), unreported judgment of Geatros J.

When violence has arisen in circumstances where play has stopped, and a party moves into the scene from the bench or elsewhere on the ice to deliver a blow or to strike with a stick, it has generally been seen as beyond the area of consent and therefore a criminal act, as in the following cases:

> R. v. Gray, 1981 CanLII 2481 (SK PC), [1981] 6 W.W.R. 654
>
> R. v. Mayer (1985), 1985 CanLII 3816 (MB PC), 41 Man. R. (2d) 73
>
> R. v. Henderson, 1976 CanLII 1531 (BC CC), [1976] 5 W.W.R. 119
>
> R. v. Watson (1975), 1975 CanLII 1493 (ON CJ), 26 C.C.C. (2d) 150

I wish only to add that it is not appropriate to conclude that everything done in the heat of action is necessarily consented to. I can perceive that in some circumstances violent action, even though taken in the heat of action, might be seen as such a marked departure from acceptable conduct that it must have been the result of a deliberate intent to injure, and that intention is the significant factor. I only mean to indicate that this intent to injure is more clearly identified where action has stopped

and, conversely, is less likely to exist where it could be seen as an almost involuntary act motivated by the objective of enhancing the team's legitimate objective of winning the game.

Assuming then that one can conclude there is a general consent to violent physical contact, which takes place in the heat of action, I see no difficulty in concluding that while the trial judge may have provided some rather imprecise statements of the need to consider whether a consent had been given here, he did make some findings of fact which are adequate to support the application of what I perceive to be the appropriate standard. He found, for example, that this cross-check was done in the heat of action and without the intent to injure. That being so, it did not matter that he may have made the error of assuming that the willingness of the injured party to return to hockey was the equivalent of consent. When the trial judge said:

> So, I have to come to a conclusion that there was certainly no intention, on the part of Cey, to do anything else than what has really been the standard of play in hockey for a long time…

he must necessarily have decided that the accused did not intend to injure and his conduct was not beyond that which might reasonably be expected to occur in a physically violent sport. In my view, that forms an adequate basis for the conclusion that consent prevents the incident from being a criminal assault.

While he may not have specifically formulated the basis upon which he negatived consent, it is clear he considered the question, and having found that an assault had not been proven, I see no reason why it should be assumed his conclusion was not supportable for, as I have stated, he quite properly concluded that the accused had not intended to injure and the violent shove with the stick was not beyond the bounds of what could reasonably have been expected in the heat of action. In such circumstances, he was right to conclude that the assault was not made out, and I would therefore dismiss the appeal.

DATED at the City of Regina, in the Province of Saskatchewan, this 8th day of May, A.D. 1989.

WAKELING J.A.